IN THE SUPREME COURT OF FLORIDA

CASE NO. 89116
4th DCA no. 95-0300

STATE OF FLORIDA,

Petitioner,

v.

ELIJA DAVIS,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Elija Davis 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 trafficking in over 28 grams of cocaine (R 381). During voir dire, the trial judge told prospective jurors that first cardinal rule was that they must presume Appellant innocent (R 142). The second cardinal rule is that the State has the burden to prove the Defendant guilty (R 142-43). The Defendant does not have to prove his innocence (R 143).

The trial judge then told the prospective jurors (R 143-45):

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, you must be satisfied, the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty. And that's a landmark concept and a bedrock foundation of American juris prudence.
>
> Any time, any Defendant is found guilty by a jury of committing any crime, whether it rape, robbery, burglary, drug trafficiking, arson, or stealing a six pack of beer, any time a jury finds a Defendant guilty of committing a crime, that means that jury has been satisfied, that jury 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. But 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 from the jury a conviction, the State must convince you beyond and to the exclusion of every reasonable doubt of the Defendant's guilt. But even though it's a very heavy burden that the State has whenever it charges somebody with committing a crime, in order to secure a conviction, the State does not, and I repeat, stress, emphasize, the State does not have to convince you, the jury, to an absolute certainty of the Defendant's guilt. You do not have to be 100 percent certain that the Defendant is guilty in order to find him guilty.

The point I'm trying to make is that you can still have a doubt as to Mr. Davis' 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.

In other words, if after the conclusion of the trial you have a doubt as to the Mr. Davis' guilt that you can attach a reason to, ladies and gentlemen, that's a reasonable doubt, and you must find the defendant not guilty.

But if at the conclusion of trial the only kind of doubt you have as to Mr. Davis' guilt is a possible doubt, a speculative doubt, an imaginary doubt, or forced doubt, that's not a reasonable doubt. And if all the elements of trafficking in cocaine have been proven to you beyond and to the exclusion of every reasonable doubt, you must find the Defendant guilty.

The trial judge told prospective jurors that the burden of

proof was on the State (R 147). Respondent's failure to present evidence could not be held against him (R 147-48, 353).

The trial judge then said (R 150-51):

> Now, the fifth phase of the trial is what's known as the legal instructions. That'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 should be, must be disregarded by you. The only law you apply to the evidence in this case is the law 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 345, 350).

The trial judge then stated (R 351):

> 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 a 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 is one which is not stable, but one which waivers [sic] and vacillates, then 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 that proof. A reasonable doubt may arise from the evidence, lack of evidence, or conflict in the evidence. The bottom line is if you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

The trial judge later told the jurors that they must follow the law as given in these instructions (R 354). The case must be decided only upon the evidence (R 354). The trial judge again reminded the jury that they must follow the law as explained in these instructions just given (R 357).

The jury found Petitioner guilty of the lesser offense of possession with intent to deliver (R 395). 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). The Court certified the same question certified in Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), rev. granted, 672 So. 2d 543 (Fla. 1996).

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 twenty 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).

Davis v. State, Case no. 95-0300 (this case).

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 143-45):

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, you must be satisfied, the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty. And that's a landmark concept and a bedrock foundation of American juris prudence.
>
> Any time, any Defendant is found guilty by a jury of committing any crime, whether it rape, robbery, burglary, drug trafficiking, arson, or stealing a six pack of beer, any time a jury finds a Defendant guilty of committing a crime, that means that jury has been satisfied, that jury 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. But 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 from the jury a conviction, the State must convince you beyond and to the exclusion of every

> reasonable doubt of the Defendant's guilt. But even though it's a very heavy burden that the State has whenever it charges somebody with committing a crime, in order to secure a conviction, the State does not, and I repeat, stress, emphasize, the State does not have to convince you, the jury, to an absolute certainty of the Defendant's guilt. You do not have to be 100 percent certain that the Defendant is guilty in order to find him guilty.
>
> The point I'm trying to make is that you can still have a doubt as to Mr. Davis' 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.
>
> In other words, if after the conclusion of the trial you have a doubt as to the Mr. Davis' guilt that you can attach a reason to, ladies and gentlemen, that's a reasonable doubt, and you must find the defendant not guilty.
>
> But if at the conclusion of trial the only kind of doubt you have as to Mr. Davis' guilt is a possible doubt, a speculative doubt, an imaginary doubt, or forced doubt, that's not a reasonable doubt. And if all the elements of trafficking in cocaine have been proven to you beyond and to the exclusion of every reasonable doubt, 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 144). 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 145). 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 143-45). "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 144):

> 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. But 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 150-51):

> Now, the fifth phase of the trial is what's known as the legal instructions. That'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 should be, must be disregarded by you. The only law you apply to the evidence in this case is the law 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).

The Third District has recently confirmed the correctness of Petitioner's position. In Doctor v. State, 21 Fla. L. Weekly D1856 (August 14, 1996)(copy attached), prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the venire. The Defendant claimed that the extemporaneous instruction minimized the reasonable doubt standard and constituted fundamental error. As in this case, the Defendant did not raise any error as to the formal jury instructions at the close of evidence. The Third District affirmed, holding:

> We adhere to our decision in Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991), and hold that 'the giving of the instruction does not rise to the level of fundamental error . . . ." Freeman, 576 So. 2d at 416.
>
> We decline Doctor's invitation to follow Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995), as we find it antithetical to our holding in Freeman.

Petitioner also notes the "special concurrence" in Doctor

specifically and completely agreed with State's position that 1) the trial judge's comments not erroneous, 2) if erroneous, were not harmfully so in light of the complete instructions given at the end of trial, and 3) if harmfully erroneous, were not fundamentally so since they could have easily been corrected upon objection and in no way affected the validity of the trial. Id. at D1857.

The "special concurrence" in Doctor was signed by a majority of the sitting members of the Court . Accordingly, it is law of the case. See Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980). This Court should approve the Third District's decision and disapprove 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 as soon as possible.

Respectfully submitted,
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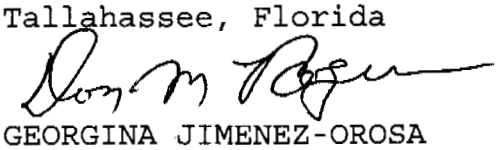

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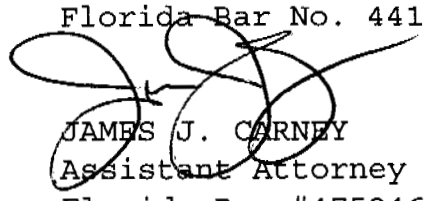

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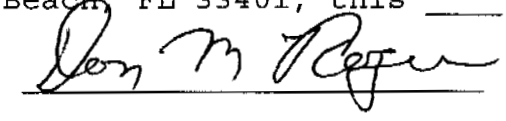
Certificate of Service

I CERTIFY that a true copy has been furnished by courier to Cherry Grant, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach, FL 33401, this 2nd day of October 1996.



Of Counsel

sued Tiffany's, alleging that Tiffany's had breached its duty of reasonable care by serving alcohol to underaged persons who became intoxicated and, thereafter, attacked the claimants.

Tiffany's submitted the individual claims to its premises bility carrier, Scottsdale. Scottsdale insured Tiffany's against premises liability claims, excluding liquor liability claims[1], while Illinois insured against claims resulting from Tiffany's furnishing of alcoholic beverages to underage persons.[2] On January 28, 1988, Scottsdale notified Illinois of the lawsuit against Tiffany's and requested that Illinois defend the claim because it was based on liquor liability and Scottsdale's policy excluded liquor claims. Illinois refused to defend the claim.

Scottsdale defended Tiffany's under a reservation of rights pursuant to Section 627.426, Florida Statutes (1988). After Scottsdale paid $88,286 to settle the claims and accrued $26,610 in attorney's fees and costs, Scottsdale and Tiffany's sued Illinois, seeking a declaratory judgment, alleging that Illinois must indemnify Scottsdale for its attorney's fees and costs incurred in defending the negligence action and for the sums Scottsdale expended in settlement of the claims. Scottsdale and Illinois filed cross summary judgment motions. Scottsdale argued that the claimants' action fell within both policies and that Illinois had a duty to defend and, consequently, to indemnify Scottsdale. In its motion, Scottsdale requested an award of fifty percent of the settlement funds paid and fifty percent of the attorney's fees and costs incurred in defending Tiffany's. Illinois, on the other hand, argued that there was no coverage because there was no evidence that alcohol had caused the attack. The trial court granted Scottsdale's motion for summary judgment and denied Illinois' motion for summary judgment. Illinois appeals this order.

The trial court properly granted Scottsdale's summary judgment motion regarding indemnification for fifty percent of Scottsdale's attorney's fees and costs incurred in defending the gligence action because both Scottsdale and Illinois had a ncurrent duty to defend their insured, Tiffany's. In determining when an insurer's duty to defend may arise, this court has stated:

> An insurance carrier's duty to defend a claim depends solely upon the allegations in the complaint...[T]he duty to defend is broader than, and distinct from, the duty to indemnify. If the complaint, fairly read, alleges facts which create potential coverage under the policy, the insurer must defend the lawsuit.

Fun Spree Vacations, Inc. v. Orion Ins. Co., 659 So. 2d 419, 421 (Fla. 3d DCA 1995) (citations omitted); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810 (Fla. 1st DCA 1985). The claimants' complaint alleged facts sufficient to create potential coverage under both policies. Scottsdale had a duty to defend Tiffany's because the complaint alleged a claim of premises liability. Illinois had a duty to defend because the complaint alleged that Tiffany's had served alcohol to underaged persons, causing their intoxication.

Since Scottsdale's policy excluded liquor liability claims, and since Illinois' policy specifically covered liquor liability claims, Illinois was the primary insurer on the negligence claim and Scottsdale was the excess insurer. "The fact that a carrier which is secondarily liable also had a duty to defend the insured does not deprive the carrier of its right to be indemnified for the cost of defending the insured." *United States Auto. Ass'n v. Hartford Ins. Co.*, 468 So. 2d 545, 548 (Fla. 5th DCA), *rev. denied*, 476 So. 2d 676 (Fla. 1985); *see also Associated Elect. & Gas Ins. Servs., Ltd. v. Ranger Ins. Co.*, 560 So. 2d 242 (Fla. 3d DCA 1990). Accordingly, Scottsdale is entitled to half of the *attorney's fees and costs* that it incurred while defending Tiffany's.

The trial court erred, however, in granting Scottsdale's motion for summary judgment regarding the indemnification of settlement funds because an issue of material fact existed concerning whether the service of alcohol had caused the claimants' injuries. The duty to indemnify is narrower than the duty to defend, and there must be a determination that coverage exists before a duty to indemnify arises. *Baron Oil Co.*, 659 So. 2d at 813; *Keller Indus. Inc. v. Employers Mut. Liab. Ins. Co. of Wis.*, 429 So. 2d 779, 780 (Fla. 3d DCA 1983) ("[A]n unjustified failure to defend does not require the insurer to pay a settlement where no coverage exists."); *Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40, 41 (Fla. 3d DCA 1985) ("[C]ourts have no power simply to create coverage out of the whole cloth when none exists on the face of an insurance contract...."). The record, as it presently exists, fails to prove whether or not the improper service of alcohol by Tiffany's to minors was the proximate cause of the injury or loss suffered by the claimants. We therefore reverse the trial court's order granting Scottsdale's summary judgment motion as to the indemnification for settlement funds, because of the material issue of fact that exists regarding whether the service of alcohol to minors contributed to the claimants' damages. "A summary judgment cannot stand where genuine issues of material fact exist." *Marquez v. Heim Corp.*, 632 So. 2d 85, 86 (Fla. 3d DCA), *rev. denied, Kelly v. Marquez*, 641 So. 2d 1345 (Fla. 1994); *Rothstein v. Honeywell, Inc.*, 519 So. 2d 1020 (Fla. 3d DCA 1987) (reversing final summary judgment because issues of causation, liability, and fraud remained).

Accordingly, this cause is remanded for further appropriate proceedings to allow a factual determination regarding whether the improper service of alcohol caused the injury to the claimants. If it did, Illinois is also liable in indemnification to Scottsdale in connection with the settlement funds. If not, Scottsdale will collect nothing from Illinois in connection with the settlement funds.

Affirmed in part and reversed in part.

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[1]Scottsdale's insurance policy, one of comprehensive general liability, covered bodily injury and property damage, but excluded claims relating "to bodily injury or property damage for which the insured or his indemnity may be held liable as a person or organization engaged in the business of manufacturing, distributing, selling or serving acholic beverages...."

[2]Illinois policy provided coverage resulting from the following: "(1) causing or contributing to the intoxication of any person; (2) the furnishing of alcohol[ic] beverages to a person under the legal drinking age or under the influence of alcohol; or (3) any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages...."

* * *

Criminal law—Jury instructions—Trial court's extemporaneous instruction to jury venire regarding reasonable doubt, to which defendant did not object, did not rise to level of fundamental error

DONNIE HUGH DOCTOR, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2395. L.T. Case No. 94-8554. Opinion filed August 14, 1996. An Appeal from the Circuit Court for Dade County, Leonard E. Glick, Judge. Counsel: Samek & Besser and Lawrence Besser, for appellant. Robert A. Butterworth, Attorney General, and Fleur J. Lobree, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and LEVY and SHEVIN, JJ.)

(SHEVIN, Judge.) Donnie Hugh Doctor appeals convictions for armed robbery, aggravated battery, and possession of a firearm. We affirm.

During Doctor's trial, prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the jury venire. Defense counsel did not object.

Doctor argues on appeal that the extemporaneous instruction minimized the reasonable doubt standard and rises to the level of fundamental error. Doctor does not raise any error as to the formal jury instructions at the close of the evidence.

We adhere to our decision in *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991), and hold that "the giving of the instruction does not otherwise rise to the level of fundamental error . . . ." *Freeman*, 576 So. 2d at 416.

We decline Doctor's invitation to follow *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA), *review denied*, 663 So. 2d 632 (Fla. 1995), as we find it antithetical to our holding in *Freeman*.

Therefore, we affirm Doctor's convictions.

Affirmed. (LEVY, J., concurs.)

(SCHWARTZ, Chief Judge, specially concurring.) In my opinion the remarks to the jury in this case, in our previous cases of *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991) and *Perez v. State*, 639 So. 2d 200 (Fla. 3d DCA 1994), and in the line of Fourth District decisions which began with *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *review denied*, 663 So. 2d 632 (Fla. 1995), *cert. denied*, 116 S.Ct. 1451 (1996),[1] were

1.

not erroneous, Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Jones*, 656 So. 2d at 491 ("At bar, the trial judge's instructions were accurate as far as they went."); and

2.

if erroneous, were not harmfully so in the light of the complete, and completely accurate instructions repeatedly given the jury on the burden of proof issue, particularly at the most critical time immediately before its deliberations. Esty v. State, 642 So. 2d 1074 (Fla. 1994), cert. denied, 115 S.Ct. 1380 (1995); Higginbotham v. State, 155 Fla. 274, 276-77, 19 So. 2d 829, 830 (1944) ("[A] single instruction cannot be considered alone but must be considered in light of all other instructions bearing upon the same subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail."); and

3.

if harmfully erroneous, were not fundamentally so since they could easily have been "corrected" upon objection and in no way affected "the validity of the trial itself." See State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Castor v. State, 365 So. 2d 701 (Fla. 1978); Brown v. State, 124 So. 2d 481 (Fla. 1960).

Cardozo has described the process which I believe may have led the Fourth District's contrary decisions:

> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

Benjamin Cardozo, The Growth of the Law, in Selected Writings of Benjamin Nathan Cardozo 214 (Margaret E. Hall ed. 1947). I concur without reservation in this Court's continued refusal to do the same. (LEVY, Judge, concurs.)

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[1]Accord Reyes v. State, 674 So. 2d 921 (Fla. 4th DCA 1996); Variance v. State, __ So. 2d __ (Fla. 4th DCA Case no. 94-3019, opinion filed, January 3, 1996) [21 FLW D79], review granted (Fla. Case no. 87,916, July 19, 1996); Cifuentes v. State, 674 So. 2d 743 (Fla. 4th DCA 1996); Poole v. State, 674 So. 2d 746 (Fla. 4th DCA 1996); McInnis v. State, 671 So. 2d 803 (Fla. 4th DCA 1996); Pierce v. State, 671 So. 2d 186 (Fla. 4th DCA 1996), review granted (Fla. Case no. 87,862, July 1, 1996); Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 1996), cause dismissed, __ So. 2d __ (Fla. Case no. 88,168, June 6, 1996); Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), review granted, 672 So. 2d 543 (Fla. 1996); Frazier v. State, 664 So. 2d 985 (Fla. 4th DCA 1995), review denied, 666 So. 2d 145 (Fla. 1995), cert. denied, 116 S.Ct. 1679 (1996); Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995), cert. denied, 116 S.Ct. 1421 (1996); Jones v. State, 662 So. 2d 365 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995), cert. denied, 116 S.Ct. 1421 (1996).

* * *

Criminal law—Sentencing—Probation revocation—No merit to argument that trial court lacks authority to impose special probation conditions as part of new sentence once defendant is formally charged with a probation violation and brought before the court for a hearing—Case remanded for court to clarify vague probation condition prohibiting defendant from taking any job which would require him to wear a uniform—Court also to clarify vague probation condition regarding visitation with minors

MARC McCORD, Appellant, vs. STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2115. L.T. Case No. 88-12650. Opinion filed August 14, 1996. An Appeal from the Circuit Court for Dade County, Maxine Cohen-Lando, Judge. Counsel: Bennett H. Brummer, Public Defender, and Julie M. Levitt, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Sandra S. Jaggard, Assistant Attorney General, for appellee.

(Before COPE, LEVY, and FLETCHER, JJ.)

ON MOTION FOR REHEARING GRANTED

[Original Opinion at 21 Fla. L. Weekly D1633b]

[Editor's note: Substituted opinion deleted three sentences from the fourth paragraph of the original opinion.]

(PER CURIAM.) The opinion filed in this case on July 17, 1996, is vacated and this opinion is substitution in its stead.

Marc McCord (hereinafter "defendant") appeals a new sentencing order on the grounds that it impermissibly imposes special probation conditions and that it does not conform to the trial court's oral pronouncement. While we disagree that the trial court lacks the authority to impose special probation conditions as a part of the new sentence once the defendant is formally charged with a probation violation and brought before the court for a hearing, we agree that the written sentence must conform to the court's oral pronouncement at the sentencing hearing. *See Clark v. State*, 579 So. 2d 109 (Fla. 1991); *Walls v. State*, 596 So. 2d 811 (Fla. 4th DCA 1992).

However, in order for the written sentence to conform to the oral pronouncement, the latter must be clear and unambiguous, lacking any language which might be considered vague. *See Hall v. State*, 661 So. 2d 63 (Fla. 2d DCA 1995). In the instant case, after a thorough review of the record, we found that the oral pronouncement was vague regarding two conditions. During the February 27, 1996 hearing on the defendant's motion to correct illegal sentence, the court stated that as one of the conditions of probation the defendant could not take any job which would require him to wear a uniform. As an example, the court stated that the defendant could not become a security guard. Accordingly, the case must be remanded to the trial court so that the court can clarify the probation conditions by specifically indicating the types of jobs that require the wearing of a uniform that would violate this prohibition.

The second condition which was vague involved the type of visitation that the defendant was allowed to have with minors. The court must clarify the parameters of visitation that the defendant is allowed to have with his own son, relatives who are of minor age, and other children who are not related to the defendant. Specifically, the court must indicate whether or not the visitation is to be supervised and, if the court finds that supervision is a necessary prerequisite of visitation, the court must indicate which group—son, relatives or unrelated children—needs supervised visitation and which group, if any, does not.

As to appellant's other points, we find them to be without merit.

Affirmed in part; reversed in part and remanded.

* * *

Criminal law—Speedy trial—Order granting prohibition in DUI case on speedy trial ground that county court incorrectly charged continuance to defendant is reversed—Continuance was properly charged to defendant because counsel waited until day of trial before going to county court library to inspect intoxilyzer maintenance documents, which were made available for inspection there pursuant to administrative rule, and finding that certain documents were missing—Fact that defendant's counsel had requested same missing documents in other case did not eliminate counsel's obligation in this case—Order declaring county court's administrative rule invalid is reversed

THE STATE OF FLORIDA, Appellant, vs. WADE HARRILL, Appellee. 3rd District. Case No. 95-3291. L.T. Case No. 95-18627. Opinion filed August 14, 1996. An Appeal from the Circuit Court for Dade County, Amy Dean, Judge. Counsel: Robert A. Butterworth, Attorney General, and Fredericka Sands, Assistant Attorney General, for appellant. Michael A. Catalano, for appellee.

(Before NESBITT, COPE and SHEVIN, JJ.)

95-140295 ✓ E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

ELIJAH DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-0300

Opinion filed September 25, 1996

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mark A. Speiser, Judge; L.T. Case No. 94-5911 CF10A.

Richard L. Jorandby, Public Defender, and Cherry Grant, 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.

Although the evidence is sufficient to sustain appellant's conviction for possession of cocaine with intent to deliver, we reverse the conviction and remand for new trial because the trial court's preliminary instructions regarding reasonable doubt constituted fundamental error. See Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995), cert. denied, __U.S.__, 116 S. Ct. 1451, 134 L. Ed. 2d 570 (1996).

Nevertheless, we certify as one of great public importance the same question certified in Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), rev. granted, 672 So. 2d 543 (Fla. 1996).

GLICKSTEIN, WARNER and GROSS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.