IN THE SUPREME COURT OF FLORIDA

CASE NO, 89,510
4th DCA no. 95-0749

STATE OF FLORIDA,

Petitioner,

v.

FRANCISCO RODRIQUEZ,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Francisco Rodriquez 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."

STATEMENT OF THE CASE AND FACTS

Respondent was charged by a two count information with attempted first degree murder and aggravated battery.

There was a preliminary instruction given prior to the voir dire of the prospective jurors to give them some insight into what was going to happen (R 7). The trial court introduced himself and the court personnel (R 7-11). The judge told the jury, a criminal trial is divided into several stages: the first phase of the trial is jury selection (R 11-16); and went on to explain the jurors' duties in general in any given trial. The judge then said the second phase of the trial was "opening statements" (R 16), and that the third phase of the trial is the "evidentiary phase" (R 17). As the judge's explanation of the evidentiary phase of the trial, the judge gave the venire "three cardinal rules that apply to every single criminal trial ... ." (R 19). As cardinal rule number one, the judge said the defendant must be presumed innocent (R 19-20). The second cardinal rule is that the State has the burden of proof to prove the defendant guilty (R 20-21). The third cardinal rule

> is that in order for you the jury to find the defendant guilty the State must satisfy you,, the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that you [sic] the defendant is guilty. That's a landmark concept, that's a bedrock foundation of our American criminal juris

prudent [sic] system. That is any time any jury anywherein the United States of America if you ever find a defendant guilty, whether it be in state court, federal court in all 50 states, whether the person is charged with stealing a six pack of beer, robbery, murder,rape, or drug trafficking, arson, burglary, grand theft; no matter what the charge is, if the jury finds the defendant guilty that means that jury is saying that it has been satisfied-beyond and to the exclusion of every reasonable doubt that the defendant is guilty.

(R 21) . .

' give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I sive you the 1 egal instructions at the conclusion of trial. But suffice it to say, it's a very heavy burden the State shoulders whenever it charges somebody with committing a crime. In other words, to secure a conviction even though it's a very heavy burden the State does not, I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the defendant's guilt. 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 at the conclusion of the as to [Appellant's] guilt, and still find him guilty so long as it's not a reasonable doubt. If you have a doubt you must find him guilty unless it's a reasonable doubt.

A reasonable doubt simply stated is a doubt you can attach a reason to, If in fact at the conclusion of this trial you have a doubt as to [Appellant's] guilt that you can attach a reason to ladies and gentleman, that's a reasonable doubt and you must find defendant not guilty.

> But if at the conclusion of this trial the only kind of doubt you have as to [Appellant's] guilt is a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt; that's not a reasonable doubt. And as long as all of the elements of the crime are have been proven to you, you must find the defendant guilty (emphasis supplied) .

(R 22-23). The judge then continued to explain the "evidentiary" phase of the trial (R. 23-26). The trial court then stated that the fourth phase of the trial consists of closing argument (R 26-28). The trial judge later said (R 28):

> Now, the fifth phase of the trial is what's known as legal instructions. And that's where you set the law you apply to the evidence in this case. Any preconceived ideas you have as to what the law is, or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you (emphasis supplied).

The trial judge further instructed the jury that every element of the attempted first degree murder charge must be proved beyond and to the exclusion of every reasonable doubt (R 29) .

At the close of evidence, the trial judge again 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 470). As part of the charge to the jury, the trial court read the standard jury instructions on reasonable doubt (R 470-471).

> Whenever you hear the words reasonable doubt you must consider the following: A reasonable doubt is not a possible doubt, a speculative doubt, an imasinary 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 of 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.

(R 471). As concluding remarks, the trial court reminded the jury, "it is important you follow the law set out in these instructions in deciding your verdict. There are no other laws that apply to this case."(R 475). The defense raised no objections to the instructions as read to the jury (R 475-476).

The Respondent was found guilty as charged on each count (R 505-506). 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). 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:

Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995) (reversed based on Jones, quashed December 26, 1996 in this Court's Case no. 87,575).

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.

Ravfield v. State, 664 So. 2d 6 (Fla. 4th DCA), rev. denied, 664 So. 2d 249 (Fla. 1995) (reversed based on Jones).

Reves 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).

Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 1996) (reversed based on Jones, question certified).

Smith v. State, Case no. 95-1636 (pending).

Jackson v. State, Case no. 95-3738 (pending).

Davis v, State, Case no. 95-0300 (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 these cases may be difficult to retry. A great number of victims are affected by these cases. This case involves attempted murder and aggravated battery. Smith involves convictions for kidnaping, extortion, impersonating a police officer and burglary. Davis 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. 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 and correct the Fourth District's far-reaching misapplication of the law as it did in Wilson.

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. Further, when the comments are taken together with the charge given to the selected jury just prior to deliberations, were not only proper, but any alleged error was thereby cured. The challenged comment did not impermissibly reduce the reasonable doubt standard below the protection of the due process clause. 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 fundamental error, nor was any error otherwise preserved by a contemporaneous objection..

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:

> The third cardinal rule is that in order for you the jury to find the defendant guilty the State must satisfy you,, the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that you [sic] the defendant is guilty. That's a landmark concept, that's a bedrock foundation of our American criminal juris prudent [sic] system. That is any time any jury anywherein the United States of America if you ever find a defendant guilty, whether it be in state court, federal court in all 50 states, whether the person is charged with stealing a six pack of beer, robbery, murder,rape, or drug trafficking, arson, burglary, grand theft; no matter what the charge is, if the jury finds the defendant guilty that means that jury is saying that it has been satisfied beyond and to the exclusion of every reasonable doubt that the defendant is guilty.

(R 21)..

> I'll give you a more elaborate definition of what that shrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of trial. But suffice it to say, it's a very heavy burden the State shoulders whenever it charges somebody with committing a crime. In other words, to secure a conviction even though it's a very heavy burden the State does

> not, I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the defendant's guilt. 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 at the conclusion of the as to [Appellant's] guilt, and still find him guilty so long as it's not a reasonable doubt. If you have a doubt you must find him guilty unless it's a reasonable doubt.
>
> A reasonable doubt simply stated is **a** doubt you can attach a reason to. If in fact at the conclusion of this trial you have a doubt **as** to [Appellant's] guilt that you can attach a reason to ladies and gentleman, that's a reasonable doubt and you must find the defendant not guilty.
>
> But if at the conclusion of this trial the only kind of doubt you **have** as to [Appellant's] guilt is a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt; that's not a reasonable doubt. And as long as all of the elements of the crime are have been proven to you, you must find the defendant guilty (emphasis supplied).

(R 22-23).

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 was not incorrect, as such. The preliminary instructions were almost identical to those given in State v. Wilson, Case No. 87,575 (Fla. December 26, 1996) quashing Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995).

Moreover, also as in State v. Wilson, Case No. 87,575 (Fla. December 26, 1996) quashing Wilson v. State, 668 So, 2d 998 (Fla, 4th DCA 1995), the trial judge's preliminary comment was balanced. The trial judge repeatedly stated that it was a very heavy burden (R 20-21). 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 22-23). 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 (R 21-23). "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 Estv 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 siven until the jury was beinq 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); Kraiewski 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 22) :

> 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 28):

> Now, the fifth phase of the trial is what's known as legal instructions. And that's where you get the law you apply to the evidence in this case. Any preconceived ideas you have as to what the law is, or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you (emphasis supplied) .

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, Hissinbotham, and all other cases holding that instructions must be considered as a whole. This Court has quashed this far-reaching misapplication of the **law** in State v. Wilson, Case No. 87,575 (Fla. December 26, 1996) quashing Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995).

The Fourth District relied on Case 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 Case. 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 Hissinbothem, 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 Case 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 Case 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, 590. 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 Case 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 reauired.*** *You may be convinced of the truth of the fact bevond a reasonable doubt and vet be fully* aware that *possibly you may* be ***mistaken.*** You may find an accused guilty uwon ***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. Nasle, 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 Federa

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 which this Court has disapproved in State v. Wilson, Case No. 87,575 (Fla. December 26, 1996) quashing Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995). This case too must be reversed.

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. The jury was told that it must follow those instructions. 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 Roias v. State, 5.52 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. 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), 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 invitatidn 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) (Case 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.

In State v. Wilson, Case no. 87,575 (Fla. December 26, 1996), quashing Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), this Court again affirmed that jury instructions are subject to the contemporaneous objection rule absent fundamental error. There was no error, **fundamental or otherwise, in this case.** This Court should reverse this case.

CONCLUSION

The decision is without support in the law. The trial judge's comments were not erroneous. This Court should reverse this case as it did in State v. Wilson, Case no. 87,575 (Fla. December 26, 1996), quashing Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995).

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I CERTIFY that a true copy has been furnished by U.S. Mail to Counsel for Appellant :Anthony B. Borras, Esquire, 1888 N. University Drive, Suite A, Plantation, Fl. 33322 this 8th day of January, 1997.

Of Counsel