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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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Chief Deputy Clerk

CASE NO. 88,954

DONNIE HUGH 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 JURISDICTION

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INTRODUCTION

Petitioner, DONNIE HUGH DOCTOR, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal. The parties shall be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the District Court of Appeal of Florida, Third District, which affirmed the judgment and sentence of the Eleventh Judicial Circuit Court. The decision of the lower court acknowledged direct conflict with a decision of the Fourth District, stating:

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*.

Doctor v. State, 21 Fla. L. Weekly D1856 (Fla. 3d DCA Aug. 14, 1996). Accordingly, the District Court affirmed the judgment and sentence of the trial court. Id. The mandate of the District Court was issued on August 30, 1996. On September 12, 1996, Petitioner filed a timely notice to invoke discretionary review in this cause.

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN *JONES v. STATE*, 656 So. 2d 489 (Fla. 4th DCA), *rev. den.* 663 So. 2d 632 (Fla. 1995), AND ITS PROGENY.

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal found that the decision in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA), *rev. den.* 663 So. 2d 632 (Fla. 1995), was antithetical to the holding in *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991). Therefore the decision of the lower court expressly and directly conflicts with a decision of the Fourth District Court of Appeal.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN *JONES v. STATE*, 656 So. 2d 489 (Fla. 4th DCA), *rev. den.*, 663 So. 2d 632 (Fla. 1995), AND ITS PROGENY.

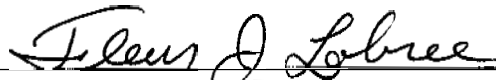
The decision of the **lower** court expressly acknowledged conflict between the Third District holding in *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991), **and** the line of Fourth District cases beginning with *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA), *rev. den.* 663 So. 2d 632 (Fla. 1995). Several cases which are the progeny of *Jones* are currently pending under review by this Court. See e.g., *Wilson v. State*, 668 So. 2d 998 (Fla. 4th DCA 1995), *rev. granted*, No. 87,575 (Fla. Mar. 20, 1996).

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully acknowledges that the Court may exercise its discretionary jurisdiction to review this cause.

Respectfully submitted,

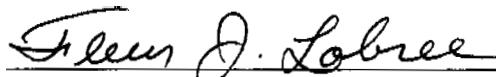
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was mailed to ROSA C. FIGAROLA, ESQ., Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this 9th day of October, 1996



FLEUR J. LOBREE
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