IN THE SUPREME COURT OF THE STATE OF FLORIDA

CEDRICK JONES

Petitioner,

vs. CASE NO. SC04-1217

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the District Court and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before the Court. The supplemental record filed with the District Court on June 4, 2003, will be designated by "SR". The original record volume is "R" and the trial transcript is designated by "T". The first order finding no reconstruction possible was filed as a supplemental record on July 9, 2002 and will be designated by "AR".

STATEMENT OF THE CASE AND FACTS

This case is before the court because of express and direct conflict between the decision of the lower court and other district courts of appeal on the same issue of law: when may an appellate court affirm a conviction where a major part of a trial transcript is unavailable and cannot be reconstructed ? The lower court held that a new trial is required in such circumstances only if the appellant can "point to a specific decision by the trial judge that he would use to show reversible error."*Jones v. State*, 870 So. 2d 904(Fla. 4th DCA 2004). As discussed below, other district courts have decided that such a showing is not necessary.

Petitioner, Cedrick Jones, was convicted after a jury trial and sentenced on August 24, 2001. In preparing his appeal to the Fourth District, Mr. Jones' trial counsel, Broward Assistant Public Defender Emmauel Simon, requested the transcription of the entire jury trial, including jury selection, (R-144,149) but due to court reporter error, her notes of voir dire were lost . (T-33, SR-99)

On appellant's motion, the district court relinquished jurisdiction for proceedings to reconstruct the record and after a hearing on May 17, 2002, the trial court found the voir dire could not be reconstructed on June 5, 2002. (AR, SR-16-18) Appellant filed his initial brief requesting a reversal under *Delap v. State*, 350 So. 2d 462 (Fla. 1977) due to the inability of his appellate counsel to review the voir dire

proceedings and determine the presence or absence of reversible error. Petitioner claimed the "record of jury selection proceedings is incomplete and inadequate for effective appellate review." (IB-17). Appellee requested an additional relinquishment to attempt to reconstruct and develop evidence before filing its answer brief, which was granted (SR-3-5).

At a hearing to reconstruct on January 24, 2003, it seemed as though the state agreed that objections during voir dire were made that were not subject to appellate review. Assistant State Attorney Martel proffered that the trial prosecutor, Julie Porter, now in private practice, had notes of jury selection and a recollection that during the voir dire missing in this case, both sides exercised peremptory challenges to which the other side objected. The trial court resolved the controversy by having both objections cancel each other out, disallowed both peremptories and allowed each of the challenged jurors to sit. (SR -30).

At the evidentiary portion of the proceedings to reconstruct on February 21, 2003, Ms. Porter testified that she did recall those rulings in a specific case tried before Judge Agner where defense counsel was Assistant Public Defender Emmanuel Simon, but she "didn't know whether or not it was this case, that I thought it may have been." (SR-75). She was unsure but did not think that it occurred in this trial voir dire.(SR-76).

Emmauel Simon, defense counsel, also testified that he designated transcription of the entire trial proceedings and wanted the voir dire transcribed for review by appellate counsel in West Palm Beach for possible error. He had no recollection of what occurred or what objections might have been registered by either side or ruled on, even though he frequently objected and it was his practice to object as necessary throughout the trial. (SR-106-109). Petitioner's counsel at the reconstruction hearing also introduced the voir dire of the PRIOR voir dire held in this case on July 23, 2001, when it was mistried due to a hung jury just two days before the trial proceedings on appeal in this case. That transcript was admitted as indicative of defense counsel's level of practice and whether he was in the habit of objecting to the prosecutor's conduct during voir dire. That transcript, which is NOT the missing voir dire at issue here, did indicate defense counsel's *Neil-Slappy*[1] objections to peremptories made by the prosecutor, which were overruled by the trial judge. (SR-79-80).

When the trial prosecutor, Julie Porter, testified she admitted her memory was not as good as a court reporter's transcript and said that objections might have occurred during voir dire that she could not recall. (SR-82-83). At the reconstruction hearing, Mr. Jones testified to some memory of his attorney making *Neil-Slappy*

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[1] *State v. Neil*, 457 So. 2d 481 (Fla. 1984), and *State v. Slappy*, 522 So.2d 18 (Fla. 1988)

objections during voir dire that he wished to have reviewed on appeal. (SR -118-119) Still, the lower court did not find that it was likely that objections occurred during voir dire because the memories were dim and no one could remember exactly what did or did not happen.

The trial court certified that "it is patent from these proceedings that we cannot accurately reconstruct voir dire" of July 25, 2001, except the court noted that "defendant had used only three peremptory challenges." (SR-131). The clerk's progress notes showed the peremptory challenges used by the parties and that the state exercised two peremptory challenges. (R-113-114).

The Fourth District affirmed petitioner's convictions, noting that Jones conceded that "he does not know if errors occurred in voir dire." This concession lead the court to find Jones was not entitled to a *Delap* reversal because he failed to demonstrate "that the missing portions of the transcript are necessary for meaningful review of a specific, identifiable issue in this appeal." The court concluded:

> Under existing law by which we are bound, defendant has failed to demonstrate that the missing portions of the transcript are necessary for meaningful review of a specific, identifiable issue in his appeal. It is not enough to say that as a result of the omission we do not know whether any error occurred, and therefore a new trial is required. A new trial would be required under *Darling-Burgess-Velez* only if Jones could point to a specific decision by the trial judge that he would use to show reversible error.

Jones v. State, 870 So. 2d 904, 905 (Fla. 4th DCA 2004).

Notice to invoke discretionary jurisdiction was timely filed. The court noted jurisdiction and set a briefing schedule. This brief follows.

SUMMARY OF THE ARGUMENT

Conflict exists among the district courts on the standard to be used to determine when a new trial must be granted due to loss of a transcript of a material portion of the trial that cannot be reconstructed. In petitioner's case, the district court required him to show that some specific ruling of the trial judge subject to appellate review was in the missing portion of the transcript. Other district courts require reversal for a material omission in the appellate transcript even though they do not know and cannot tell whether reversible error occurred. Previously, in *Swain v. State,*701 So. 2d 675 (Fla. 3rd DCA 1997), *Rozier v State*, 669 So. 2d 353 (Fla. 3d DCA 1996) and *Hernandez v State*, 824 So. 2d 997 (Fla. 3rd DCA 2002), the Third District reversed for a new trial where the transcript of voir dire was lost and could not be reconstructed without any necessity to show what was in the missing portion of the record.

Petitioner was entitled to a full and complete transcript of his trial on which to base his direct appeal by Florida constitutional guarantees of due process and *Florida Rule Judicial Administration,* 2.070(b). Appellate counsel's claim on direct appeal that the transcript without voir dire was inadequate for effective appellate advocacy and complete appellate review should have resulted in reversal. The Fourth District's decision Jones would only be entitled to a reversal under *Delap* if he pointed to a specific, identifiable issue that he would use to show reversible error was wrongly

decided based on the district court's misreading this Court's decision in *Darling v. State*, 808 So. 2d 145 (Fla. 2002).

Petitioner was prejudiced by the complete absence of the voir dire transcript because his appellate attorney was denied the opportunity to review the state's use of peremptory challenges to determine whether *Neil-Slappy, Melbourne* [2] objections were made. Through no fault of petitioner, his right to full appellate review of his trial was denied by this omission in the record. The decision of the Fourth District must be reversed.

[2] *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996)

ARGUMENT

WHETHER THE COMPLETE UNAVAILABILITY OF THE VOIR DIRE TRANSCRIPT FOR A DIRECT APPEAL THAT CANNOT BE RECONSTRUCTED IMPAIRS A CRIMINAL DEFENDANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO FULL APPELLATE REVIEW OF HIS CRIMINAL CONVICTION.

The lower court held that an appellant/defendant must make an additional showing of prejudice when there is no transcript of a major part of the trial and none can be reconstructed to include a showing of what specific error would be in the portion of the transcript that is missing. *Jones v. State*, 870 So. 2d 904 (Fla. 4th DCA 2004). The rule of law followed by other district courts in *Blasco v. State*, 680 So. 2d 1052,1053(Fla. 3rd DCA 1996) and *Jones v. State*, 780 So. 2d 218 (Fla. 2nd DCA 2001), is that material omissions in the transcript of a defendant's trial make meaningful appellate review of the conviction impossible and *Delap v. State*, 350 So. 2d 462 (Fla. 1977)[3] requires reversal. *Hernandez v. State*, 824 So. 2d 997 (Fla. 3rd DCA 2002).

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[3]Although *Delap* was a reversal due to an incomplete record in a capital case, the district courts recognize its holding where an appellant has constitutional or statutory rights to appellate review. *Peretz v State*, 710 So. 2d 754 (Fla. 4th DCA 1998)(*Delap* applied to reverse involuntary commitment where no transcript of hearing existed); *J.W. v. State*, 667 So. 2d 207 (Fla. 1st DCA 1995)(*Delap* applied to juvenile cases); *Lipman v. State*, 429 So. 2d 733 (Fla. 1st DCA 1983) (*Delap* reversal where complete appellate review was not possible due to incomplete record) Furthermore, the right to a transcript on which to take an appeal predates *Delap*. See *Simmons v. State*, 200 So. 2d 619 (Fla. 1st DCA 1967); *Yancey v. State*, 267 So. 2d 863 (Fla.4th

In affirming petitioner's conviction the lower court said "it is not enough to say that as a result of the omission we do not know whether any error occurred," *Jones* at 905, but *Blasco* says just the opposite. In *Blasco v. State, supra,* the court reversed DUI convictions where the transcript of the state's rebuttal witnesses was missing because "we do not know, and are not capable of knowing, whether any reversible error was committed" during the unreported portion of the trial. The Second District in its *Jones v. State, supra,* decision adopted the "we do not know" standard from *Blasco* where the transcript of the state's closing argument was missing and also relied on the criminal defendant's statutory rights to a full transcript for his appeal.

The right implicated by the inadequate record supplied to petitioner to prosecute his direct appeal is the denial of his right to direct appellate review of the judgment of conviction, which is a necessary ingredient of due process of law and is guaranteed by the constitution of this state. *Simmons v. State,* 200 So. 2d 619 (Fla. 1st DCA 1967). Also, *Florida Rule of Judicial Administration* 2.070(b), which requires reporting of all criminal proceedings, fortifies the criminal defendant's right to a

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DCA 1972); *Dismukes v. State,* 299 So. 2d 133 (Fla. 3rd DCA 1974).

complete transcript; the entire record is necessary so appellate counsel can properly represent her client and adequately present issues to the court for review. *Jones v. State*, 780 So. 2d 218 (Fla 2nd DCA 2001). The right to a full transcript for a direct appeal arises from a combination of all these appellate rights including, the indigent criminal defendant's representation by counsel in the first appeal as a matter of right under the Fourteenth Amendment of the United States Constitution. *Douglas v. California*, 372 U. S. 353 (1963).

Appellant, as an indigent, is also constitutionally entitled to an adequate, free transcript on which to base his appeal. *Griffin v. Illinois*, 351 U. S. 12 (1956)(plurality)(once a state establishes appellate review, the state cannot "bolt the door to equal justice." *Id.* at 24). See also *Hampton v. State*, 591 So. 2d 945 (Fla. 4th DCA1991)(indigent defendant constitutionally entitled to transcript of trial so appellate counsel can first "master the record."). In *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990), this Court relied on *Griffin v. Illinois*, to say that "under doctrine of equal protection, indigent appellants must have the same ability to obtain meaningful appellate review as wealthy appellants." *Id*. at 1131. Counsel on appeal cannot discharge her duty of appellate advocacy for the defendant without an adequate transcript of the trial proceedings. See, Justice Anstead's special concurrence in *Johnson v. Singletary*, 695 So. 2d 263, 268 (Fla. 1997) reiterating "the

most basic and fundamental tool" required for an appellate advocate is a complete transcript.

Whether the missing portion of the trial transcript is "necessary to a complete review" of the criminal conviction is what determines whether reversal is required under *Delap*, not whether the appellant knows what is in the missing portion of the record. Petitioner asserts that his rights to a full transcript necessary for his direct appeal includes the right to a record of voir dire proceedings. In *Swain v. State*, 701 So. 2d 675 (Fla. 3rd DCA 1997), where the voir dire from the defendant's criminal trial was missing and could not be reconstructed, the Third District required a new trial under *Delap*.

Likewise, in *Rozier v. State*, 669 So. 2d 353 (Fla. 3rd DCA 1996), the Third District ordered a new trial finding the absence of voire dire or a reconstructed record required a new trial. In *Rozier*, the state argued that the clerk's minutes of jury selection were a sufficient record for appellate review even though a commissioner's fact finding proceedings resulted in an order that the voir dire transcription notes could not be located or voir dire reconstructed. The Third District concluded that the clerk's minutes showing the exercise of peremptory challenges by both sides, were without sufficient detail necessary for meaningful appellate review and reversed Rozier's convictions. See also *Hernandez v. State*, 838 So. 2d 683 (Fla. 3rd DCA

2003), reversing a conviction for second degree murder where the voir dire transcript was missing and could not be reconstructed. There, Hernandez claimed that he wanted to challenge the trial court's refusal to grant an additional peremptory challenge.

Here, appellant does not know if errors occurred in voir dire for which a transcript is unavailable. It seems likely based on his trial attorney's standard practice as testified to by both the trial prosecutor and defense counsel himself, but no reconstruction is available and memories of the parties were not clear enough to provide for any degree of reconstruction in the present circumstance. And that's what the trial court found- voir dire cannot be accurately reconstructed. (SR-131) Petitioner was prejudiced by the complete absence of the voir dire transcript in this case because through no fault of his own, his right to complete and full appellate review of his trial was denied by this omission in the transcript. The inability of defense counsel to recall the proceedings to aid in reconstruction should also result in a reversal for a new trial. *Fairell v. State*, 662 So. 2d 428 (Fla. 3rd DCA 1995). See also, *Bogdanowicz v. State*, 744 So. 2d 1155 (Fla. 2nd DCA 1999)(Defense attorney memory insufficient to reconstruct lost suppression hearing so reversal under *Delap* required).

The Fourth District affirmed petitioner's convictions based on three cases *Velez v. State*, 645 So. 2d 42 (Fla. 4th DCA 1994), *Burgess v. State*, 766 So. 2d 293

(Fla. 4th DCA 2000) and *Darling v. State*, 808 So. 2d 145 (Fla. 2002), a capital appeal, where this Court found the defendant's right to appeal was not prejudiced because certain pre-trial hearings were missing from the appellate transcript:

> Darling argues that there are no records of certain pretrial hearings which occurred in this case, precluding meaningful consideration of Darling's claims. However, Darling has failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal. Cf. *Velez v. State*, 645 So.2d 42, 44 (Fla. 4th DCA 1994) (concluding that the appellant was not prejudiced in the review of his conviction and sentence, "[c]onsidering the limited portion of transcript which is missing and the errors alleged to have occurred in the trial court"). Therefore, this claim too lacks merit.

Darling v. State, 808 So. 2d at 163.

How Darling's right to meaningful appellate review was not prejudiced by the absence of pre-trial hearing transcripts is not hard to imagine as any pre-trial motion would have to be renewed at trial to preserve the court's denial of the motion for appeal. *Perez v. State*, 717 So. 2d 605 (Fla. 3rd DCA 1998). Missing portions of a transcript do not always prejudice the defendant on appeal, depending on the materiality of the unreported proceedings. *Armstrong v. State*, 862 So. 2d 705,721 (Fla. 2003) (Absence of voir dire strike conferences, not reversible; "Armstrong has failed to link a meritorious appellate issue to the allegedly missing record.") Sometimes,

the state can take a position forbearing preservation arguments so that the appellant is not prejudiced by an absent transcript. See *Gutierrez v. State*, 854 So. 2d 218 (Fla. 3rd DCA 2003). There, the court minutes reflected a motion for judgement of acquittal was made, but the transcript was missing; the state did not assert any preservation problem on appeal when appellant raised insufficiency of the evidence so the absent transcript did not impair Gutierrez' right to appellate review of his criminal conviction.

Manifestly, *Darling's* discussion of *Delap* does not say in its brevity that an appellant trying to demonstrate prejudice from an unavailable transcript on appeal can "only" do so if the appellant "could point to a specific decision by the trial judge that he would use to show reversible error" that was in the missing portion. That rule of law expounded by the Fourth District in petitioner's case on authority of *Darling*. *Jones*, at 905, is incorrect and at odds with the standards employed by this Court and the other district courts on when reversal is required where a material portion of the trial, like voir dire or closing arguments, cannot be transcribed or reconstructed for appeal. *Blasco v. State*, *supra*, *Jones v. State*, 780 So. 2d 218 (Fla. 2nd DCA 2001), *Hernandez v. State*, *supra*.

The *Jones* decision in petitioner's direct appeal misreads *Darling* to require a criminal defendant to somehow know what is in a missing portion of the record before he is entitled to a reversal under *Delap*. This is an unwarranted expansion of

the *Darling* rule from whether a particular (there insignificant) portion of the record is necessary for complete appellate review to whether the defendant has identified a specific issue for which a complete record is necessary for review. These are two different statements of law and *Darling* does not stand for the proposition that a significant missing portion of the record-THE ENTIRE VOIR DIRE- will result in a *Delap* reversal "only if Jones could point to a specific decision by the trial judge that he would use to show reversible error." *Jones*, *supra* at 905. *Darling* does not require that a criminal defendant's right to a full and complete appellate review of his criminal conviction be dismissed by such a Catch-22.

Except for the decision in petitioner's case, no district court has held that the complete absence of any transcript of voir dire that cannot be reconstructed is an insufficient basis for reversal under *Delap*. Here, the Fourth District erroneously used a rule it first applied in *Velez v. State*, *supra,* under very different circumstances, where only a small portion of the voir dire was missing and where appellate counsel was trial counsel. In *Velez*, the court held that the missing portion of voir dire that could not be reconstructed was not necessary for complete appellate review of Velez' convictions where "most of the voir dire" was in the record including the individual, in chambers voir dire to determine if each juror's feelings about homosexuality would prevent the juror from being fair and impartial. Velez claimed he acted in self-defense

to the victim's homosexual attack. Appellate counsel, who was also trial counsel, alleged three specific errors occurred during that part of the voir dire for which the reporter's notes were unavailable, 1) that he was foreclosed from asking follow up questions about bias or favoritism toward homosexuality or bisexuality in open court, 2) that the state's questions contained an improper definition of premeditation and 3) that the state's questions called on the panel to commit to a guilty verdict. *Id.* at 43. The Fourth District found that the missing transcript was "not necessary for a full review" as the court was able to dispose of the raised errors " as a matter of law." On the available record, the court found error 1) was not an abuse of discretion and errors 2) and 3) were harmless beyond a reasonable doubt. The Fourth District held that trial and appellate counsel were the same, reversal is not required when a portion of the transcript is unavailable, absent a showing of hardship and a prejudicial effect on the appeal. *Id*. at 44.

Later in *Burgess v. State*, 766 So. 2d 293 (Fla. 4th DCA 2000), the district court built on its *Velez* holding requiring a showing of prejudice for a missing transcript where the court reporter's voir dire notes were destroyed. The voir dire was partially reconstructed and the Fourth concluded "appellant has not identified any prejudicial error that occurred during the voir dire, in spite of testifying at the hearing that he had 'an accurate recollection of what happened during the voir dire.'"

Thus, since Burgess himself claimed to accurately remember the voir dire but did not remember objections he wanted reviewed on appeal, the district court affirmed.

Starting in *Velez* then, in the context of when prejudice must be shown due to only a limited omission in the appellate transcript, where appellate and trial counsel are the same, the Fourth District has created its own standard, now applied in petitioner's case, that criminal defendants are entitled to a *Delap* reversal only when the appellant can "demonstrate that the missing portions of the transcript are necessary for meaningful review of a specific, identifiable issue in his appeal." The Fourth District misconceives the prejudice that applies in petitioner's situation where the record could not be reconstructed and appellate counsel did not know if reversible error occurred during the voir dire. The Fourth District's *Jones'* decision completely overlooks that a criminal defendant's right to a meaningful appeal is compromised when no adequate record exists to ensure the district court performs its appellate review function that is guaranteed by due process of law. To the extent that *Burgess* and *Velez (*or *Darling)* can be read to require an appellant to show prejudicial error occurred in a part of the proceedings for which no appellate record exists for his appellate counsel and the appellate court to review, they must have been wrongfully decided.

The facts of petitioner's case show that it is an impossible burden to show prejudicial rulings were made against an appellant where the record of proceedings to

which a defendant/appellant is entitled for his direct appeal is missing and unable to be reconstructed. In a different, though analogous context, this Court has found no requirement that the defendant sufficiently state errors to be found on appeal before he is otherwise entitled to a belated appeal where his counsel neglected to timely file the notice. *State v. Trowell*, 739 So. 2d 77 (Fla. 1999).

Nor do the appellate rules require assignments of error for an appeal to proceed. A trial attorney's Statement of Judicial Acts to be Reviewed are not the equivalent of assignments of error. In its *Jones v. State* decision the Second District has observed that a trial attorney's list of Judicial Acts "frequently bears no resemblance to the questions actually raised on appeal." *Id*. at footnote 1.

In order to demonstrate that his right to appeal is compromised and prejudiced petitioner need only show that a portion of the proceedings in which reversible error might well have arisen is insulated from appellate review by the complete absence of the record of voir dire. Petitioner needed to review the transcript to see if there were *Neil-Slappy-Melbourne* objections to the state's use of premptory challenges. Although petitioner does not know if errors occurred in voir dire, he continues to assert that he was prejudiced by the complete absence of the voir dire transcript from his appeal because, through no fault of his own, his right to complete and full appellate review of his trial was denied by this omission in the transcript. Petitioner

was not required under *Delap* and its progeny, those cases reversing for inadequate record, to show that some error exists in the missing portion of the trial in order to preserve and protect his right to appellate review. None should be required by this court. Reversal for a new and fair trial is now required.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner requests this court to disapprove of the district court's decision in his case and to order reversal for the absence of an adequate record on which to take his direct appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RICHARD VALUNTAS, ESQ., Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 by courier this th day of _____ day of NOVEMBER , 2004.

_____

MARGARET GOOD-EARNEST
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

_____

MARGARET GOOD-EARNEST
Assistant Public Defender