IN THE SUPREME COURT OF THE STATE OF FLORIDA

CEDRICK JONES

Petitioner,

vs. CASE NO. SC04-1217

STATE OF FLORIDA,

Respondent.

_______________________________/

REPLY BRIEF OF PETITIONER

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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.

Respondent, the State of Florida, continues to argue, as it did in the trial and district courts, that the prosecutor's recollection was reliable and a perfectly good basis on which to conclude that nothing happened during voir dire that was appealable. This is a factual argument that was resolved against respondent when the trial judge entered his finding that "it is patent from these proceedings that we cannot accurately reconstruct voir dire" except to show that the defendant exercised 3 peremptory challenges.(SR-131). If due process requires more of a record for appeal than the defense counsel's recollection and summary letter to the appeals court that nothing appealable occurred, *Anders v. California*, 386 U.S. 738 (1967), then certainly the petitioner is entitled to more of an appellate record than his adversary's uncertain recollection as to what happened during voir dire. Petitioner raised this due process objection at the reconstruction hearing, insisting that reconstruction required the participation and agreement of the parties, that Ms. Porter's contested memory was not a sufficient record of voir dire proceedings for

appeal. (SR-123-124,127). See also, *Draper v. Washington*, 83 S.Ct. 774 (1963) (summary findings of the trial court and the affidavit of prosecutor that no error occurred was not a "record of sufficient completeness" on which to base criminal defendant's appeal.)

At this point in the legal proceedings the question should no longer be one of fact but of law- in the absence of an important portion of the trial transcript that cannot be reconstructed, is the state of Florida entitled to a presumption of correctness, that all is well and no error occurred? Or on appeal, is the appellant, the criminal defendant entitled to a new trial where a material omission in the appellate transcript, the absence of voir dire, makes meaningful appellate review of the conviction impossible under Florida due process guarantees expressed in *Simmons v State*, 200 So. 2d 619 (Fla 1st DCA 1967) and *Delap v. State*, 350 so. 2d 462 (Fla. 1977) ?

The state does not address these essential legal questions except to say that *Darling v. State*, 808 So. 2d 145 (Fla. 2002) justifies the district court's decision below as *Darling* requires an appellant to allege error occurred in the missing portion of the transcript before reversal is required. (RB-15). Respondent's argument on the importance of suppression hearings as even "more integral" (RB-16) than jury selection to an appellate record is unconvincing. Supposedly the

conclusion here is that if more important suppression hearings don't need to be in the appellate record to affirm, than neither does the insignificant voir dire have to be in the record for a complete and effective appeal. But respondent's argument understates and disrespects the importance of voir dire. Case authority and experience are to the contrary: effective voir dire has long been recognized as of critical importance to the trial rights of the criminal defendant. See *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986), adopting as the majority "Judge Pearson's comprehensive, articulate, and logical dissenting opinion" in *Lavado v. State*, 469 So. 2d. 917(Fla. 3rd DCA 1985), citing *Rosales-Lopez v. United States*, 451 U.S. 182, (1981), and *Connors v. United States*, 158 U.S. 408, 413, (1895) on the importance of meaningful voir dire. There are errors[1] that might occur in voir dire that do not require the defendant to exhaust all of his peremptory challenges to preserve an issue for appeal. Appellate review of the voir dire to determine if the jury selection was fair and fully undertaken is not possible without an adequate record of that voir dire.

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[1]Petitioner has already identified the need to determine if the state's peremptory challenges were properly exercised. Other examples of error in voir dire include *State v. Singletary*, 549 So. 2d 996, 999 (Fla. 4th DCA 1989) where the judge left the bench during voir dire and the district court concluded the judge's presence could not be waived. In *Perry v. State*, 675 So.2d 976 (Fla. 4th DCA

Respondent's assertion that Darling was not required to renew his pre-trial suppression objections at trial to preserve them for appeal is based on a statute that was not even in effect at the time of Darling's trial, Section 90.104(1)(b) *Florida Statues* (2003). Notably this court has not yet adopted that statute as encompassing the procedural rule for practice in Florida and questions of that statute's constitutionality are unresolved. *Amendments to the Florida Evidence Code*, 29 Fla. Law Weekly S787 (Fla. December 9, 2004)

Under this court's decision in *Dorsey v State*, 868 So. 2d 1192 (Fla. 2003) the state is not entitled to any presumption of validity of peremptory strikes unless the existence of its proffered reason is either confirmed by the trial court or otherwise supported by the record. Thus, the respondent is incorrect in its insistence that the prosecutor's testimony shows the validity of its questioned strikes. (RB-19,26). Here neither the appellate record nor the trial judge confirmed the prosecutor's uncertain testimony about the race of the jurors she struck nor did her testimony establish why she struck them; respondent assumes the reasons it advances from her jury chart in evidence. *Dorsey* undergirds the importance of the voir dire transcript for appellate counsel's review in quest of reversible error

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1996) the trial court's limitation on voir dire prevented the intelligent exercise of the defendant's peremptory challenges and required reversal.

and supports the Second and Third districts in their decisions in *Jones v. State*, 780 So. 2d 218 (Fla. 2nd DCA 2001) and *Blasco v. State*, 680 So. 2d 1052 (Fla. 3rd DCA 1996); in the absence of a record, the appellate court is not capable of knowing whether or not reversible error occurred so the conviction must be reversed for a new trial.

Recently in *Vargas v. State*, —So. 2d —, 2004 WL 3000954(Fla. 3rd DCA December 29, 2004), the Third District reversed the appellant's conviction where the notes of voir dire were destroyed by fire. After a full hearing attempting to reconstruct the record, the trial judge certified the proceedings could not be reconstructed. While reversing on its own precedent of *Swain v. State*, 701 So. 2d 675 (Fla. 3rd DCA 1997) and *Rozier v. State*, 669 So. 2d 353 (Fla. 3rd DCA 1996), and the Second District's decision in *Jones*, *supra*, the court questioned the need for reversal in circumstances where appellant was "unable, either at the hearing below or on appeal, to identify even a potential sounce of reversible error in the conduct of the voir dire." The *Vargas* court certified conflict with the Fourth District *Jones'* decision in petitioner's case and noted the differing views from various appellate court's in and out of Florida on when the lack of a portion of the appellate record requires reversal.

Vargas also contains a suggestion, hidden in footnote 1, that "absence of any

recollection of the participants in the actual trial that any such challenges [to the state's strikes] were actually asserted" ought to preclude a *Delap* reversal. Should one participant's testimony recalling objections being made in voir dire be all that is necessary for reversal due to an unavailable transcript, as Judge Schwartz inferentially suggests? If so then petitioner met that standard here when Jones himself testified at the reconstruction hearing that he had some recollection of his attorney making *Neil-Slappy*[2] objections during voir dire that he wished to have reviewed on appeal. (SR- 118-119). What standard applies when a prosecutor now thinks no objections occurred but earlier had informed another assistant state attorney that the trial judge disallowed peremptory challenges advanced by each side in order to balance out the objections, as occurred in this case? (SR-30, 75-76)

In *Vargas*, the defendant suggested that the trial court might have erred in its ruling on cause challenges, but footnote 1 questions that assertion as "contrary to human understanding that everyone would have failed to remember a series of such incidents if they had, in fact, occurred." Other courts are more forgiving in recognition of the frailty of human memories trying to reconstruct proceedings

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[2] *State, v. Neil*, 457 So 2d 4481(Fla 1984), and *State, v. Slappy*, 522 So. 2d 18 (Fla. 1988).

after a period of time. *Bogdanowicz v. State*, 744 So. 2d 1155 (Fla. 2nd DCA 1999) (Defemse counsel could not recall events from motion to suppress hearing in a meaningful way sufficient to reconstruct the proceedings so the state agreed case had to be reversed), *Fairell v. State*, 662 So. 2d 428 (Fla. 3rd DCA 1995). Although the Third District adheres to its *Swain* and *Rozier* decisions and reverses in *Vargas*, it seems to favor a requirement that someone testify at the relinquishment hearing to an objection or ruling of the court that would potentially encompass error before reversal for an incomplete transcript is required. Such a standard is untenable as it allows the state to benefit from human error, disaster, or a poor court reporting system that results in an inability to ensure a full record for appellate review.

The law in Florida does not favor presumptions or standards that remove from the state its burden of showing error is harmless. *Williams v. State*, 863 So. 2d 1189 (Fla. 2003), *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999). This court should not adopt any such standards now. A conclusion that defendant has to show what is missing from a portion of the appellate record that he requested transcribed for his appeal makes the state the beneficiary of the error without requiring the state to shoulder its burden. Whenever voir dire, closing argument, the testimony of a witness, or another critical portion of the proceedings are unavailable to be

included in the appellate record, this court should continue to view the omission as entitling the defendant to a new trial in order to protect the defendant's right to a complete and thorough appellate review and not place the burden on the defendant to prove what is missing in the first place. The defendant's appellate attorney should not be required to prove what cannot be known when the transcript is incomplete and missing an important part of the trial proceedings through no fault of the defendant.

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 of this reply brief has been furnished to CELIA TERENZIO and RICHARD VALUNTAS, Assistant Attorney General, 1515 North Flagler Drive, 9th Flooor, West Palm Beach, Florida 33401 by courier this day of _____________ , 2005.

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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.

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