

IN THE SUPREME COURT OF FLORIDA

CASE NO.

**JASON JERROD BODIE,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL  
OF FLORIDA, THIRD DISTRICT

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## TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
<p><b>THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN <i>Jones v. State</i>, 923 So.2d 486 (Fla. 2006); <i>DiGuilio v. State</i>, 491 So.2d 1129 (Fla. 1986); <i>Card v. State</i>, 803 So. 2d 613 (Fla. 2001); AND <i>Ruiz v. State</i>, 743 So.2d 1 (Fla. 1999).</b></p>	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10
CERTIFICATE OF FONT .....	10

**TABLE OF CITATIONS**

**PAGES**

*Card v. State*  
803 So. 2d 613 (Fla. 2001) ..... 5,7,8

*DiGuilio v. State*  
491 So. 2d 1129 (Fla. 1986) ..... 5,7

*Jones v. State*  
923 So. 2d 486 (Fla. 2006) .....5,6,7,8

*Ruiz v. State*  
743 So. 2d 1 (Fla. 1999)..... 5,7,8

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**INTRODUCTION**

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Bodie v. State*, 32 Fla. L. Weekly D1510 (Fla. 3d DCA June 20, 2007), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as “A,” followed by the page number(s). All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

Jason Jerrod Bodie was convicted of three counts of attempted murder and one count of unlawful possession of a firearm (A. 2). He was sentenced to serve life in prison (A. 4). On appeal, it was discovered that substantial portions of the trial transcript, including the state's entire closing argument, are not available (A. 2, 4). The Third District Court of Appeal relinquished jurisdiction in order for the parties to attempt to reconstruct the record (A. 4-5).

The parties agreed and entered into stipulations with regard to six of the seven missing portions of the trial<sup>1</sup> (A. 5). But with regard to closing argument the two sides could not agree (A. 5). The state submitted a three page statement of its recollection of the argument (A. 5). The state represented that there were no objections made by the defense during its closing, and no motions for mistrial (A. 5). The defense disagreed, recalling that there were objections during the closing argument (A. 5). Specifically, Mr. Bodie remembered that the defense objected to a comment by the prosecutor to the effect that there was no evidence showing that Bodie was not the shooter, and that the only evidence from Bodie was his confession<sup>2</sup> (A. 5). The trial judge had no independent recollection of the closing

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<sup>1</sup> These included the absence of transcripts of the testimony of a police witness, the defense rebuttal closing, the reading of the instructions to the jury, the court's responses to questions submitted by the jury during deliberations, the rendering of the verdict, and a separate bifurcated trial for the firearm possession charge (A. 5).

argument in this case (A. 6). Defense counsel's previous motion for new trial did not address closing argument errors (A. 6).

On appeal, Mr. Bodie maintained that a new trial is required because the defense specifically identified improper argument by the state, the missing transcript of the closing argument is necessary for meaningful appellate review, and the record could not be adequately reconstructed (A. 7). The Third District Court of Appeal assumed *arguendo* that Mr. Bodie demonstrated a basis for a claim of error, as required by this Court's decision in *Jones v. State*, 923 So. 2d 486 (Fla. 2006) (A. 10, 12). But the Third District held that the "defendant cannot meet the prejudice prong of the supreme court's [*Jones*] test." The Third District concluded that this prong was not met because Mr. Bodie's confession and the evidence introduced at trial rendered the closing argument error harmless (A. 11-12). The court thus found that Mr. Bodie "fails in his obligation to reflect a matter which caused him prejudice" (A. 12).

A motion for rehearing and/or clarification of the opinion was filed in the district court of appeal on July 5, 2007. The motion was denied July 19, 2007. Notice of invocation of this Court's discretionary jurisdiction was filed August 15, 2007.

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<sup>2</sup>Bodie also recalled that the defense objected to the prosecutor's remarks characterizing the AK47 as a military weapon designed to kill, but this comment was not the basis of the appeal (A. 5, 7).

## SUMMARY OF ARGUMENT

In *Jones v. State*, 923 So.2d 486 (Fla. 2006), this Court established that where transcripts of certain trial proceedings are unavailable, the defendant must demonstrate a “basis for a claim” that specific error took place. *Jones* makes clear that if the defense is prejudiced in seeking review of his claim of error due to an inadequate record, a new trial is required. The Third District Court of Appeal failed to apply the correct *Jones* standard, imposed a significantly more onerous standard requiring that the defendant prove *harmful* error, and eliminated Mr. Bodie’s right to meaningful review of his asserted closing argument error. It is therefore respectfully submitted that this Court should exercise its discretionary conflict jurisdiction to review the decision of the district court of appeal in this case.

## ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *Jones v. State*, 923 So.2d 486 (Fla. 2006); *DiGuilio v. State*, 491 So.2d 1129 (Fla. 1986); *Card v. State*, 803 So. 2d 613 (Fla. 2001); AND *Ruiz v. State*, 743 So.2d 1 (Fla. 1999).**

In *Jones v State*, 923 So.2d 486 (Fla. 2006), this Court clarified the standard to be applied by reviewing courts in addressing whether a defendant is entitled to a new trial on the ground that certain transcripts of the proceedings below are unavailable for appellate review. In this case, the Third District Court of Appeal misconstrued the *Jones* standard in a manner that eviscerated the defendant's constitutional right to meaningful appellate review. The decision in this case conflicts not only with the central holding of *Jones*, but also with this Court's decision in *DiGuilio v. State*, 491 So.2d 1129 (Fla. 1986) regarding harmless error analysis, as well as this Court's decisions in *Card v. State*, 803 So. 2d 613 (Fla. 2001) and *Ruiz v. State*, 743 So.2d 1 (Fla. 1999) regarding appellate review of closing argument error.

In *Jones*, the transcript of the jury selection was unavailable, and the parties attempted to reconstruct the record. Jones testified that he recalled a "Neo [sic] Slappy" objection when the state was "striking a witness or something." *Jones*, 923 So. 2d at 487. But Jones conceded that he had difficulty separating what happened during his three different trials. The state produced a chart at the

reconstruction hearing indicating that the state had proffered neutral reasons for its two peremptory challenges. This Court found that a new trial was not warranted, where the defendant’s unspecific claim of error was based on “pure conjecture,” and was unsupported by the evidence introduced at the reconstruction hearing *Id.* at 490. This Court explained that “it is an ‘important principle’ that the defendant bears the burden of demonstrating that an error occurred in the trial court.” *Id.* at 488. This Court concluded that Jones “did not demonstrate that *any* error occurred during the voir dire, and thus there was no identification of any **prejudice that resulted because of the missing transcript . . .**” *Id.* at 489.

The central holding of *Jones* is that when transcripts are unavailable, the defendant must demonstrate a “basis for a claim” of specific error. *Id.* If the defense shows that it is prejudiced in that the claim of error is not reviewable in the absence of a complete record, then the defendant’s constitutional right to meaningful appellate review requires a new trial. *Id.*

In this case, the Third District misconstrued the language of *Jones*, and imposed an additional burden on the defense not required by *Jones*. The Third District assumed *arguendo* that Mr. Bodie demonstrated a basis for a claim of specific closing argument error. But the Third District then held that Bodie failed to “meet the prejudice prong” of the *Jones* test because the asserted closing argument error was harmless in light of the state’s evidence at trial (A. 11-12).

Thus, the Third District interprets *Jones* as requiring that the defense show not only a basis for a claim of specific error, but also that the error was harmful. This interpretation far exceeds the *Jones* requirement that the defendant show prejudice in pursuing his right to meaningful appellate review. The Third District's holding also contradicts *DiGuilio v. State*, 491 So.2d 1129 (Fla. 1986), which specifically requires that the state bear the burden to show that any error asserted by the defendant is harmless beyond a reasonable doubt.

The Third District not only misconstrues the central holding of *Jones*, and conflicts with *DiGuilio*, but also eliminates Mr. Bodie's right to meaningful review of the closing argument error. In *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001), this Court made clear that in reviewing closing argument errors, appellate courts must **“not examine allegedly improper comments in isolation,”** but look to the **“totality of the errors in the closing argument,”** including both preserved and unpreserved errors, to determine whether the cumulative effect of all improper comments by the state deprived the defendant of a fair trial. *Accord Ruiz v. State*, 743 So. 2d 1 (Fla. 1999). Therefore, *Card* and *Ruiz* establish that meaningful appellate review of an improper burden-shifting comment by the state, like the comment asserted by Bodie in this case, includes review of the entire closing argument. If a closing argument transcript existed in this case, Mr. Bodie would be entitled to consideration of his asserted error in the context of the state's entire

summation, including any improper comments by the prosecutor that were not objected-to below. But such review is impossible in this case, where the entirety of the state's closing argument is missing. The Third District's review of Mr. Bodie's claim of error in isolation, without a transcript of the state's closing, and its conclusion that the error was harmless in this context, directly conflicts with *Card* and *Ruiz*.

In sum, the proper inquiry under *Jones* is whether a defendant's specific claim of error can be meaningfully reviewed on appeal in the absence of a complete record. *Jones* makes clear that if a defendant demonstrates that he is prejudiced in the review of his claim due to an inadequate record, a new trial is required. The Third District Court of Appeal failed to apply the correct *Jones* standard, imposed a significantly more onerous standard requiring that the defendant prove *harmful* error, and eliminated Mr. Bodie's right to meaningful review of his asserted closing argument error. It is therefore respectfully submitted that this Court should exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case based on this express and direct conflict with the decisions of this Court.

## CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this \_\_\_\_th day of August, 2007.

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MARIA E. LAUREDO  
Assistant Public Defender

**CERTIFICATE OF FONT**

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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MARIA E. LAUREDO  
Assistant Public Defender