IN THE SUPREME COURT OF FLORIDA

HUGH MILLER CURTIS, Defendant/Petitioner, vs. STATE OF FLORIDA, Plaintiff/Respondent.	)	CASE NO. 65,891

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATE OF FLORIDA,	)	
	)	
Plaintiff/Respondent.	)	
	)	

QUESTION PRESENTED

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN IVORY V. STATE, 351 So.2d 26 (Fla. 1977), AND CURTIS V. STATE, ___ So.2d ___ (Fla. 5th DCA September 13, 1984) [9 FLW]?

In Ivory v. State, 351 So.2d 26 (Fla. 1977)[Appendix "B"], this Court clearly stated "that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request." Id. at 26.

Thereafter, in Hitchcock v. State, 413 So.2d 741 (Fla. 1982)[Appendix "C"], this Court stated "[a]s a general rule, it is error for a judge to respond to a jury's question without the parties being present and having the opportunity to discuss the request." Id. at 744. (Emphasis added). This Court went on to

explain that the jury's inquiry in that case concerned only a matter of procedure to be followed by the jury, to-wit: whether they were required to recommend a sentence of life or death at the rendition of the verdict concerning guilt. This Court held that the communication by the judge with the jury "[did] not fall within the scope of Fla.R.Crim.P. 3.410."[1/] Id. at 744. Implicit in this Court's holding is that any improper [ex parte] communication by the judge with the jury within the scope of Fla. R.Crim.P. 3.410 remained reversible error.

Finally, in Rose v. State, 425 So.2d 521 (Fla.1982) [Appendix "D"], this Court held that the trial judge did not commit reversible error by sua sponte giving the jury an "Allen"[2/] charge in the presence of the prosecutor, defendant and defense counsel after the jury had deliberated for seven hours. Concluding that "... we find such error to be harmless in the present case" id. at 524 (emphasis added), this Court again did not view the instruction as falling under Fla.R.Crim.P. 3.410 because the jury did not request additional instructions or to have testimony read to them.

The holding of Ivory v. State, supra, remains viable if the improper communication violates Fla.R.Crim.P. 3.410.

The facts of Curtis v. State, ___ So.2d ___ (Fla. 5th DCA

[1/] Fla.R.Crim.P. 3.410 provides: After the jurors have retired to consider their verdict, if they request additional instructions or to have testimony read to them they shall be conducted into the courtroom ... and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant." (Emphasis added).

[2/] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

September 13, 1984)[9 FLW], unequivocally come within the confines of Fla.R.Crim.P. 3.410 and are boldly and affirmatively set forth in the body of the opinion of the majority. Specifically, the jury requested additional instruction by the court concerning how to consider certain evidence previously presented at trial, and the court, without bringing the jury into the courtroom, answered the inquiry without participation or knowledge of the parties or counsel for either side (see Appendix "A", p.2). In Curtis, supra, the Fifth District Court of Appeal has adhered to its opinion in Villavincencio v. State[3/], 449 So.2d 966 (Fla. 5th DCA 1984) [Appendix "E"], that a defendant must show prejudice to demonstrate reversible error, notwithstanding the clear, mandatory language of Fla.R.Crim.P. 3.410 and the equally clear, mandatory holding of Ivory v. State, 351 So.2d 26 (Fla. 1977).

This Court should exercise the discretionary jurisdiction that clearly exists in this case to resolve the confusion expressed by the Fifth District Court of Appeal and to protect the rights to due process of the defendant and the State of Florida.

[3/] Petition for discretionary review pending, Supreme Court Case No. 65,386.

CONCLUSION

BASED UPON the argument and authority set forth herein, this Court is respectfully asked to exercise its discretionary jurisdiction to review the instant decision of the Fifth 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 has been mailed to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014 and Mr. Hugh M. Curtis, Inmate No. 086938, 3976 Evans Road, Box 50, Polk City, FL 33868 this 20th day of September, 1984.

LARRY B. HENDERSON
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