IN THE SUPREME COURT OF FLORIDA

RALPH CORTEZ WILLIAMS,

Petitioner,

v. CASE NO.: 67,217

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Ralph Cortez Williams, the appellant and criminal defendant below will be referred to herein as Petitioner. The State of Florida, the appellee and prosecution below will be referred to herein as Respondent.

Citations to the sequentially numbered record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s).

The decision of the court below is now reported as Williams v. State, 468 So.2d 335 (Fla. 1st DCA 1985), a copy of which has been attached as an appendix hereto.

STATEMENT OF THE CASE AND FACTS

Respondent, for purposes of resolving the issues raised herein, accepts as accurate, though incomplete, Petitioner's Statement of the Case and Facts (PB 2-4) and therefore submits the following additional information:

At the close of the State's case (R 260) Petitioner moved for judgment of acquittal and the trial court denied same (R 261). Petitioner renewed his motion for judgment of acquittal at the close of the State's rebuttal evidence and it was again denied (R 372).

Subsequent to the trial judge's charges to the jury, neither counsel raised objections to the charges as given nor did they request additional instructions (R 406).

In affirming the cause, the lower court did not resolve the issue of whether the ex parte communication was without the scope of the notice requirements of Fla.R.Crim.P. 3.410, but instead based its decision upon a finding that said communication was harmless error. Williams v. State, supra, at 336,337.

SUMMARY OF ARGUMENT

Respondent argues that the first question certified by the lower court should be answered in the negative because the ex parte communication complained of herein is not governed by the notice requirements of Fla.R.Crim.P. 3.410 since said communication constituted neither denial of nor compliance with a jury request for additional instructions or the reading of testimony.

Respondent also argues that the second question certified by the lower court should be answered in the negative because this Court's decisions in Hitchcock v. State, infra, and Rose v. State, infra, indicate that Ivory v. State, infra, would not preclude application of the harmless error rule sub judice nor would it preclude a finding of harmless error. Respondent further argues that such a result is consistent with United States Supreme Court decisions and decisions of this Court applying the harmless error doctrine.

ARGUMENT

ISSUE I

QUESTION CERTIFIED

IS A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR A COPY OF INSTRUCTIONS WITHIN THE EXPRESS NOTICE REQUIREMENTS OF FLA.R.CRIM.P. 3.410?

During deliberations in the case at bar the jury told the bailiff that they would like to have a copy of the jury instructions and he so informed the trial judge. The judge then directed the bailiff to tell the jury that he couldn't give them a copy of the instructions, but, if they wanted, he would bring them back into the courtroom and reread the instructions. The bailiff communicated the response to the jury who in turn said they would let him know. Subsequently, the jury returned the verdict (R 441). Counsel was not notified of the jury's request until after the verdict was rendered (R 423). See also Williams v. State, supra, at 336.

Respondent, on the foregoing facts and the authority of Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied, 459 U.S. 960 (1982), and Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984), pet. for rev. den., 456 So.2d 1182 (Fla. 1984), contends that the certified question should be

answered in the negative.[1] Petitioner, relying upon Ivory v. State, 351 So.2d 26 (Fla. 1977) and Isley v. State, 354 So.2d 457 (Fla. 1st DCA 1978), contends the contrary.

Fla.R.Crim.P. 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they should be conducted into the courtroom by the officer who has them in charge 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.]

In Hitchcock v. State, supra, a capital case, the jury sent a note to the trial judge asking if it was required for them to recommend the death penalty or life at the time. Since the jury was in the guilt-innocence phase of deliberations, the judge sent them a note stating that they should not consider any penalty at that time--only guilt or innocence. The record reflected that the notes were filed in open court but was silent as to whether the parties were present during the exchange. This Court, recognizing the per se rule established in Ivory, nonetheless rejected Hitchcock's claim of reversible error holding that the communication did not

[1]The lower court did not pass upon the question certified but affirmed the cause on the basis of harmless error.

fall within the scope of Fla.R.Crim.P. 3.410 and that Hitchcock had failed to demonstrate anything more than harmless error. Id. at 714.

Thus, Petitioner's reliance upon Ivory is misplaced since this Court's decision in Hitchcock evinces a marked retreat from the broad implication in Ivory that all communications between a trial judge and a jury are governed by the notice requirements of Fla.R.Crim.P. 3.410. Along the same line, Isley leaves Petitioner equally devoid of support because the lower tribunal, when it decided Isley did not have the benefit of this Court's decision in Hitchcock and was therefore compelled to rule in accord with Ivory.

Petitioner nevertheless seeks to distinguish Hitchcock from the case at bar claiming "that the jury in Hitchcock did not request additional instructions as did the jury in the instant case." (PB 9). Respondent submits that the jury did not request additional instructions sub judice either. The trial judge refused to give the jury a copy of the written instructions and offered to reread the instructions to the jury if they so desired. Had the jury, in response to the trial judge's communication, requested him to reread the instructions, and had he done so without notice to counsel, then Petitioner might have found himself on firmer ground.

In Villavicencio v. State, supra, the appellant, relying upon Fla.R.Crim.P. 3.410 and Ivory v. State, supra, asserted

that the trial court reversibly erred by informing the jury, outside of the presence of the appellant or his counsel, that a certain exhibit they inquired about had not been admitted into evidence. The court, noting that this Court had apparently receded from Ivory in Hitchcock, rejected the appellant's claim holding, inter alia:

> In the instant case, the jury merely informed the jurors that a certain exhibit introduced at trial had not been admitted into evidence. The jury's request was neither an express request for testimony to be read to them nor a request for additional instructions regarding the law in the case and thus was not per se within the scope of rule 3.410.

Id. at 969. See also Curtis v. State, 455 So.2d 1090 (Fla. 5th DCA 1984) holding that the trial court's refusal to answer certain questions from the jury was not a violation of Rule 3.410, and Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984) holding that the jury's request to be advised of the penalties attendant upon lesser included offenses was not within the purview of Rule 3.410.

Petitioner also attempts to distinguish Villavicencio from the case at bar on the basis that "the trial judge feasibly could have honored the jury's request in the instant case, but could not in Villavicencio", (PB 9),[2] and will no

[2]Irrespective of whether the trial judge sub judice could have honored the jury's request, the simple fact of the matter is that he did not, thereby leaving Petitioner with a distinction without a difference.

doubt offer some factual basis for distinguishing Curtis and Smith. While Hitchcock, Villavencio, Curtis and Smith may embrace factual scenarios which might render them distinguishable from the instant case and from one another, the bottom line, which is wholly unaffected by any such distinction, is that the above-cited decisions demonstrate that not every communication between a trial judge and jury is within the ambit of Rule 3.410. This being the case, Respondent strenuously maintains that the communication complained of here is equally without the ambit of the rule. The trial judge merely informed the jury that they could not have a written copy of the instructions, but could have the instructions reread to them. As the trial judge so aptly put it:

> It's hard to see how there could possibly be--how the Ivory case could possibly apply to such an innocuous situation as to tell the bailiff to tell the jury no, that the instructions aren't in a form to be sent to the jury room. It wasn't like an additional instruction was given to them or comment on the testimony. . .

(R 431).

At this point, it bears repeating that had the jury requested the trial judge to reread the instructions and had he done so without notice to counsel, Petitioner might have had a compelling claim under Ivory. However, this did not transpire and as a result all Petitioner is left to complain about is an inconsequential exchange between judge and jury amounting to neither compliance with nor denial of a jury

request for either additional instructions or the reading of testimony. Accordingly Respondent submits that the communication complained of is not within the scope of Fla. R.Crim.P. 3.410 and the question certified by the lower tribunal should be answered in the negative.

ISSUE II

QUESTION CERTIFIED

> DOES IVORY V. STATE, 351 So.2d 26 (FLA. 1977) PRECLUDE APPLICATION OF A HARMLESS ERROR RULE TO A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR A COPY OF INSTRUCTIONS DURING DELIBERATIONS, WITHOUT NOTICE TO COUNSEL?

Respondent concurs with Petitioner's suggestion that the negative response to the first certified question (Issue I, supra) urged by Respondent would, on the facts of this case, render the above question largely academic (See PB 9). That being as it may, Respondent, while steadfastly maintaining that the communication complained of was not governed by the notice requirements of Fla.R.Crim.P. 3.410, submits that Ivory v. State, supra, does not preclude application of the harmless error rule to the ex parte communication which occurred in the case at bar.

In Ivory v. State, supra, the jury, during deliberations, sent out two notes requesting certain additional information. Without notifying the defendant, his counsel, or counsel for the State, and outside of their presence, the court ordered the bailiff to deliver to the jury the documentary exhibits requested. It was later discovered that one of the items, the medical examiner's report, had never been admitted into evidence. After the jury had the report for approximately 45 minutes, the trial judge ordered it withdrawn, whereupon

the defendant moved for a mistrial. The trial court denied the motion but instructed the jury to disregard the medical examiner's written report. Id. at 27. This Court found that it was prejudicial error for the trial judge to respond to the jury's inquiries outside the presence of the defendant and counsel for the parties holding in pertinent part:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.
>
> * * *
>
> We now hold 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. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id. at 28. In short, this Court concluded that the harmless error rule could never be applied to any ex parte communication between a trial judge and a jury--in effect, a per se rule of a reversal.

However, this Court in Hitchcock v. State, supra, and Rose v. State, 425 So.2d 521 (Fla. 1983), has unquestionably receded from the application of such a per se rule--a fact which has been recognized by the district courts confronted with the issue. See Curtis v. State, supra, Villavicencio v.

State, supra; Smith v. State, supra; Meek v. State, 10 F.L.W. 126 (Fla. 4th DCA Jan. 4, 1985); Morgan v. State, 10 F.L.W. 1574 (Fla. 3d DCA June 25, 1985).[3]

As noted in Issue I, supra, this Court rejected Hitchcock's claim of reversible error holding that the ex parte communication complained of did not fall within the scope of Fla.R. Crim.P. 3.410 and that Hitchcock had failed to demonstrate anything more than harmless error. Hitchcock v. State, supra, at 744. Similarly, in Rose v. State, supra, another capital case, the appellant, relying upon Fla.R.Crim.P. 3.390(d) and 3.410 claimed that the trial court erred in giving an "Allen" charge to the jury, who had been deliberating for seven hours, without first notifying counsel and giving them an opportunity for discussion. There too, this Court rejected the claim, holding that although counsel should have been notified prior to giving of the instruction, "we find such error to be harmless in the present case." Id. at 524.

Subsequently, the district courts, relying upon Hitchcock and Rose, began applying the harmless error rule in similar

[3]As Petitioner points out, the Second District in Coley v. State, 431 So.2d 194 (Fla. 2d DCA 1983), has afforded Hitchcock a rather narrow interpretation. However the court made no reference to the Rose decision and its effect upon Ivory.

situations. In Curtis v. State, supra, the foreman of the jury, during deliberations, sent the following questions to the trial judge:

> Q: Jury wishes to know if there is a record of plaintiff shouting into the phone, "he's going to stab me."
>
> Q: Can we accept that statement as evidence?

Id. at 1954. On the same sheet of paper, filed in open court and made a part of the record, the trial judge responded:

> A: Members of the jury:
>
> Your decision in this case will have to be based solely on the evidence presented in the trial itself--This evidence consists of the testimony of the witnesses and the photographs only. As to the testimony, you will have to consider all of it and you may accept or reject all or part of any witness's statement depending upon its credibility or lack of credibility when considered or compared with all of the other evidence.

Id. at 1954. While the record was silent concerning whether or not the trial court notified counsel of the request, the district court, for purposes of the opinion, assumed that they were neither notified nor present. In rejecting the appellant's assertion of reversible error predicated upon Fla.R.Crim.P. 3.410 and Ivory v. State, supra, the court held:

> Ivory has been distinguished, however, by the supreme court in Hitchcock v. State, 413 So.2d 741 (Fla. 1982), a first degree murder trial where the jury asked if it was required to recommend a death penalty or life, and the judge wrote back that

> only guilt or innocence should be decided. The supreme court held that the communication from the jury did not fall within the scope of Rule 3.410, thus there was no error in responding to it outside the presence of defendant or of counsel. The supreme court appears to have receded from the apparent per se rule of Ivory in Rose v. State, 425 So.2d 521 (Fla. 1982), where the court held that any error in the giving of an "Allen" charge to the jury without first notifying counsel and giving counsel an opportunity for discussion was harmless.
>
> Rule 3.410 proscribes the giving of additional instructions or the reading of testimony to the jury without first giving notice to counsel. While we agree that the safer practice would be to convene court and advise counsel and the defendant of the jury's request before deciding how to respond, we cannot consider the court's violation of the rule, particularly where there is abundant evidence, although disputed, upon which the jury's verdict could be based and there is no prejudice shown. (Footnote omitted).

Id. at 1954,1955.

In like manner, the court in Villavicencio v. State, supra, citing to this Court's application of the harmless error rule in Hitchcock and Rose, held:

> In the case before us, appellant has failed to demonstrate prejudice as a result of the judge's communication. Therefore the error, if any, was harmless.

Id. at 969. So too, the Smith court, citing Hitchcock and Rose, opined:

> During appellant's absence the request made of the trial court by the jury was to be advised of the penalties attendant upon

> lesser included offenses. This is not within the purview of Rule 3.410. If there was error, we find it to have been harmless.

Smith v. State, supra, at 506. Similarly, the court in Meek v. State, supra, reasoned:

> We agree with appellant that Ivory furnishes a vehicle for him to raise his absence druing the jury communication for the first time on appeal. However, we do not believe that Ivory mandates a reversal in every case where the defendant is absent during a communication with the jury . . . We find additional support for this conclusion in Rose v. State, 425 So. 2d 521 (Fla. 1982) . . . in Hitchcock v. State, 413 So.2d 741 (Fla. 1982) . . . in Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984) . . . and in Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984) . . .

Id. at 10 F.L.W. 127. Lastly, in Morgan v. State, supra, the court stated:

> The second question for consideration is whether the defendant's presence is required when the court, with the agreement of both counsel, in effect, denies a request for additional instructions. Florida Rule of Criminal Procedure 3.410 addresses the issue and requires, before a response is made to the jury, that both the prosecuting attorney and defense counsel be notified. The literal terms of the rule were complied with in this case. However, in Ivory v. State, 351 So.2d 26 (Fla. 1977), the supreme court appeared to add the additional requirement that the defendant be present when any response is made by the court to the jury. The court also apparently established a per se reversible error rule for violations of the requirements. In cases subsequent to Ivory,

however, the supreme court has receded from the per se standard, finding reversible error only when the defendant is prejudiced. In Francis v. State, 413 So.2d 1175 (Fla. 1982), a portion of the voir dire was conducted outside the defendant's presence. While the case involved a violation of Florida Rule of Criminal Procedure 3.180(a)(4), that rule, like Ivory, requires the defendant's presence. It is unquestionably more important that a defendant be present during voir dire than during a conference on the jury's request for additional instructions. A defendant can be of much greater assistance to himself, and his counsel, in selecting a jury than in discussing jury instructions. Yet, in Francis, the supreme court conducted a harmless error inquiry. The court decided it could not assess the extent of prejudice to Francis and, therefore, found the error was not harmless. The fact that a harmless error inquiry was made, however, is instructive.

In Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 902, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), the trial judge decided, sua sponte, to give an additional jury instruction. He gave the instruction without prior notice to the prosecuting attorney and defense counsel. The supreme court, in an opinion which glaringly fails to mention Ivory, found the error to be harmless. Rose may be explained by the fact that the communication between judge and jury, which is the focus of Ivory, occurred in everyone's presence. Consequently, there was an opportunity for objection at the time of the instruction, if not before. Still, reading Francis and Rose together, we conclude that violations of Rule 3.410 are subject to the harmless error rule. Other district court opinions have recognized the sumpreme court's retreat from the per se rule in Ivory. Williams v. State,

> 10 F.L.W. 967 (Fla. 1st DCA April 15, 1985); Curtis v. State, 455 So.2d 1090 (Fla. 5th DCA 1984); Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA), review denied, 456 So.2d 1182 (Fla. 1984); State v. Prieto, 439 So.2d 288,290 (Fla. 3d DCA 1983) (Judge Ferguson concurring), review denied, 450 So.2d 488 (Fla. 1984). [Footnotes omitted.] [Emphasis added.]

Id. at 10 F.L.W. 1574.

Consequently, Respondent submits that Ivory, in light of this Court's decisions in Hitchcock and Rose, does not preclude the application of the harmless error rule herein. Nor does it preclude a finding of harmless error on the facts of this case since the trial judge's communication amounted to nothing more than a mere refusal to provide a copy of the written instructions and an offer to reread the instructions to the jury if they so desired.

Petitioner, in evident awareness of this state of affairs, contends that reversal hereof is nonetheless mandated because the error complained of was not harmless (PB 11). In support of his contention, Petitioner argues that he was indeed prejudiced by the instant ex parte communication. Respondent maintains that Petitioner, rather than demonstrating actual prejudice as a basis for reversible error, has done nothing more than to offer rank speculation as grounds therefor, to-wit:

1. The jury was apparently reluctant to have the instructions reread because they didn't want to disturb the other case the trial judge presided over during deliberations (PB 12).

2. The jury obviously intended their finding of guilt "with mercy" to have some significance (PB 12).

Since Petitioner was not privy to the jury's deliberations, the foregoing represents conjecture in its purest form. Reversible error cannot be predicated upon conjecture. Sullivan v. State, 303 So.2d 632,635 (Fla. 1974), cert. denied, 428 U.S. 911 (1976), reh. denied 429 U.S. 873 (1976).

Moreover, the application of the harmless error rule sub judice and a concomitant finding of harmless error would not be constitutionally offensive and would be consistent with the United States Supreme Court's decision in Rushen v. Spain, ____U.S.____, 104 S.Ct.____, 78 L.Ed.2d 267 (1983), where the Court disapproved a decision of the Ninth Circuit Court of Appeals which held that an unrecorded ex parte communication between a trial judge and a juror can never be harmless error. The Court opined:

> We emphatically disagree. Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.
>
> At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing

> interests. United States v. Morrison, 449 U.S. 361,364,66 L.Ed.2d 564, 101 S.Ct. 665 (1981); see also Rogers v. United States, 422 U.S. 35,38-40, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975). In this spirit, we have previously noted that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 445 U.S. 209,217, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). There is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts' conclusion that an unrecorded ex parte communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice. (Footnotes omitted.)

Id. at 78 L.Ed.2d 272,273.[4]

In addition, the result urged herein by Respondent would be in conformity with the harmless error rule, Florida Statutes § 924.33, and the courts' application thereof. Florida Statutes § 924.33 provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers,

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[4]These same principles are embodied in Fla.R.Crim.P. 3.020 which provides, inter alia, that the rules shall be construed to secure simplicity in procedure and fairness in administration.

> that error was committed that injuriously affected the substantial rights of the appellant.

In Richardson v. State, 246 So.2d 771 (Fla. 1971), the appellant sought reversal on the basis of the State's violation of former Fla.R.Crim.P. 1.220 pertaining to discovery. This Court held that:

> . . . the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant. All of the four District Courts of Appeal have now so held and we now place our stamp of approval upon this principle. See Howard v. State, Fla.App., 239 So.2d 83; Wilson v. State, Fla.App., 220 So.2d 426,427; Buttler v. State, Fla., 238 So.2d 313; Rhome v. State, Fla., 222 So.2d 431; Ramirez v. State, Fourth District, Fla., 241 So.2d 744, Opinion filed October 14, 1970. This is particularly true in view of the purpose of the Florida Rules of Criminal Procedure. As stated in Rule 1.020 of the rules themselves: "These rules are intended to provide for the first determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration." Furthermore, the Rule in question must be considered by an appellate court in parimateria with the provisions of our harmless error statute, viz, F.S. 924.33, F.S.A. which provides that rulings or proceedings in criminal cases that are not prejudicial or harmful do not require reversal. As stated in Howard v. State, supra:
>
> > The cited statute is but a codification of the 'harmless error' doctrine which has been developed by judicial decision to avoid reversal in cases where it appears that justice has been served and that in all probability a new trial with the same admissible evidence would not alter the end result.

> See Urga v. State, 155 So.2d 714, Fla. App., 1963, and cases cited therein.
>
> Therefore, petitioner's contention that the State's non-compliance with the Rule entitles him, as a matter of right, to have a non-listed witness excluded from testifying, or to have a mistrial where it becomes evident during the trial that there existed a witness who probably had knowledge or facts relevant to petitioner's defense, is not tenable. [Emphasis added.]

Id. at 774.

Similarly, in State v. Murray, 443 So.2d 955 (Fla. 1984), this Court held that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." Id. at 956. This Court in so holding, agreed with the harmless error analysis employed by the United States Supreme Court in United States v. Hasting, ___U.S. ____, 102 S.Ct. ____, 76 L.Ed.2d 96 (1983) where the Court opined:

> Soon after Griffin, however, this Court decided Chapman v. California, supra, which involved prosecutorial comment on the defendant's failure to testify in a trial that had been conducted in California before Griffin was decided. The question was whether a Griffin error was per se error requiring automatic reversal or whether the conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. In Chapman this Court affirmatively rejected a per se rule.
>
> After examining the harmless error rule of the 50 states along with the federal analog, 28 USC §2111 [28 USCA §2111], the Chapman Court stated:

> All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction. 386 US, at 22, 17 ALR 3d 1065 (Emphasis added by the court).

In holding that the harmless error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. Brown v. United States, 411 US 223,231-232, 36 L Ed 2d 208, 93 S Ct 1565 (1973), citing Bruton v. United States, 391 US 123,135, 20 L Ed 2d 476, 88 S Ct 1620 (1968); cf. Engle v. Isaac, 456 US 107,133,134, 71 L Ed 2d 783, 102 S Ct 1558,1574 (1982). Chapman reflected the concern, later noted by Chief Justice Roger Traynor, that when Courts fashion rules whose violations mandate automatic reversals, they "retreat [] from their responsibilities, becoming instead 'impregnable citadels of technicality.'" R. Traynor, The Riddle of Harmless Error 14 (1970) (quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 ABAJ 217,222 (1925)).

Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial

> record as a whole and to ignore errors that are harmless, including most constitional violations, see, e.g., Brown, supra, 411 US, at 230-232, 36 L Ed 2d 208, 93 S Ct 1565; Harrington v. California, 395 US 250, 23 L Ed 2d 284, 89 S Ct 1726 (1969); Milton v. Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972). The goal, as Chief Justice Traynor of the Supreme Court of California has noted, is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error. Traynor, supra, at 81. (Footnotes omitted).

Id. at 76 L.Ed.2d 105,106. Along the same line, this Court has held that even constitutional error may be treated as harmless where the evidence of guilt is overwhelming, Palmes v. State, 397 So.2d 648,654 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct 369, 70 L.Ed.2d 195; and that it should not be presumed that error injuriously affects the substantial rights of the defendant. Salvatore v. State, 366 So.2d 745,751 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979), reh. denied, 444 U.S. 975, 100 S.Ct. 474, 62 L.Ed.2d 393 (1979).

Accordingly, Ivory v. State, supra, neither precludes application of the harmless error rule sub judice nor does it preclude a finding of harmless error on the facts of this case.

CONCLUSION

Based upon the foregoing arguments and the authority cited herein, the questions certified by the First Distict Court of Appeal should be answered in the negative and that court's decision herein should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on the Merits was forwarded by U.S. Mail to Rhonda S. Martinec, Esquire, Post Office Box 2522, Panama City, Florida, 32402, on this 1st day of August, 1985.

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