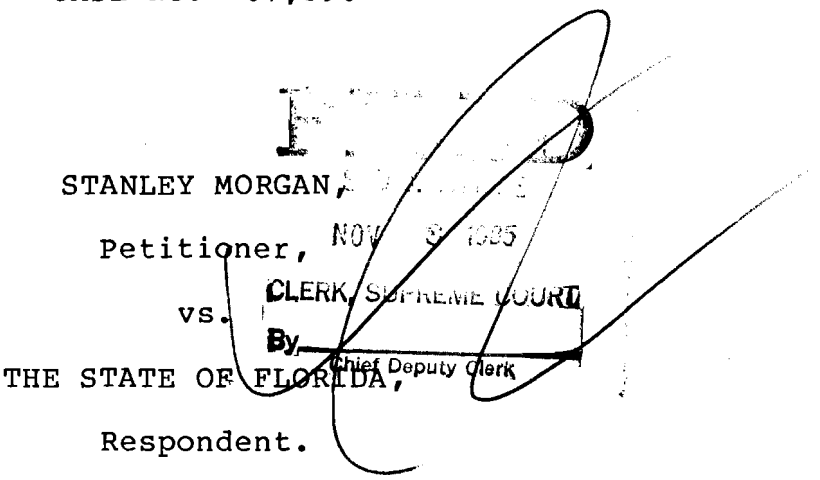
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,390



STANLEY MORGAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, Stanley Morgan, was the petitioner in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the respondent in the trial court and the Appellee in the District Court. The parties will be referred to as they stood before the lower court. The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the separately bound transcript of proceedings. The abbreviation "App." will refer to the Petitioner's appendix attached to this brief.

STATEMENT OF THE CASE AND FACTS

On February 12, 1982, the defendant filed a motion to vacate judgment and sentence in this case alleging, in pertinent part, that he was convicted of first-degree murder on November 21, 1985, after trial by jury held before the Honorable Natalie Baskin, Circuit Judge; that shortly after the trial jury retired for deliberations in the cause, it sent out a request for additional physical evidence and for additional instructions interpreting the difference between first-degree and second-degree murder; and that the defendant's trial attorney without agreement or acquiescence of the defendant purported to waive the presence of the defendant, the court thereupon responding to the jury's request in the absence of the defendant, in violation of the principle denoted by Ivory v. State, 351 So.2d 26 (Fla. 1977) and the pertinent rules of criminal procedure, 3.180(a)(5) and 3.410 (R. 2-3).

On February 24, 1982, the trial court, the Honorable Ellen Morphonios, Circuit Judge, without hearing summarily denied the defendant's Rule 3.850 motion (R. 4a, 6). The basis of Judge Gable's ruling of denial was that "defense counsel at that time waived appearance of defendant" (R. 4a).

Upon timely appeal from the summary denial, the Third District Court of Appeal reversed and remanded for an evidentiary hearing upon authority of Ivory v. State and related cases. Morgan v. State, 414 So.2d 233 (Fla. 3d DCA 1982).

The testimony and exhibits at the evidentiary hearing were undisputed. The defendant, who had been in custody prior to and

during trial, was removed to a holding cell when the jury retired for deliberations (T. 10-11). In the course of deliberations, the jury made a verbal request for all the physical evidence in the case, and made the following written request: "We need an inter-pretation of the law as to what constitutes the difference between first-degree and second-degree murder. Nelson Martines, foreman." (T. 35-36). In the absence of the defendant, who was still in the holding cell, his trial attorney purported to waive his presence and acquiesced, in lieu of having the jury returned to the courtroom, in the trial court's furnishing the physical evidence and providing a written note to the jury instructing them to rely on the (written) instructions already furnished to them (T. 8; R. 35-37, 76). The jury subsequently returned a verdict of first-degree murder (R. 38).

The undisputed testimony, credited by the trial court, was that the defendant, who was in a holding cell, did not know of the foregoing discussion or communication, and did not ratify or acquiesce in the waiver of his presence (T. 10-11, 20-22, 43). The defendant did not even learn of the foregoing until several years after trial (T. 11).

The trial court denied the motion, however, upon the grounds that the jury was not returned to the courtroom and that it had been previously provided with written instructions (T. 27, 33-34). The court subsequently entered a written order thereupon (R. 3-85).

Upon timely appeal to the Third District Court of Appeal, that court affirmed upon variant grounds. Morgan v. State, 471

So.2d 1336 (Fla. 3d DCA 1985). The majority opinion, authored by Judge Nesbitt, concluded that no error had occurred in furnishing physical evidence upon jury request during deliberations because neither the defendant nor counsel were required to be present at all. Id. at 1337; App. As to the response to the jury's written question, the majority below recognized that Ivory v. State required the defendant's presence and established a per se rule of reversal for communication between the judge and the jury occurring in violation of the requirement. However, the majority concluded that Ivory had been receded from by this Court. Id. at 1337-1338; App. Further, the majority intimated a construction of the applicable criminal rules as turning a defendant's right to be present upon the manner in which the trial court responds to the jury's request; only where a trial court recalls the jury for additional instructions or reading of testimony, in the view of the majority below, does a defendant have the right to be present. Id. at 1337; App.

The majority declined to expressly rule whether the trial court's responses in this case constituted error, concluding that if there was "error at all, it was harmless." Id. at 1338; App. The majority certified as one of great public importance the following question:

> Is a violation of Florida Rule of Criminal Procedure 3.410, by responding to a jury's request without the defendant being present, subject to the harmless error rule?

Id. n. 6 at 1338; App.

Judge Pearson, concurring, concluded that "Ivory remains afloat despite persistent rumors of its scuttling", but that a

defendant's presence at a discussion of jury instructions or reinstructions is not critical and can be unilaterally waived by his attorney. Id. at 1338, 1341; App.

Notice to invoke this Court's discretionary jurisdiction was timely filed on July 18, 1985.

SUMMARY OF ARGUMENT

When, in the course of deliberations, a jury requests additional evidence or instructions, under the applicable rules of criminal procedure, the trial court is required to have the jury returned to the courtroom so that it may respond to the request in open court. Further, the defendant is entitled to be personally present at that time. Because, in Petitioner's trial for first-degree murder, the trial court responded to jury requests without having the jury returned to the courtroom, and without the defendant being present, the defendant is entitled to a new trial. The defendant's right to be present is not a right waivable solely by defense counsel. For such a waiver by counsel to be valid, the defendant must either ratify or acquiesce in the waiver. It is undisputed in the instant case that the defendant did not so ratify or acquiesce in waiver of his presence.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, IN THE COURSE OF THE DEFENDANT'S TRIAL FOR FIRST-DEGREE MURDER, IT RESPONDED TO JURY REQUESTS DURING DELIBERATIONS FOR EVIDENCE AND FOR ADDITIONAL INSTRUCTIONS WITHOUT RETURNING THE JURY TO THE COURTROOM AND WITHOUT THE DEFENDANT BEING PRESENT.

In the course of the defendant's 1975 trial for first-degree murder, a capital offense, upon the retirement of the jury for deliberations, the defendant was removed to a holding cell. During deliberations, the jury requested all the physical evidence in the case and also made a written request for "an interpretation of the law" as to what constitutes the difference between first-degree and second-degree murder. Without the defendant present, and unknown to him, the trial court relied upon a purported waiver of the defendant's presence by his attorney and, without returning the jury to the courtroom, the court furnished the physical evidence and provided a written note to the jury directing them to rely upon the (written) instructions already furnished. The jury subsequently returned a verdict of first-degree murder. It is undisputed that the defendant did not ratify or acquiesce in the waiver of his presence, and that he did not even learn of the proceeding until long after trial. It is submitted that the procedure employed by the trial court was in departure from the principles embodied by Ivory v. State, 351 So.2d 26 (Fla. 1977), that Ivory was eminently correct and strongly grounded in historic principles of Florida jurisprudence, that since the date of the decision below Ivory has been

reaffirmed by clear mandate of this Court, and that the decision of the lower court must be accordingly quashed.

In Ivory v. State, this Court held that:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and the defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.
>
> [I]t is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and the 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 28.

Subsequent to the decision below, this Court resolved any question about the vitality of Ivory:

> We reaffirm the viability of Ivory and conclude with the words of Justice England:
>
> > The rule of law now adopted by this Court is obviously one designed to have a prophylactic effect. It is precisely for that reason that I join the majority. A "prejudice" rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in search of evansecent "harm," real or fancied.
>
> Ivory, 351 So.2d at 28 (England, J., concurring).

Curtis v. State, 10 FLW 533 (Fla. Sept. 26, 1985).

Curtis resolves, adversely to the resolution suggested below, the certified question of whether response to a jury request in the (involuntary) absence of a defendant can be harmless; remaining is the propriety of the lower court's determination that the defendant did not have the right to be

present at all.

Ivory embodies two distinct but related concerns, the right of the defense to be heard and the right of the defendant to be present at his trial. Although couched in "we now hold" language, in fact, as Ivory recognized, its conclusion as to a defendant's right to be present was already in accord with most Florida authority on the subject. For instance, there was substantial reliance in Ivory upon Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970):

> After the case was submitted to the jury and during the course of their deliberations in the jury room, the jury sent a message by the bailiff to the trial judge. It requested that certain testimony be read back to them. The court summarily denied the request. This procedure was accomplished without inquiry, without opening court and without advising the defendant's counsel or the prosecuting attorney. It was also conducted outside the presence of the defendant. This procedure was assigned as error. We believe that it was and because of it that defendant should have a new trial.
>
> * * *
>
> [W]e feel that the practice here employed, innocently intended as undoubtedly it was, violated the defendant's right in a harmful way and entitled him to a new trial. ... [T]he trial court, faced with such a request, should have advised counsel of it and reconvened court with defendant in attendance. ...

Ivory v. State, 351 So.2d at 27, 28, quoting from Slinsky v. State, 232 So.2d at 452, 453. (Emphasis supplied).

The Ivory court also cited to the 1960 decision of Holzapfel v. State, 120 So.2d 195 (Fla. 3d DCA 1960), cert. denied 125 So.2d 877 (Fla. 1960), in which it was held that: "The court and the court alone is entitled to instruct the jurors as to the law

and this must be done in the presence of the defendant." Holzapfel, 120 So.2d at 197. (Emphasis supplied).

These references strongly refute the possible State argument that the requirement of the defendant's presence did not apply to the defendant's 1975 trial. This point is powerfully underscored by the antecedence of a classic and historic line of Florida cases. For example, in Smith v. State, 40 Fla. 203, 23 So. 854 (1898), in the absence of the defendant or his counsel the trial court allowed a jury which had already arrived at a verdict to separate and to return the next morning with the sealed verdict. The Supreme Court held:

> We think the action of the court below in permitting the jury to separate was erroneous, and necessitates a reversal of the judgment. The defendant was charged with a felony, and he not only had a right to be present when this order was made, but the Court had no right to make an order without his presence, whereby the jury then considering his case were permitted to separate before their verdict was received in court, certainly not without a necessity calling for it. 23 So. at 857. (Emphasis supplied).

In so holding, the Supreme Court referred back to the even earlier case of Holton v. State, 2 Fla. 476 (1849), stating as follows:

> [I]t appeared that, after the jury had retired, the judge instructed the sheriff, if they did not agree in one hour, to adjourn the court until the next morning. Between 11 and 12 o'clock at night the jury sent to the judge by a bailiff for his charge, and, on a message from the judge, the clerk made out and furnished the jury with what purported to be a copy of the charge. This was done without the knowledge of the prisoner, and this Court held that the action of the trial court was tantamount to recharging the jury in the absence of the defendant, and granted a new trial. It

> was also there held that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to the jury, and they have been charged by the court, unless in open court and in the presence of the defendant, and, if practicable of his counsel. That case is decisive of the present question, and it has been often quoted and approved in subsequent decisions of this Court.

Smith v. State, id. at 857. (Emphasis supplied).

It is thus readily apparent that although Ivory did not expressly cite to any case earlier than the 1960 Holzapfel decision, Ivory is in fact a direct, closely related descendant of the historic Holton and Smith cases. It is further highly pertinent that these historic cases, as the above-emphasized language indicates, regard the defendant's right to be present as paramount to even that of his attorney.

This right, moreover, was viewed as of even greater importance in capital cases, of which the instant case is one. See, e.g., Adams v. State, 28 Fla. 511, 10 So. 106 (1891):

> The bill of exceptions shows that an objection was made by the counsel for the accused to the competency of Ike Spanish as a witness for the State, and pending the discussion of this question before the court the jury was sent from the courtroom. The officers who had the custody of the defendant, Adams, through mistake took him also from the courtroom, and carried him to jail. Counsel for the defendant then proceeded to discuss before the court the competency of Ike Spanish as a witness, and had proceeded about 10 minutes with the discussion in the absence of the prisoner, when his presence was missed. The state's attorney called the attention of the court to the absence of the prisoner, and thereupon the court requested the counsel for defendant to suspend his argument, which he did, at the same time excepting to the removal of the prisoner from the court-room without

> his consent, and of his being deprived of a right guaranteed by the constitution. On the return of the prisoner to the court-room the judge requested his attorney, in order to save any difficulty that might arise by reason of the inadvertence, to commence anew his argument, and that the court would hear his views and authorities anew. Defendant, by his counsel, declined to say anything further, but insisted that his objection to taking the accused from the court-room be noted. Without any argument further, either from the defendant or the state, the court decided that the witness was competent to testify against the accused. It was early decided in this state, and has been rigidly adhered to in later decisions, that the prisoner has the right to be and in fact must be present during the trial of a capital case, and no steps can be taken by the court in his absence (citations omitted). There is no doubt about the fact that the accused here was taken from the court-room and remained out for at least 10 minutes during the discussion of the competency of a witness against him. He has the right to be present and to hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence. The court must see in capital cases that the accused is present before any proceedings are taken in the case. The fact that the court directed the argument to be gone over again could not possibly restore the accused to the position of hearing what had already been said in his absence.

Id., 10 So. at 117. (Emphasis supplied).

In Lovett v. State, 29 Fla. 356, 11 So. 172 (1892), in discussing the requirement that the record show presence, the court stated:

> That it was necessary for the defendant, who was on trial for murder in the first degree, and was convicted of it, to be personally present during the trial and preceding the sentence, as well as when sentenced, is, of course, not denied, (citations omitted) and that it is necessary that the record should show his personal

presence is equally unquestionable(.)

Id., 11 So. at 173.

In Morey v. State, 72 Fla. 45, 72 So. 490 (1916), the court stated:

> During the whole of the trial of a capital case the defendant is required to be present(.)

Id., 72 So. at 494.

The later caselaw reflected expansion of the right to be present to felony cases generally. In Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896), the court stated:

> It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial, -- from its beginning to and including the final passing of sentence.

Id., 20 So. at 243. (Emphasis supplied).

In Blocker v. State, 60 Fla. 4, 53 So. 715 (1910), the court stated:

> [I]t is necessary to a valid conviction of a felony that the accused be arraigned, be allowed to plead, and be personally present at every stage of the trial, and that such facts appear by the record proper as a perpetual memorial that due process of law was observed and accorded to the accused in the trial.

Id., 53 So. at 716. (Emphasis supplied).

By rules promulgated by this Court, the right was ultimately enlarged to encompass misdemeanor cases as well. See, West's F.S.A. R.Crim.P. Rule 3.180, Author's Comment.

In contrast to this broadening of the critical right of a criminal defendant to be present during his or her trial, the majority below gave a narrow, restrictive reading to Rules

3.180(a) and 3.410, Fla.R.Crim.P. In pertinent part, Rule 3.180 provides:

> Rule 3.180. PRESENCE OF DEFENDANT
>
> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:
>
> (1) At first appearance;
>
> (2) When a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of Rule 3.170(a);
>
> (3) At any pre-trial conference; unless waived by defendant in writing;
>
> (4) At the beginning of the trial during the examination, challenging, inpanelling, and swearing of the jury;
>
> (5) At all proceedings before the court when a jury is present;
>
> (6) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;
>
> (7) At any view by the jury;
>
> (8) At the rendition of the verdict;
>
> (9) At the pronouncment of judgment and the imposition of sentence.

Rule 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 shall 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.[1]

The majority below concluded, in a footnote, that under these rules "the defendant's presence is required only when the jury is actually recalled for additional instructions or the reading of testimony and not when a request is denied, as here." Id., n. 3 at 1337. However, as noted by Judge Pearson, concurring, the majority's reasoning on this point was at variance with Ivory's interpretation of Rule 3.410. Id. at 1338-1339. This Court's intervening decision in Curtis v. State, lays to rest any remaining questions:

> The "response" contemplated by Ivory, vis-a-vis "instructions," encompasses more than merely rereading some or all of the original instructions, or the giving of additional instructions from the Florida Standard Jury Instructions (Criminal). The procedural mandates of Rule 3.410 apply when any additional instructions are requested.
>
> * * *
>
> As the written response in this case demonstrates, even a refusal to answer questions frequently will require something more than a simple "no," and both the state and the defendant must have the opportunity to participate, regardless of the subject matter of the jury's inquiry. Without this process, preserved in the record, it is impossible to determine whether prejudice has occurred during one of the most sensitive stages of the

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[1] Also pertinent is Rule 3.420 which provides:

> The court may recall the jurors after they have retired to consider their verdict to give them additional instructions, or to correct any erroneous instructions given them. Such additional or corrective instructions may be given only after notice to the prosecuting attorney and to counsel for the defendant.

trial.

Curtis, 10 FLW at 533. See also, n. 2, id.: "Petitioner's counsel asked this court to remand for a supplemental hearing should we determine that actual notice was dispositive. Notice is not dispositive. The failure to respond in open court is alone sufficient to find error."

Thus, under a long line of Florida cases, as well as under Ivory and Curtis, the lower court's decision cannot stand. Its conclusion, that under Fla.R.Crim.P. 3.410 notice alone to defense counsel without an open court response to the jury is sufficient, is clearly error. Curtis v. State, supra. To the contrary, the trial court was, by the precise terms of Rule 3.410, required to have the jury "conducted into the courtroom(.)" The defendant's right to be present was thereby specifically guaranteed by Fla.R.Crim.P. 3.180(a)(5): "In all prosecutions for crime the defendant shall be present: . . . (5) At all proceedings before the court when the jury is present(.)"

The remaining point requiring discussion is the conclusion of Judge Pearson, concurring below, that the defendant's right to be present at the time the jury is instructed or re-instructed is unilaterally waivable by defense counsel, with neither knowledge, ratification, nor acquiescence by the defendant required. However, this view presupposes that instruction or reinstruction of the jury is not a critical stage of the proceedings, (Morgan v. State, Pearson, J., concurring at 1341), a presupposition directly laid to rest by this Court's holding in Curtis that such point is "one of the most sensitive stages of the trial." Id., 10

FLW 533.

See also, Harris v. State, 438 So.2d 787 (Fla. 1983): "[F]or an effective waiver (of lesser included offenses) there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made." Id. at 797.

Since, in the instant case, the trial court failed to comply with the mandated procedure, the defendant's absence was indisputably involuntary, and his attorney's waiver of the defendant's presence was neither ratified nor acquiesced in by the defendant, see Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982) quashal of the decision below and reversal of the defendant's conviction are required.

CONCLUSION

Based on the foregoing argument and authorities cited, the petitioner respectfully requests this Court to quash the decision below and to remand with directions that his conviction be reversed and a new trial granted.

Respectfully submitted,

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BY: _____
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 5th day of November, 1985.

BRUCE A. ROSENTHAL
Assistant Public Defender