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 RESPONDENT 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 of Florida, was the respondent in the trial court and the Appellee in the District Court. The parties will be referred to as they stand before this court. The symbol "R" will designate the record on appeal. The symbol "T" will designate the transcript of proceedings. The symbol "A" will designate the appendix to this brief. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RESPONDED TO THE JURY'S REQUEST, DURING DELIBERATIONS, FOR ADDITIONAL INSTRUCTIONS WITHOUT THE PETITIONER BEING PRESENT WHERE THE RESPONSE TO THE JURY WAS NOT AN INSTRUCTION THEREBY NOT ELEVATING THE PROCEEDING TO A CRITICAL STAGE WHICH REQUIRED THE PETITIONER'S PRESENCE.

SUMMARY OF THE ARGUMENT

Petitioner contends that his presence was required during the conference between the trial court and both counsel concerning the jury's request for additional instruction. This position is meritless since Rule 3.410 was complied wth when both counsel were consulted prior to responding to the jury's request. Furthermore, since the trial court did not give the jury any directions on the law of the case, it was never reinstructed. Since no reinstruction took place, the proceedings never raised to a critical stage, thereby mandating Petitioner's presence.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT RESPONDED TO THE JURY'S REQUEST, DURING DELIBERATIONS, FOR ADDITIONAL INSTRUCTION WITHOUT THE PETITIONER'S BEING PRESENT WHERE THE RESPONSE TO THE JURY WAS NOT AN INSTRUCTION THEREBY NOT ELEVATING THE PROCEEDING TO A CRITICAL STAGE WHICH REQUIRED THE PETITIONER'S PRESENCE.

During deliberations in the case sub judice, the jury sent out two requests. Both counsel for the State and the Defendant were consulted before a response was made. The first was for all previously admitted physical evidence. The second was a written request for an interpretation of the difference between first and second degree murder. With concurrence of both counsel, the trial court responded in writing that "the jury should rely on instructions already furnished." (R.35-37).

Based on the foregoing, the majority in the Third District, held that a violation of Fla.R.Crim.P. 3.410, by responding to a jury's request for additional instructions without the defendant being present is subject to the harmless error rule. The majority then applied said rule and found that the trial court's response, made with both counsel's agreement and without the Petitioner's presence,

which denied the request and which told the jury to rely on the previously given written instructions, if erroneous, was harmless. (A.1-31). The majority then certified 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?
>
> (A.3).

Judge Pearson, concurring, believed the holding should have been "that where the trial court affords counsel for the defendant and the prosecutor an opportunity to be heard before denying a deliberating jury's request for additional instruction, the defendant's presence at the discussion of the action to be taken on the jury's request may be waived, as it was here, by his attorney." (A.3). Judge Pearson, after finding that the rule of Ivory v. State, 351 So.2d 26 (Fla. 1977) was still valid, reasoned as follows:

IV.

> Why, then, do I find no violation of Ivory in the present case in the face of Ivory's declaration that 'it is prejudicial error for a 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. Simply because the 'presence of the defendant' language in Ivory was not, in my view, intended to convert a discussion on jury charges into a critical stage of the proceedings, that is, one at which the defendant must be present in the absence of a specific, knowing and voluntary waiver by the defendant himself. Instead, I read the 'presence of the defendant' language as an acknowledgement that the defendant is to be present at all proceedings, critical or not, unless where permitted, his presence is waived either by counsel or himself.

I think it evident that a conference on charges to be given the jury is not a stage of the trial proceedings that cries out for the defendant's presence. Unlike, for example, the stage of selecting the jury where 'fundamental fairness might be thwarted by [the defendant's] absence,' Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982), the conference on jury charges is devoted to matters of law conducted outside of the jury's presence, upon which the lay defendant's participation would have little impact. See Herzog v. State, 439 So.2d 1372, 1375 (Fla. 1983) fundamental fairness not thwarted by defendant's absence from hearing concerning admissibility of certain photographs; such a hearing not 'crucial stage of the trial as defined by Rule 3.180 or constitutional principles.'); Hall v. State, 420 So.2d 872, 873 (Fla. 1982)(fundamental fairness not thwarted by defendant's absence from 'roll call of prospective jurors or at the general qualification of prospective jurors.'). Notably, Florida Rule of Criminal Procedure 3.180, which enumerates nine stages of a trial during which

> the defendant's presence is required, does not include the charge conference as one such stage. Indeed, a charge conference has been held to be 'a conference or argument upon a question of law' at which the defendant's presence is specifically excused by Federal Rule of Criminal Procedure 43, the analogue of our Rule 3.180. See United States v. Graves, 669 F.2d 864, 972 (5th Cir.1982). See also Randall v. State, 346 So.2d 1233 (Fla. 3d DCA 1977) (defendant's absence during charge conference is not fundamental error).
>
> I conclude, therefore, that the Florida Supreme Court has not scrubbed Ivory, but that Ivory does not require that a defendant personally waive his right to attend a charge conference or, as here, a conference concerning the response to be given to the jury's request for additional charges. Nevertheless, because the defendant is entitled to be present at such proceedings, such proceedings may not be conducted without him unless his presence has been waived by him or his counsel. The defendant's presence at the conference on additional instructions having been waived, I agree that the judgment should be affirmed.
>
> (A.5-6) Footnote omitted.

Although this Court in Curtis v. State, 10 FLW 533 (Fla. September 26, 1985) has answered the certified question negatively, the State submits that reversal is still not mandated. The reason therefore is that Judge Pearson's concurring opinion is in accord with Curtis and therefore should be adopted by this Court.

In Curtis, during deliberations, the jury sent the following two written questions to the trial court

> 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?
>
> On the same sheet paper, filed in open court and make part of the record, the trial judge responded:

The trial court, without consulting either the State or defense counsel, responded in writing as follows:

> 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.

This Court then held that the failure to consult with counsel prior to responding to the requests violated Fla.R.Crim.P. 3.410 which requires

> 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.

By so holding, this Court held that a refusal to answer may be within the scope of Rule 3.410. In deciding whether a refusal to answer is within the scope of Rule 3.410, the deciding factor is whether the response to the jury "is a direction given by the judge to the jury concerning the law of the case." This Court then found that the trial court's response to a question about an aspect of the evidence was an instruction giving direction to the jury concerning the law of the case and therefore violated Rule 3.410. However, it is clear from said opinion that not all responses are instructions and therefore a case by case determination must be made to determine if a response is an instruction.

In the instant case, upon retiring to deliberate the jury was given a full written set of the jury instructions. After deliberation had begun, the jury sent out the following written request

> We need an interpretation of the law as to what constitutes the difference between first-degree second degree murder.

The trial court, after consulting with the prosecutor and defense counsel and after defense counsel waived Petitioner's presences, provided the jury with the following written response.

> The jury should rely on the instructions already furnished them.
>
> (R.35-37).

Based on the foregoing, it is clear that Rule 3.410 was not violated since both counsel for the State and for the defense were consulted with prior to the response. The question which this case turns on then, is whether the response was an instruction and based thereon was defense counsel's waiver of Petitioner's presence valid.

The State submits that, under Curtis, it is clear that the response was not an instruction. Here the jury already had in its possessions a full set of the written jury instruction. The trial court's response, after proper consultation, as to the request for clarification between first and second degree murder, simply told the jury to rely on the previous instructions. This response, although directed to a jury that was unclear about a particular point of law, did not give the jury any directions concerning the law of the case. As such, the response was not an instruction under Curtis.

Since the response was not an instruction, the scenario did not become a critical stage in the proceedings which required the defendant's presence. See Fla.R.Crim.P. 3.180(a). It did not become a critical stage because since the response was not an instruction, the jury presence was not required and therefore the Petitioner's presence was also not required. Since Petitioner's presence was not required, his counsel's waiver of his presence was valid. See Blanco v. State, 452 So.2d 520 (Fla. 1984)(Defendant's presence not required during non-essential stage of trial). Herzog v. State, 439 So.2d 1372 (Fla. 1983)(Absence of defendant during non-crucial stage of trial not error irrespective of waiver of defendant's presence by his defense counsel). Francis v. State, 413 So.2d 1175 (Fla. 1982)(Defendant has a constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence).

Judge Pearson's concurring opinion, when reviewed in accordance with the foregoing analysis, is reconcilable with this Court's opinion in Curtis. In his opinion, Judge Pearson concludes that a recharge conference is not a crucial stage of the proceedings and therefore, Petitioner's counsel's waiver of his presence was valid. Further, since the response was not an instruction under Curtis, the proceeding never became a crucial one requiring Petitioner's

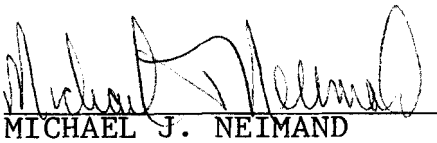
waiver to be knowing and voluntarily made. Therefore, this Court should adopt Judge Pearson's concurring opinion and affirm the judgment of the trial court.

CONCLUSION

Based upon the foregoing points and authorities the State respectfully submits that this court adopt Judge Pearson's concurring opinion and affirm the Petitioner's judgment and sentence.

Respectfully submitted,

JIM SMITH
Attorney General



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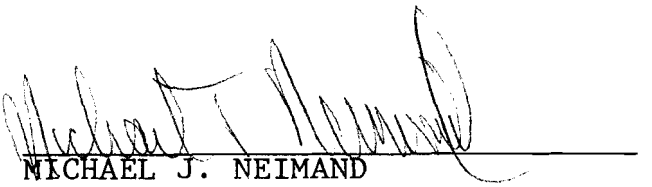
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was furnished by mail to BRUCE A. ROSENTHAL, Attorney for Petitioner, 1351 N.W. 12th Street, Miami, Florida 33125, on this 25th day of November, 1985.



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