IN THE SUPREME COURT OF FLORIDA

THOMAS MEEK,

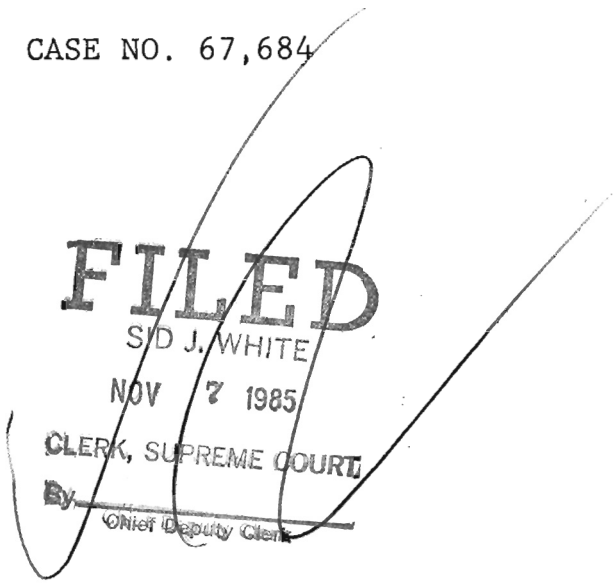
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,684



RESPONDENT'S ANSWER BRIEF
ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida 32301

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Respondent was the Appellee in the court below and prosecution in the trial court. Petitioner was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"IB"	Initial Brief of Petitioner

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts the statement of the Case as presented in Petitioner's Initial Brief, pages one and two, subject to the following additions and/or clarifications:

After the jury verdict was published, the jurors polled, and relieved from their duties in this case (R 1044-45), Defense Counsel, Mr. Duval, made an oral motion for new trial based on two grounds: (1) that the evidence presented at trial was "contrary to the law and evidence contrary to the facts and contrary to the evidence and the law"(R 1045), and (2) that the trial court erred in charging on a felony murder when it was not charged in the indictment and "that could have caused a prejudice with the jury." (R 1045-46).

Subsequently a Motion For New Trial apparently was filed within the ten days allowed by Fla. R. Crim.P. 3.590(a). A copy of this motion does not appear in the record, but a hearing on that Motion was held on April 1, 1985. A reading of the transcript of the hearing (R 1057-1187) reveals that the only issue raised on this Motion For New Trial was the allegation that members of the jury had communicated with members of the victim's family. After questioning the jurors, and hearing argument from both the prosecutor and defense counsel, the trial court denied the Motion for New Trial (R 1187).

On May 11, 1983, newly substituted defense counsel

for Petitioner filed an Amended Motion For New Trial(R 1302-1307). The State then filed its Motion To Strike the Amended Motion For New Trial (R 1308), and the trial court held a hearing on May 17, 1983.(R 1195-1260). Based on the State's Motion to Strike, the trial court struck the amended motion (R 1201). After hearing proferred testimony, the trial court took the motion under advisement (R 1250-1252), but then on May 26, 1983, the trial court entered its Order granting the State's Motion to Strike the Amended Motion for New Trial (R 1321).

By its opinion filed July 31, 1985, On Motion For Rehearing, the Fourth District Court of Appeal certified the following question as one of great public importance:

> HAVE SUBSEQUENT DECISIONS MODIFIED THE HOLDING IN IVORY V. STATE, 351 SO.2D 26 (FLA.1977) TO PERMIT APPLICATION OF THE HARMLESS ERROR DOCTRINE WHEN A TRIAL JUDGE, DURING JURY DELIBERATIONS, RESPONDS TO A LEGAL QUESTION IN THE PRESENCE OF BOTH DEFENSE COUNSEL AND THE PROSECUTOR, BUT IN THE ABSENCE OF THE DEFENDANT?

STATEMENT OF THE FACTS

Respondent accepts the statement of the Facts as presented in Petitioner's Initial Brief, pages 3 through 5, to the extent that it is a non-argumentative, accurate representation of the facts. With reference to the facts limited to the resolution of the sole issue now before this Court, Respondent would present the following additions and/or clarifications:

At the hearing of May 17, 1983, on Petitioner's Amended Motion For New Trial (R 1195-1259) Mr. Harvie S. Duval, Petitioner's trial counsel, testified that when the jury was given the case to begin deliberations, the trial court was on recess pending the call of the jury, and that Petitioner was "to be where he could be contacted and brought in properly."(R 1204) Mr. Duval stated he knew where the Petitioner was at all times(R 1204). Further Mr. Duval testified that immediately after the jury came back with the question and the judge answered it, he went to the tavern where Petitioner was and told Petitioner "in detail" what the judge had answered (R 1205-10, 1213). Further Mr. Duval made it clear Petitioner has no legal training, that Petitioner assisted defense counsel as to questions on facts, but Petitioner was not co-counsel (R 1208), and it was understood between Petitioner and Mr. Duval that Mr. Duval handled the "law matters"(R 1208-9). That Petitioner did not express any objections to the court answering the jury question in Petitioner's absence (R 1211).

Warren R. Marschat, the Bailiff in Judge Born's courtroom, then took the stand. He testified that Petitioner did not advise him where he would be while the jury was deliberating. Mr. Marschat testified that the "attorney at some period of time during the jury's deliberation advised me that Mr. Meek would be at the Alibi Lounge and if he [the attorney] wasn't around the courtroom, he would also be found there"(R 1215). That when the jury announced it had reached a verdict, Mr. Marschat looked up the Alibi's phone number in the directory and asked to speak with Mr. Duval or Petitioner, and Petitioner was the one that got on the telephone(R 1216).

Mr. Alford La Sorte, the Assistant State Attorney representing the State in the trial of Petitioner, also testified at the May 17, 1983, hearing(R1241-1248). Mr. La Sorte testified that he did not remember whether Mr. Duval waived Petitioner's presence on the record, but that prior to the judge answering the question for the jury, Mr. La Sorte voiced his concern to defense counsel as to the Petitioner's absence. Mr. La Sorte testified that Mr. Duval asserted he knew where Petitioner was, that Petitioner was available if needed, but Mr. Duval never stated he wanted Petitioner to be notified before the question was answered(R 1242).

The pertinent pages of the record(R 1040-41) reveal the following took place, of record, with reference to the jury question:

THE COURT: All right. Thank you.

We'll be in recess awaiting the call of the jury. (The Court stood in recess awaiting the call of the jury.)

(The jury renders a written question to the Court which is transmitted at 4:31 p.m. by the Bailiff.)

THE COURT: Approach the Bench.

3.01 is the --

Mr. LASORTE: Principals.

THE COURT: And the answer to that question would be, yes.

MR. LASORTE: Yes.

Mr. DUVAL: Yes.

THE COURT: Okay.

(The jury returned to the Courtroom and the following proceedings were held.)

THE COURT: Now, the question: "If one person is guilty of premeditated first degree murder and the other person meets all criteria set forth in instruction 3.01, principal, are both guilty of first degree premeditated murder?"

The answer is, yes, if they meet all those criteria.

Where do you stand now? How long do you think it will be?

JUROR NO. 2: Close.

(Jury exits the courtroom to consider its verdict at 4:34 p.m.)

(At 4:52 p.m. Court was re-convened.)

THE COURT: Okay. Bring in the jury.

The answer to the jury question was decided by the judge after consultation and approval, without objections, by the prosecutor and defense counsel.

POINT INVOLVED

WHETHER SUBSEQUENT DECISIONS HAVE CLARIFIED THE HOLDING IN IVORY V. STATE, 351 SO.2D 26 (FLA.1977) TO PERMIT APPLICATION OF THE HARMLESS ERROR DOCTRINE WHEN A TRIAL JUDGE, DURING JURY DELIBERATIONS, RESPONDS TO A LEGAL QUESTION IN THE PRESENCE OF BOTH DEFENSE COUNSEL AND THE PROSECUTOR, BUT IN THE ABSENCE OF THE DEFENDANT?

SUMMARY OF ARGUMENT

The Florida Supreme Court has already answered the Certified Question presented in this case when in Stano v. State, 473 So.2d1282 (Fla. 1985) it was held that since both the prosecutor and defense counsel were present in compliance with Fla. R. Crim. P. 3.410, defendant's absence during the communication with the jury, if it was error, the error was harmless beyond a reasonable doubt. Therefore, the opinion of the Fourth District must be approved and the conviction affirmed.

ARGUMENT

SUBSEQUENT DECISIONS HAVE CLARIFIED THE HOLDING IN IVORY V. STATE, 351 SO.2D 26 (FLA.1977) TO PERMIT APPLICATION OF THE HARMLESS ERROR DOCTRINE WHEN A TRIAL JUDGE, DURING JURY DELIBERATIONS, RESPONDS TO A LEGAL QUESTION IN THE PRESENCE OF BOTH DEFENSE COUNSEL AND THE PROSECUTOR, BUT IN THE ABSENCE OF THE DEFENDANT.

At the outset the State points out that the issue of whether the court erred in responding to a jury question without the Petitioner being present was never timely raised in the trial court, therefore Petitioner was estopped from raising the issue in the belated Amended Motion For New Trial, or on appeal. See e.g., Castor v. State, 365 So.2d 701(Fla. 1978); Clark v. State, 363 So.2d 331 (Fla.1978); Brown v. State, 449 So.2d 1293, 1294(Fla. 2d DCA 1984), Pet. for rev. denied 459 So.2d 1039(Fla.1984); Williams v. State, 441 So. 2d 1157, 1159(Fla. 3dDCA 1983); State v. Prieto, 439 So.2d 288, 290(Fla. 3dDCA 1983), Pet. for rev. denied 450 So.2d 488(Fla.1984).

Respondent would further contend that there was an implied waiver of Petitioner's attendance at the reponse to the jury question. Defense counsel did not object or ask that the Petitioner be present for the response to the question. Further, trial counsel did not bring up this issue during his motion for new trial (R. 1045-1046), (indicating that he was not of the view that any error occurred R. 1045-1046). In fact, it was not until new defense counsel were

entered into the case that this issue was ever raised. This Honorable Court in the very recent opinion in Peede v. State, 10 F.L.W. 397 (Fla. Case No. 65,318, August 15, 1985) has presently held that a defendant can waive his right to be present at stages of his capital trial. In the case at bar, although the proceedings in question occurred before the jury, this was not the taking of testimony, or presentment of an argument, but was limited to a jury instruction on a matter of law in which both counsel for the state and the defense assented to the instruction given (R 1041). Under the facts of this case, and pursuant to Fla. R. Crim. P. 3.410 and 3.180 (b), it should be reasoned that the trial counsel can waive the defendant's presence.

Florida Rule of Criminal Procedure

3.410 provides as follows:

> 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.

A review of the record in the instant case clearly shows the requirements of Rule 3.410 were fully complied with. Thus if error occurred, the error was either waived by counsel or cured by Petitioner's failure to object.

> [W]hen he failed to object to the

> course of action followed by the trial court, implying that he would not have objected or taken other action had he been present upon consideration of the initial inquiry.

Smith v. State, 453 So.2d 505, 507(Fla. 4th DCA 1984), pet. for rev. denied, 462 So.2d 1107(Fla. 1985). See also Williams, supra at 1159.

Petitioner argues that this Court in Ivory v. State, 351 So.2d 26 (Fla. 1977) declared a per se reversible error rule when any communication with the jury is held outside of the presence of defendant. The error in Petitioner's argument is apparent upon a simple review of the case law. The cases of Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970); Ivory v. State, supra; Isley v. State, 354 So.2d 457(Fla.1st DCA 1978); Rodriguez v. State, 385 So.2d 1019(Fla. 3dDCA 1980), pet. for rev. denied 392 So.2d 1380 (Fla. 1980); Taylor v. State, 385 So.2d 149 (Fla.3d DCA 1980); Davis v. State, 408 So.2d 795 (Fla. 2d DCA 1982); Williams v. State, 413 So.2d 1263 (Fla. 1st DCA 1982); and Curtis v. State, 10 FLW 533 (Fla. Case No. 65,891, September 26, 1985) all have one thing in common: the trial court communicated with the jury without notifying the defense counsel thereby denying the defendant an opportunity to object, concur on the answer, or make full argument as to the reasons the jury's request should or should not be honored. That what the per se reversible rule of Ivory refers to is the absence of the prosecuting attorney and defense counsel when communications with the jury are held in violation of Fla. R.

Crim. P. 3.410 has been made clear by this Honorable Court's holding in Stano v. State, 473 So.2d 1282 (Fla. 1985) where the Court said:

> While deliberating, Stano's second jury requested a tape player, a list of the evidence, and a color photograph. Defense counsel waived Stano's presence while the judge answered the request. Stano now claims that every stage of a trial is a crucial stage and that a defendant must be present at each. We disagree and find Stano's reliance on Ivory v. State 351 So.2d 26 (Fla.1977), misplaced.
>
> In Ivory we stated: "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." Id. at 28. Here, however, both the prosecutor and defense counsel were present. In view of the lack of an objection to the court's answering the request, and in view of defense counsel's waiver of Stano's presence, we find any error, if indeed there be any here, to be harmless beyond a reasonable doubt, at the worst. Id. at 1288.

Respondent will submit that the case sub judice is controlled by Stano v. State, supra, as opposed to this Court's decision in Curtis v. State, supra, as contended by Petitioner (See PB 10). As pointed out earlier, the difference between the facts in Curtis and the instant case is that in Curtis neither the prosecutor, nor defense counsel were consulted by the judge before answering the jury's question thereby depriving both the state and defendant "of the right to discuss the action to be taken, including the right to object and the right to make full argument." Curtis, 10 FLW at 533.

Petitioner places mistaken reliance on the case of Adams v. State, 10 So. 106 (Fla. 1891), as supporting his contention that his absence in the instant proceedings was fundamental error. However, Adams concerns the defendant's absence during ten minutes of argument concerning questions of law as well as fact pertaining to the competancy of a prosecution witness. It is clear that where as in Adams, there are issues of fact where the defendant's input might be useful to his defense, his absence from such a proceeding is prejudicial. However, where as in the instant case the proceedings in question presented no questions of fact whatsoever, there is no reasonable possibility that there was any prejudice to the Petitioner. In Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) this Court stated that a defendant has the constitutional right to be present "at the stages of his trial where fundamental fairness might be thwarted by his absence." That the exercise of peremptory challanges is essential to the fairness of a trial by jury and is one of the most important rights secured to a defendent. This is so because peremptory challenges permit rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Francis, id. at 1179. The distinc-

tion from the instant case is obvious where the question presented was strictly legal and Appellant's absence was in no way prejudicial. This Honorable Court then held that jury selection is a crucial stage of the trial, Francis, supra at 1178, and used the harmless error analysis of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17L.Ed.2d 705 (1967) before deciding that the Court was unable to assess the extent of prejudice sustained by Francis. Id. at 1179. In subsequent cases, this Honorable Court has explained and limited Francis to the "particular factual context of that case." Peede v. State, 10 FLW 397 (Fla. Case No. 65,318, August 15, 1985); Hooper v. State, 10 FLW 393(Fla. Case No. 64, 299, August 15, 1985); Herzog v. State, 439 So.2d 1372 (Fla.1983). This Court in Herzog at 1375 stated that the defendant's absence during a defense motion to suppress certain photographs from introduction as evidence for the state was not during a crucial stage of the trial or "where fundamental fairness might be thwarted by his absence." Thus, as stated earlier, Defense Counsel's presence in the instant case complied with the requirements of Rule 3.410. Thus the Fourth District was correct in finding "no violation of Rule 3.410 under the facts of this case." (See Slip Opinion, page 4, Appendix.) Additionally, when Defense Counsel advised Petitioner of the Jury Question and the answer, Petitioner did not object at the time; nor could he have added anything since this was a legal question from the jury.

Respondent will submit that the Fourth District was correct in finding that Ivory does not mandate reversal in every case where the defendant is absent during a communication with the jury. (See Appendix, Slip Opinion, page 3).

The United States Supreme Court has recently addressed the issue of a defendant's absence during court communications with a jury in Rogers v. United States, 422 U.S. 35 (1975). In Rogers, the Court found that a violation of Rule 43 of the Federal Rules of Criminal Procedure (substantially similar to Fla. R. Crim. P. 3.180) which guaranties to a defendant the right to be present at every stage of his trial may be considered harmless error. See also, United States v. Gradsky, 434 F. 2d 880 (5th Cir. 1970), where the court rejected the defendant's contentions that their constitutional rights had been violated and found beyond a reasonable doubt that any possible error in their absence from the hearings did not affect their substantial rights. And in Rushen v. Spain, ___U.S.___ ___, 104 S.Ct. ___, 78L.Ed.2d 267 (1983) the Court held that the right to be present during all critical stages of criminal proceedings and the right to be represented by counsel are subject to harmless error analysis. The Eleventh Circuit Court of Appeal in United States v. Willis, 759 F.2d 1486(11th Cir. 1985) in a situation very similar to the case at bar, found that even though the defendants had been absent during the individual questioning of veniremen in chambers, but had been present during the general voir dire, and the attorneys

for the government and the defense were present in chambers during the individual questioning, this was not a violation of Fed. R. Crim. P. 43(a). But "even assuming a Rule 43 violation, the error was harmless." Id. at 1500.

Aside from the fact that Ivory can be distinquished, and the per se reversible rule applicable only to cases where neither the prosecuting attorney nor defense counsel have been notified of a jury question brought back to the judge during deliberations, it is clear that this Honorable Court is now following the U.S. Supreme Court's ruling in Rushen, supra, and applying a harmless error analysis in this type of cases. In Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied 461 U.S. 909 (1983), this Court held that giving an "Allen charge" without notifying the defendant or counsel constituted harmless error. In Hitchcock v. State, 413 So. 2d 741 (Fla. 1982), cert. denied, 459 U.S. 960 (1982) this Court held the trial court's response to a question regarding penalties without notifying any of the parties constitutes harmless error. In Francis v. State, 413 So.2d 1175 (Fla. 1982) this Court first held that the defendant was absent during a crucial stage of his trial and that his absence was not voluntary. The Court then conducted a harmless error analysis before deciding the Court was "not satisfied beyond a reasonable doubt that this error in the particular factual content of this case is harmless." Id. at 1178.

All the District Courts of Appeal in the State of Florida have had a chance to rule on the issue and have followed

Rose, Hitchcock, and Francis in using a harmless error analysis: Williams v. State, 468 So.2d 335, 337 (Fla. 1st DCA 1985) (The Supreme Court has expressly applied harmless error principles to what it termed a "procedural error" in failing to notify counsel under Rule 3.410.) This case is before this Honorable Court in Case No. 67,217. Brown v. State, 449 So.2d 1293 (Fla. 2d DCA 1984) pet. for rev. denied 459 So.2d 1039 (Fla. 1984) (We do not believe that Ivory requires a finding of reversible error under the facts of this case.) Morgan v. State, 471 So.2d 1336 (Fla. 3d DCA 1985) ("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." Id. at 1337. "If this response outside the defendant's presence was error at all, it was harmless." Id. at 1338. Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984) pet. for rev. denied 462 So.2d 1107 (Fla. 1985) (The jury request in Smith was found to not be within the purview of Rule 3.410. But if there was error, "we find it to have been harmless." Id. at 506) Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984) Pet. for rev. denied 456 So.2d 1182 (Fla. 1984) (Appellant failed to demonstrate prejudice as a result of the judge's communication, therefore, the court found that if any error occurred, it was harmless. Id. at 969) Finally, and most controlling is this Court's opinion in Stano, supra at 1288, where it was held where both the prosecutor and defense counsel were present, if there was error, the error was "harmless beyond

a reasonable doubt, at the worst."

The certified question in the instant case, as well as in Williams, Case No. 67,217, is whether the harmless error rule applies in case dealing with Fla. R. Crim. P. 3.410 where defense counsel and prosecutor are present, but the defendant is not. Respondent urges this Court that under federal law and precedent from this Court, that question must be answered in the AFFIRMATIVE.

Under the facts of this case, it is clear defense counsel agreed at the hearing on the amended motion for new trial that the question asked by the jury was a question of law and that legal matters were exclusively in his domain (R. 1209). Consequently, it is clear that there is no reasonable possibility that Petitioner's absence during the brief consultation regarding the jury instruction and the giving of that instruction to the jury could have affected the jury verdict. Where, as in the instant case, there is no reasonable possibility that the Petitioner's absence was in any manner prejudicial to his case, his absence should be found as harmless error. See Hitchcock, supra at 744.

This Honorable Court recently in State v. Di Guilio, 10 F.L.W. 430 (Fla. Case No. 65,490, August 29, 1985) has reaffirmed the use of the harmless error rule and disapproved of per se reversible rules when it pointed out that State v. Murray, 443 So.2d 955 (Fla. 1984) "held that the supervisory power of an appellate court to reverse a conviction is inappropriate as a remedy where the error is harmless " and

further:

> The harmless error rule promotes the administration of justice. . . . It makes no sense to burden our legal system with a new trial when the result will be the same. DiGuilio, at 432.

In summary, Respondent maintains that there was an implied waiver of Petitioner's presence for this very limited proceeding. But that in any event, even if his absence should be held as error, it is clear that such error did not prejudice his substantial rights where his counsel was present to render any legal objections to the court's actions and in fact, clearly was in agreement with the actions taken.

Additionally, the matter was not preserved for review and in no way does the error (if so held) rise to the level of fundamental error on the facts of this case. The harmless error rule should apply in this case. Thus, the certified question should be answered in the affirmative, and the District Court's opinion of July 31, 1985, should be AFFIRMED.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited herein, Respondent would respectfully request this Honorable Court to answer the certified question in the affirmative, and further to APPROVE the opinion of the Fourth District Court of Appeal which AFFIRMED the conviction and sentence imposed upon Petitioner by the trial court.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida 32301

Georgina Jimenez-Orosa

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief on the Merits has been sent by United States Mail to: HENRY GONZALZ, Esquire, Counsel for Petitioner, 620 E. Madison Street, Suite 1A, Tampa, Florida 33602, this 5th day of November, 1985.

Georgina Jimenez-Orosa
Of Counsel