IN THE SUPREME COURT OF FLORIDA

THOMAS MEEK,

Petitioner

vs

STATE OF FLORIDA,

Respondent

_____/

Case Number 67,684
FOURTH DISTRICT COURT
OF APPEAL NO. 83-1131 & 83-1165

BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Citations and Authorities	ii
Statement of the Case	1 - 2
Statement of the Facts	3 - 5
Summary of Argument	6
Argument	7 - 14
Conclusion	15
Certificate of Service	16

TABLE OF CITATIONS AND

AUTHORITIES

	Page
Adams v. State, 10 So. 106 (Fla. 1891)	8,
Curtis v. State, 455 So.2d 1090 (Fla. 5 DCA 1984) No. 65,891 S.Ct. Fla. 10 FLW 533	6, 10,11,14,15
Diaz v. United States, 223 U.S. 442	13,
Francis v. State, 413 So.2d 1175 (Fla. 1982)	13,
Hitchcock v. State, 413 So.2d 741	8,9 10,
Ivory v. State, 351 So.2d 26 (Fla. 1977)	6,7,8,9,10,11,12, 14,15
Meeks v. State, 474 So.2d 340 (Fla. 4 DCA 1985)	2, 9,
Morgan v. State, 471 So. 2d 1336 (Fla. 3 DCA 1985)	8,
Morris v. State, 422 So. 2d 338 (Fla. 3 DCA 1982)	7,
Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)	13,
Rose v. State, 425 So.2d 521	8,10
Slinsky v. State, 232 So.2d 451 (Fla. 4 DCA 1970)	12,13,
State v. Hunter, 358 So.2d 50 (Fla. 4 DCA)	7,
State v. Melendez, 244 So. 2d 137 (Fla. 1971)	13,14
Turner v. State, 431 So.2d 32 (Fla. 3 DCA 1983)	7,

AUTHORITIES

Florida Rules of Criminal Procedure 3.410	6,8,9,10,11
Florida Rules of Criminal Procedure 3.180(a)(5)	6,7,

STATEMENT OF THE CASE

The Petitioner was indicted for First Degree Murder of Sonya Sanj by the Grand Jury sitting in Palm Beach County, during the Spring Term of 1982. (R 1265-1266)

The case was subsequently tried before a duly constituted and seated jury commencing on December 13, 1982 before the Honorable John E. Born, Circuit Judge.

On December 17, 1982, the jury found your Petitioner guilty as charged in the indictment, that is, guilty of first degree premeditated murder. (R 1042)

On May 11, 1983, the Petitioner filed an Amended Motion for New Trial, alleging that the trial court erred in giving additional jury instructions to the jury pursuant to a question of the jury after the jury had begun its deliberations, and outside of Petitioner's presence. In so doing, it was alleged that the trial court in fact conducted a critical portion of Petitioner's trial in his absence. (R 1302-1305) The trial court held a hearing on Petitioner's Amended Motion for New Trial on May 17, 1983 (R 1193-1252). At the conclusion of the hearing the trial court took the Motion under advisement. (R 1250) At a later date, it was denied. (R 1050-1051)

On May 17, 1983, Judge Born sentenced your Petitioner to life in prison with a mandatory twenty-five (25) years, without eligibility for parole. (R 1256-1257)

Petitioner filed his Notice of Appeal on May 25, 1983 (R 1312) to the District Court of Appeal, Fourth District, Case

Numbers 83-1131 and 83-1165.

On January 4, 1985 the District Court of Appeal filed an opinion affirming the decision of the lower court. A Petition for Rehearing was filed and the Court of Appeals granted same, withdrew its opinion issued January 4, 1985 and issued its prevailing opinion on July 31, 1985. Meeks v. State, 474 So.2d 340 (Fla. App. 4th District, 1985) In its latest opinion the Court of Appeals affirmed the lower court's decision but it did certify a question of great public importance to the Supreme Court of Florida.

On Wednesday, September 25, 1985, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

The Petitioner was indicted for first degree murder. (R1265-1266) In its successful efforts to prove the charge, the State presented testimony from various witnesses, foremost from one Sean Ethington who was a co-defendant. Although having been also charged with first degree murder and having given an inculpatory statement of his involvement in the murder, Sean Ethington negotiated a plea with the State in return for his testimony in the trial of your Petitioner. Ethington's plea agreement with the State Attorney's office required him to plead guilty to manslaughter and testify for the State against Petitioner. (R 501) Sean Ethington was sentenced by the trial court to four (4) years in the Department of Corrections, followed by two (2) years community control. (R 434, 501)

Your Petitioner also called various witnesses, including himself. His testimony specifically denied the accusations of Sean Ethington but instead reaffirmed his previous statements that it was Sean Ethington who hit the victim with a board while in their company. Petitioner further denied all evidence that he caused the death of Sonya Sanj. (R 846-873)

After all the evidence was concluded, the arguments of counsel for their respective sides, the trial court charged the jury after which they retired to deliberate on their verdict.

Upon the jury being retired to commence deliberations, the trial court excused all parties pending the call of the jury. (R 1040) The trial judge did not restrict the waiting

area. (R 1204, 1228) Prior to leaving the courthouse, your Petitioner informed his trial attorney of his location, (R1204, 1227-1228) and the trial court's bailiff, Warren Marschot. (R 1220, 1226, 1228) Petitioner advised that he and members of his family awaited the call of the jury at the Alibi Restaurant, located three (3) to four (4) minutes or one (1) block from the Courthouse. (R 1205, 1220, 1227)

During the course of their deliberations, the jury filed a written question to the court. (R 1202) The written question by the jury was:

> "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 respective attorneys were summoned back to Court, but no notice of the jury question was given to the Petitioner, (R 1203, 1221-1222-1229) nor did the trial court inquire as to Petitioner's absence. (R 1203) Petitioner's trial attorney did not waive Petitioner's presence. (R 1203, 1241) To the contrary, Petitioner testified that he desired to be present at all stages of his trial and therefore, had not authorized his trial attorney to waive his presence at any time. (R 1230-1231)

The answser to the jury's question was decided upon by the two attorneys, prosecution and defense counsel. The trial court therein assembled the jury in open courtroom along with the prosecuting attorney, the defense attorney to instruct the jury. (R 1244) The Petitioner was not present nor did the Court inquire as to Petitioner's whereabouts. The jury was

then instructed by the court on its requested question. (R 1244) The jury then retired again for further deliberations. A short time later, the bailiff telephoned the Petitioner at the Alibi Restaurant to inform him that the jury had arrived at a verdict. (R1216, 1229-1230) Petitioner returned to the courtroom and, prior to the reading of the verdict, no reference was made by the trial court with the Petitioner as to his absence during the discussion and instruction of the jury question. (R 1207, 1230, 1247-1248)

The jury then published their verdict - guilty of first degree murder.

SUMMARY OF ARGUMENT

It was reversible error per se, and not harmless error, for the trial court to have responded to written inquiry of the jury without notification to the Petitioner and further reversible error to have made the response in open courtroom to the jury in Petitioner's absence, all in violation of 3.410 and 3.180, Florida Rules of Criminal Procedure. Ivory v. State, 351 So. 2d 26 (Fla. 1977) and Curtis v. State, No. 65,891 Supreme Court of Florida opinion issued September 26, 1985, 10 FLW 533.

ARGUMENT

Petitioner maintains that subsequent decisions of this Court do not modify Ivory v. State, 351 So.2d 26 (Fla. 1977). In Ivory, our Florida Supreme Court held that "any communication with the jury outside the presence of the prosecution, defendant, and defense counsel is so fraught with potential prejudice that it cannot be considered harmless error." This rule announced in Ivory, supra, has been interpreted as creating a "per se reversible error rule," requiring no showing of prejudice. State v. Hunter, 358 So.2d 50 (Fla. 4th DCA) cert. denied, 364 So.2d 886 (Fla. 1978); Turner v. State, 431 So.2d 320 (Fla. 3rd DCA 1983) In Morris v. State, 422 So.2d 338 (Fla 3rd DCA 1982), the Third District Court of Appeal noted that prior to the "prophylactic per se reversible error rule" of Ivory v. State, supra, it was necessary for a defendant to demonstrate prejudice.

The rule announced in Ivory v. State, supra, and as interpreted by the above cited cases, did not hold that it was sufficient if the defendant's trial counsel is present, and the defendant is absent, during communications with the jury. Instead, the Supreme Court in Ivory, supra, held that "The prosecutor, defendant, and defendant's counsel must be present." The correctness of this position requiring the defendant to be present is best evidenced by Florida Rules of Criminal Procedure 3.180(a)(5) which provides that the defendant shall be present at all times when the jury is present. Further support

that a defendant's involuntary absence in a capital case is reversible error regardless of prejudice is the hold of Adams v. State, 10 So. 106 (Fla. 1891)

In the case sub judice, a capital case, Petitioner clearly desired to be present at all stages of the proceedings, did not authorize any waivers and specifically advised the Court, through its bailiff, his exact location - the restaurant located within five (5) minutes from the courtroom.

Morgan v. State, 471 So.2d 1336 (Fla. App. 3rd DCA 1985) reaffirms Ivory, supra when it states that "Ivory, expressly holds that the notice requirement of Rule 3.410 F.R.Cr.P. is activated when the request for additional instructions is made, whether the request is granted or denied." Judge Pearson, concurring in Morgan v. State, supra, clearly disagrees with the notion that Hitchcock v. State, 413 So. 2d 741 and Rose v. State, 425 So.2d 521, support a conclusion that Ivory does not mandate a per se reversal if the provisions of F.R.Cr.P. 3.410 have not been adhered to.

The cases of Hitchcock and Rose, supra, are the only cases up to September 25, 1985 in which the Supreme Court of Florida had confronted the question of judge and jury contact during deliberations in the absence of the defendant.

Let us examine first the Hitchcock v. State, supra, ruling. In that case, a murder first degree trial, the jury requested of the court, clarification as to the matters relating to the penalty phase of the case. (Jury was at that time in the guilt or innocence phase of their deliberations) Trial

judge responded in written form. This court ruled that in Hitchcock, supra, the communication did not fall within the dictates of F.R.Cr.P. 3.410. The Hitchcock opinion therefore, did not modify Ivory, supra in any manner whatsoever. Hitchcock can also be distinguished from the case sub judice, Meek. In Meek, F.R.Cr.P. 3.410 was applicable. The jury desired additional jury instructions pertinent to their deliberations. It therefore mandated the dictates of Ivory, supra, requiring notice to the prosecutor, defense counsel and defendant. As a matter of fact to make matters worse, the trial judge in Meek, supra, made his announcement to the jury, in open courtroom with the prosecutor and defense counsel present but absent the attendance of the defendant. At least in Hitchcock, supra, the communication to the jury was sent to them in written form without reconvening in open court.

In Rose, supra, the Supreme Court simply did not modify Ivory, but simply attempted to limit the application of Ivory. Rose, supra, concedes a flagrant violation of F.R.Cr.P. 3.410 but it does appear that all parties were present including the defendant when the Allen charge was read to the jury in open court.

The case of your Petitioner was certified to the Florida Supreme Court as one of great public importance. The Court of Appeals, Fourth District, certified it on September 6, 1985, Meek v. State, 474 So.2d 340. On September 25, 1985, the Supreme Court of Florida granted and accepted jurisdiction.

The certification question as posed in Meek, supra,

by the Fourth District Court of Appeal is:

> 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 PROSECUTION, BUT IN THE ABSENCE OF THE DEFENDANT?

The Supreme Court of Florida, Petitioner maintains, has answered such certified question unequivocally in the negative. This court on September 26, 1985 in the case of Curtis v. State, No. 65,891, 10 FLW 533, issued an opinion which reaffirms its holding in Ivory that a violation of F.R.Cr.P. 3.410 is reversible per se.

The trial court in Curtis v. State, 455 So.2d 1090 (Fla. 5 DCA 1984) received two written questions to the trial judge. On the same sheet of paper the trial judge responded in essence that he "could not respond". The note was returned to the jury by the bailiff. Never was the jury convened in open court with the prosecutor, the defense counsel or defendant present. To the contrary, the court without notification or consultation with the prosecutor, defense counsel or defendant, answered the request. The Fifth District Court of Appeal in its decision found that the Supreme Court appeared to have receded from Ivory in its Rose and Hitchcock opinions.

The Fifth District Court of Appeal in Curtis, supra, does admit that a safer practice to comply with Rule 3.410, F.R.Cr.P. would be to convene court and advise counsel and the defendant of the jury's request before deciding how to re-

spond, see page 1092.

In its opinion in Curtis v. State, No. 65,891 10 FLW 533, the Supreme Court of Florida addressing itseslf to the vital issue presented as to compliance with 3.410, F.R.Cr.P. as follows:

"We explained the operation of rule 3.410 in Ivory:

> [I]t 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 the record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

> 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. "Additional instructions" are defined thusly: "If during the course of deliberations the jury is unclear about a particular point of law or aspect of the evidence it may request the court for additional or supplementary instructions." Black's Law Dictionary 769 (rev. 5th ed. 1979) A "jury instruction" is a "direction given by the judge to the jury concerning the law of the case." Id. Obviously, the trial judge's response in this case was an "instruction," a "direction ... concerning the law of the case" in response to a question about an "aspect of the evidence" -in short, the trial judge gave additional instructions to the jury without complying with rule 3.410.

> Ivory dictates reversal. The state urges us to recede from Ivory's per se rule and adopt a harmless error standard. However, the considerations which led us to conclude that per se reversal was appropriate in 1977, when we decided Ivory, remain just as vital today.

> We explained the reason for strict compliance with rule 3.410 in Ivory, 351 So.2d at 28 (quoting from Slinsky v. State, 232 So.2d 451, 452 (Fla. 4th DCA 1970):
>
> > [T]he trial court, faced with [a request to have testimony read], should have advised counsel of it and re-convened court with the defendant in attendance...This would afford counsel an opportunity to perform their respective functions. They could advise the court, object, request the giving of additional instructions or the reading of additional testimony, and otherwise fully participate in this facet of the proceeding.
>
> We agree. 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.
>
> The state urges that when the record is adequate to show lack of prejudice, reversal should not be required. However, regardless of whether the record is preserved, either by a court reporter or, as in this case, by virtue of the fact that the court's response was preserved in the record in a writing, the state and defendant have been deprived of the right to discuss the action to be taken, including the right to object and the right to make full argument. 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 states of the trial.
>
> We affirm the viability of Ivory..."

Neither can it be argued that Petitioner waived his constitutional right to be present at all stages of his capital trial. Absent knowledge and awareness that there were trial court proceedings taking place, it cannot be said that Petitioner knowingly, intelligently and voluntarily waives his constitutional

right to be present at all stages of his capital trial. Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) Petition for Rehearing, 706 F.2d 311 (11th Cir. 1983)

In Francis v. State, 413 So.2d 1175, 1179 (Fla. 1982), this Court held that the involuntary absence of a defendant during a crucial stage of his capital trial is reversible error notwithstanding the verbal waiver by trial counsel. In the case at bar, the facts are more compelling for not finding waiver of presence by Petitioner. Record reveals that Petitioner's attorney did not waive Petitioner's presence. (R 1203, 1241)

The right of a defendant to be present at all critical stages of his capital trial is so fundamental that the United States Supreme Court has held that the right can never be waived. Diaz v. United States, 223 U.S. 442.

In State v. Melendez, 244 So.2d 137 (Fla. 1971) (a non-capital case) this Honorable Court ruled that where counsel waives a defendant's presence, the trial court must, upon the reappearance of the defendant, carefully question the defendant as to his knowledge and understanding of his right to be present, and obtain from the defendant ratification of his counsel's action in waiving his right to be present. The right to be present and to be able to consult with counsel when the trial court is giving an answer to a question from the jury is a critical stage of the proceedings which requires that the defendant and his counsel be present. Slinsky v. State, 232 So.2d 451 (Fla. 4 DCA 1970) In the instant case, a capital case, Petitioner was never questioned by the trial judge upon his re-

turn to the courtroom as required in Melendez, supra. (R 1207, 1230, 1247-1248) Thus, the Petitioner in this case never consented to, or ratified a part of his capital trial being conducted in his absence.

Thus, in this case, the trial court's act of conducting proceedings before the jury in the absence of Petitioner, infringed upon one of the most basic constitutional rights of an accused, and therefore the error is nothing less than fundamental and per se reversible. Ivory v. State, 351 So.2d 26 (Fla. 1977) and reaffirmed in Curtis v. State, Supreme Court of Florida No. 65,891 10 FLW 533, decided September 26, 1985.

CONCLUSION

Based upon the foregoing authorities, the certified question submitted by the District Court of Appeal, Fourth District, the answer to such certified question spoken in Ivory v. State, 351 So.2d 26 (Fla. 1977) and reaffirmed in Curtis v. State. Supreme Court of Florida No. 65,891 10 FLW 533, on September 25, 1985, unequivocally in the negative. The State of Florida should, therefore, admit error and join your Petitioner in requesting a reversal of this case and remand for re-trial. The reversible per se doctrine of Ivory, supra is final and conclusive. This case must now be reversed and remanded for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing Brief of Petitioner has been furnished by regular United States Mail to the Office of the Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, FL. 33401, this the 14th day of October, 1985.

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