IN THE SUPREME COURT OF FLORIDA

THOMAS MEEK,

Petitioner

vs

STATE OF FLORIDA,

Respondent

Case Number 67,684
FOURTH DISTRICT COURT
OF APPEAL NOS. 83-1131
AND 83-1165

REPLY BRIEF OF PETITIONER

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Petitioner alleges an error of fundamental dimensions in his trial, raising an assertion of denial of due process. The Fourth District Court of Appeals framed the certified question herein in terms of whether the error alleged was harmless or fundamental. Thus, the allegation of fundamental error presented before this Court requires no objection contemporaneous to the time of alleged error at trial to preserve the issue for appeal. State v. Smith, 240 So. 2d 807 (Fla. 1970)

Respondent's assertion that Petitioner impliedly waived his presence during the trial court's instruction to the jury in open court in response to their question is likewise frivolous. The case cited by Respondent, Peede v. State, 474 So.2d 808 (Fla. 1985) deals with a defendant voluntarily absenting himself from the courtroom and being questioned extensively by the trial court to insure that Defendant's decision was knowingly and voluntarily being made. Petitioner herein took great care to notify the court through its personnel as to his whereabouts during the jury deliberations. Respondent is unable to show this Court in the record of proceedings below that the Petitioner himself had knowledge of the proceedings in question beforehand and thereafter knowingly and voluntarily waived his right to be present.

Petitioner asserts that Respondent has not overcome the pronouncements of Curtis v. State, 10 FLW 533 (Fla. September 26, 1985), or Ivory v. State, 351 So.2d 26 (Fla. 1977), by its reliance on Stano v. State, 473 So.2d 1282 (Fla. 1985).

The single most glaring distinction between the facts in Stano and in the case at bar rise in the waiver by defense counsel of his client's presence in Stano. Further, the jury's request in Stano concerned physical evidence. As Respondent concedes in its Answer Brief, Petitioner's absence occurred during a "jury instruction on a matter of law." (Answer brief at p. 11)

The Curtis decision focused on the definition of a jury instruction, quoting from Black's Law Dictionary: "a jury instruction is a 'direction given by the judge to the jury concerning the law of the case.'" Curtis v. State, supra at 533. As in Curtis, the communication by the trial court below was a jury instruction.

This Court in Curtis concluded by reaffirming the viability of Ivory, should there be any question that a rule requiring prejudice had crept into the jurisprudence to erode the Ivory decision. Respondent's arguments, then, that the Ivory per se rule has been modified is without merit.

Respondent's efforts to minimize the efficacy of Ivory and Curtis fall short in its analysis of Adams v. State, 10 So. 106 (Fla. 1891). Respondent notes that in Adams questions of law as well as fact were discussed in the absence of the defendant. This distinction totally ignores the emphasis of Curtis, which dealt with jury instructions. The mere right to be present and in view of the jury is so essential to the criminal trial process that prejudicial error must be presumed in the involuntary absence of a defendant. In part, the presence issue relates to the right to confront witnesses and hear the evidence against

him. But if that were the only reason, the rationale for the Ivory line of cases would fall. Petitioner's essential right to be present and observe and be observed in open court before the jury must not be eroded. Thus, under the aegis of Florida Rules of Criminal Procedure 3.410 and the Ivory and Curtis decisions, the very presence vel non of a defendant while instructions are being given by the court to the jury is the matter at hand.

Cases cited by Respondent do not minimize this right. In Rose v. State, 425 So.2d 521 (Fla. 1982) cert. den., 461 U.S. 909 (1983), the court apparently read an "Allen charge" to the jury in the presence of both counsel and defendant but did not notify them for purposes of discussion or objection. In Hitchcock v. State, 413 So.2d 741 (Fla. 1982) cert. den., 459 U.S. 960 (1982), the exchange between the court and jury was via notes and not in open court where the defendant's absence could have been noted. In Francis v. State, 413 So.2d 1175 (Fla. 1982), the court dealt with the defendant's involuntary absence during pre-emptory challenges conducted in chambers. Although not addressing F.R.Cr.P. 3.410, the Court did reverse the conviction and noted that there was no showing of a knowing and intelligent waiver of the defendant's right to be present, notwithstanding defense counsel's waiver on his client's behalf. In Williams v. State, 468 So.2d 335 (1 DCA 1985)(appeal pending), communication between the court and the jury was by way of a bailiff. In Brown v. State, 449 So.2d 1293 (2 DCA 1984), petition for review denied, 459 So.2d 1039 (Fla. 1984), discussions on a jury request were held in chambers

in the absence of the defendant.

Also cited by Respondent is Morgan v. State, 471 So.2d 1336 (3 DCA 1985) which involved no open court communication between the court and jury. The Morgan court hit upon the essence of Petitioner's point when it said: "(T)he 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. at 337, note 3. While Petitioner disagrees with the position of Morgan, that a harmless error analysis may be undertaken, the above quoted language reveals how erosion of the Ivory opinion cannot be tolerated when the jury is instructed in open court and a defendant is involuntarily absent.

Smith v. State, 453 So.2d 505 (4 DCA 1984), petition for review denied, 462 So.2d 1107 (Fla. 1985), also cited by Respondent supports Petitioner's position. "Error of this category has never been considered harmless where the criminal defendant is absent during proceedings contemplated by Rule 3.410, F.R.Cr.P. ..." Id. at 506. Finally, in Villavicencio v. State, 449 So.2d 966 (5 DCA 1984), petition for review denied, 456 So.2d 1182 (Fla. 1984), the communication between the judge and jury was not in open court.

The above referenced cases as well as others cited by Respondent simply do not involve the situation and facts at bar. While Petitioner asserts that a per se rule must be applied based upon Ivory and Curtis, even the cases cited by Respondent that talk in terms of harmless error did not deal with the in-

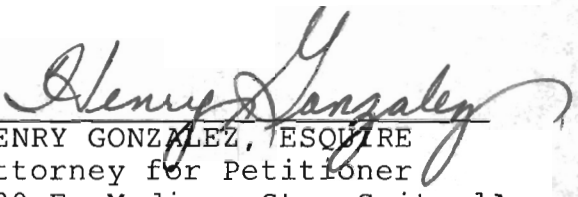
voluntary absence of a defendant while a trial court was instructing a jury in open court.

CONCLUSION

Based upon the foregoing, Petitioner respectfully submits that the certified question submitted to this Court by the Fourth District Court of Appeal should be answered in the negative, requiring reversal of this cause and remand for trial.

Respectfully submitted,

LAW OFFICES OF HENRY GONZALEZ

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing Reply Brief of Petitioner was furnished by regular U.S. Mail to the office of the Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, FL. 33401, this the 1st day of December, 1985.

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