IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,187

DENNIS WAYNE THOMPSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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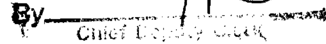
Chief Deputy Clerk



ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

Respectfully submitted,

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INTRODUCTION

The Petitioner, DENNIS WAYNE THOMPSON, was the defendant at trial and the appellant before the District Court of Appeal, Third District, in this case. The Respondent, the State of Florida, was the prosecution at trial and the appellee in the District Court of Appeal.

In this brief, the parties will be referred to by their proper name or as they stood in the trial court. The defendant's appendix contains the original and revised opinions of the District Court of Appeal, consecutively paginated and referred to as "A. 1", etc. Additionally included within the defendant's appendix are those portions of the trial transcript necessary to reflect the basis upon which the Petitioner seeks to invoke the jurisdiction of this Honorable Court.

STATEMENT OF THE CASE AND FACTS

(a) Course of proceedings and disposition in the courts below.

Dennis Wayne Thompson was charged by Information with Grand Theft (Count I) in violation of Florida Statute 812.014 and Dealing in Stolen Property (Count II) in violation of Florida Statute 812.019 (1).

During the course of his jury trial, the defendant took the stand to testify in his own behalf. At the

conclusion of direct examination, the State Attorney requested a recess prior to beginning his cross examination of the defendant in order to research the proper method of impeaching him with an unrelated arrest for which he had not yet gone to trial[1/] (A. 15-18). The trial judge granted this request. When the recess was declared, the defendant and his counsel attempted to consult with each other (A. 18) and the State objected. The trial judge sustained the objection, precluded the requested consultation, and expressly barred the defendant from communicating with his attorney during

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1/ This method of impeachment had become available to the State when the defendant's counsel conducted the following direct examination of his client:

> Q: Have you ever been charged with theft or accused of that before?
> A: No.
> Q: Have you ever been charged with burglary or accused of that before?
> A: No.
> Q: Have you ever been charged with dealing in stolen property or accused of that before?
> Q: Have you ever been in this situation before?
> A: No.

(A. 14)(Emphasis supplied).

Defense counsel erroneously believed that despite those questions the defendant's arrest for theft and burglary of a conveyance while on bond in the instant case could not be the subject of impeachment on cross-examination since the defendant's arrest for those offenses occurred subsequent to (and therefore not "before") his arrest for the offenses charged in this case (A. 16-17)

the entire one-half (1/2) hour recess which ensued, solely because the defendant was "still on the stand" (A. 18). When the trial resumed, the defendant offered an imprecise response to the prosecutor's first question thereby "opening the door" for the prosecutor to engage in further more specific impeachment regarding this unrelated arrest. In response to this further impeachment, the defendant volunteered a summary of facts underlying the unrelated arrest for which he had not yet been tried (A. 19-22).

Following his conviction and the imposition of a sentence of five years on Count I, to be served concurrently with a fifteen-year sentence imposed on Count II, the defendant timely perfected his direct appeal to the District Court of Appeal of Florida, Third District. This appeal raised, inter alia, the trial court's denial of the defendant's constitutional right to effective assistance of counsel by its order barring attorney/client communication during a critical period in his criminal trial. The district court's original majority opinion rejected this argument and condoned the trial court's refusal to permit the defendant an opportunity to confer with his attorney during the trial recess because the restraint was "brief"[2/] (A. 1).

2/ The panel reversed the conviction for Grand Theft on other grounds (A. 6,7).

Judge Natalie Baskin dissented from the majority opinion, expressing her belief that: (1) the trial court's refusal to permit Thompson an opportunity to consult with his attorney during a recess in his trial was error; and, (2) the denial of access to counsel in this case was prejudicial because it damaged Thompson's credibility in the eyes of the jury in a case in which the State's evidence was far from overwhelming (A. 2).

The defendant timely filed a Motion for Rehearing _En Banc_ and Motion for Rehearing on June 5, 1985. On December 17, 1985, the original majority opinion of the district court was withdrawn and a revised opinion was issued (A. 9). The defendant's Motion for Rehearing was considered as directed to the revised opinion and denied (A. 9). The revised majority opinion held that the trial court had committed error by barring attorney/ client communication and acknowledged the prejudicial damage to credibility which the defendant suffered in the eyes of the jury as a result of the State Attorney's cross examination regarding the unrelated arrest (A. 5,6). The revised majority opinion nonetheless affirmed the defendant's conviction on the basis that the defendant had failed to demonstrate "cognizable" prejudice (A. 6). Judge Natalie Baskin dissented from court's denial of the defendant's Motion for Rehearing.

On the same day, the entire District Court of Appeal of Florida, Third District, considered and denied (by a 5 to 4 majority) the defendant's Motion for Rehearing En Banc (A. 10).[3/] Chief Judge Schwartz's dissent from denial of rehearing *en banc* was based upon his determination that the majority had failed to "conclude that this constitutional error was -- as is, at a minimum, required -- harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see* *Crutchfield v. Wainwright*, 772 F.2d 839 (11th Cir. 1985)." Judge Baskin agreed and opined that rehearing should have been granted both because "the case is of exceptional importance" and "for maintenance of uniformity in the court's decisions." Similarly, Judge Jorgenson expressed his view that the majority had failed to apply the appropriate legal standard, which he felt required a determination that "the error in this case was not harmless beyond a reasonable doubt" (A. 11-13).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed on January 16, 1986.

3/ Chief Justice Schwartz, together with Judges Baskin and Jorgenson, each issued separate dissenting opinions. Judge Daniel S. Pearson dissented without opinion. Judges Barkdull, Hendry, Hubbart, Nesbitt and Ferguson concurred.

SUMMARY OF ARGUMENT

In the instant case, the majority has ruled that a trial court's refusal to permit a defendant an opportunity to consult with his attorney during a recess in his criminal trial is harmless error unless a defendant can demonstrate that the error resulted in "cognizable prejudice" (A. 6). This rule fashions a new and improper legal standard for the treatment of this federal constitutional error which directly conflicts with this Honorable Court's pronouncement in Bova v. State, 410 So.2d 1343 (Fla. 1985).

ARGUMENT

THE REVISED DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN BOVA V. STATE, 410 So.2d 1343 (Fla. 1982).

In Bova v. State, 410 So.2d 1343 (Fla. 1982), this Honorable Court stated that a defendant in a criminal proceeding must have access to his attorney during any trial recess:

> "No matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney ... . [w]e find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel." Bova, supra, 410 So.2d at 1345.

Having unequivocally so stated, this Honorable Court went on to hold that such error constitutes federal constitutional error and requires application of the mandate of Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967).

In Chapman, supra, the Supreme Court of the United States declared that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Accordingly, in Bova, this Honorable Court conducted "a complete review of the record" and determined that the evidence of the defendant's guilt

was both "direct and overwhelmingly satisfying beyond any reasonable doubt" that the trial court's error did not even "contribute to the jury's finding petitioner guilty." (Emphasis ours) Bova, supra, at 1345.

As recognized by Judge Baskin's dissent (and the dissents from the denial of the rehearing en banc issued by Chief Judge Schwartz and Judges Baskin, Jorgenson, and Pearson), the majority's opinion in this case clearly conflicts with Bova, supra. Herein, the majority opinion has created a new, improper, and imprecise legal standard with which to evaluate a trial court's error in refusing to permit a defendant to consult with his counsel during a recess in his criminal trial. The majority's new legal standard requires that the defendant establish that the error resulted in "cognizable prejudice" (A. 6). This new rule directly conflicts with the established principle that the prosecution has the burden of showing that any intrusion upon a criminal defendant's right to consult with counsel during a trial recess was harmless beyond a reasonable doubt. The new test fashioned by the District Court has improperly shifted the burden to the defendant contrary to the dictates of Bova, supra at 1345, citing Bova v. State, 392 So.2d 950, 954 at n.1 (Fla. 4th DCA 1980).

There is simply no authority to support the majority's newly fashioned legal standard for determining whether a trial court's order barring a defendant's communication with his attorney during a trial recess requires reversal. The "cognizable prejudice" test deviates from well-established Sixth Amendment principles and constitutes a severe encroachment upon the Sixth Amendment. Moreover, because it is so vague and imprecise it provides fertile ground for further erosion of this Honorable Court's unequivocal declaration in Bova.

Because the rule announced in this case stands in direct conflict with Bova, and because other fragmented district court decisions regarding the proper treatment of such error have recently issued, firm guidance to both the bench and bar is necessary to prevent future conflict with, and dimunition of, the fundamental rights preserved by this Court in Bova (A. 11-13); see, e.g., Recinos v. State, 420 So.2d 95 (Fla. 3 DCA 1982)(reh. en banc). Accordingly, this Honorable Court should exercise its discretionary jurisdiction to remedy the conflict created by the decision in this case and stabilize the decisional law of this State regarding this fundamental and important constitutional issue.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Assistant Attorney General, Michael Niemand, Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 27TH day of January, 1986.

RICHARD J. PREIRA