IN THE SUPREME COURT OF FLORIDA

STEPHEN WILLIAM BRADLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,657

PETITIONER'S BRIEF ON JURISDICTION

PETITION TO INVOKE DISCRETIONARY JURISDICTION ON THE BASIS OF EXPRESS AND DIRECT CONFLICT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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JURISDICTIONAL BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

STEPHEN WILLIAM BRADLEY was found guilty of burglary with a battery, battery, and petit theft following a jury trial in the Circuit Court for Seminole County, the Honorable Vernon C. Mize presiding. Bradley was adjudicated guilty of each offense and sentenced in departure from the recommended guideline sanction. Following a direct appeal to the Fifth District Court of Appeal, the convictions were affirmed, the sentence was reversed and the matter remanded for resentencing. The decision was corrected November 10, 1986 following a timely Motion for Rehearing. The decision states:

> While the jury was deliberating, it submitted to the judge the question, 'Can we read the original police report?' The record does not reflect whether notice was given to the prosecuting attorney or counsel for defendant as required by rule 3.410. The judge responded by appending to the

> bottom of the paper on which the question was written: 'No. The police report is not in evidence. You have to consider only the matters in evidence.'

Bradley v. State, 11 FLW 2141 (Fla.5th DCA October 9, 1986).

The Fifth District Court of Appeal noted that the record is unclear as to whether defense counsel was notified or was present, and went on to hold "it is clear that the communication is not covered by rule 3.410. This rule only requires notice to counsel if the jury requests additional instructions or testimony be read to them." Bradley, supra at 2142 (emphasis added).

A timely Notice to Invoke on the basis of express and direct conflict was filed by Bradley on November 18, 1986. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

In Bradley v. State, supra, the Fifth District Court of Appeal is holding that the notice requirement of Fla.R.Crim.P. 3.410 only applies if the jury requests additional instructions that testimony be read to them. The court, however, is viewing the "requests additional instructions" provision very narrowly, in such a manner as to defeat the clear purpose of the rule. As held by this Court in Curtis v. State, infra, the rule requiring notice is to be liberally construed so as to provide counsel for both parties the opportunity to address a concern of the jury that is affecting their deliberations. The decision in Bradley fosters confusion to an area of the law that needs to be clear, especially where a per se rule of reversal is utilized for prophylactic protection. The holding in Bradley conflicts with the holding in Curtis. Accordingly, this court should exercise the discretionary jurisdiction that clearly exists and review this issue on it merits.

ISSUE

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE HOLDINGS IN CURTIS V. STATE, 480 So.2d 1277 (Fla. 1985) AND BRADLEY V. STATE, 11 FLW 2141 (Fla. 5th DCA October 9, 1986).

The inquiry of the jury in the instant case asked "Can we read the original police report?"; the trial judge answered "No. The police report is not in evidence. You have to consider only the matters in evidence." Bradley v. State, 11 FLW 2141 (Fla. 5th DCA October 9, 1986). The Fifth District Court of Appeal held that the jury question was not covered by Fla.R.Crim.P. 3.410 because "[t]his rule only requires notice to counsel if the jury requests additional instructions or testimony be read them." Bradley at 2142. The court distinguished Curtis v. State, 480 So.2d 1277 (Fla. 1985) from the instant case as follows: "The request in Curtis, unlike the request in the instant case, did involve the testimony given during the trial and did request an instruction on applicable law regarding that testimony and, thus, unlike the instant case, falls within the ambit of rule 3.410." Bradley at 2142.

The jury inquiry and ex parte judicial response thereto involved in Curtis was the following:

> 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?
>
> 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' statement depending upon its credibility or lack of credibility when considered or compared with all other evidence.

Curtis at 1277. This Court stated: "The 'response' contemplated by [Ivory v. State, 351 So.2d 26 (Fla. 1977)] 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." Curtis at 1278 (emphasis supplied). This Court went on to hold the following:

> 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 stages of trial.
>
> We reaffirm the viability of Ivory and conclude with the words of Justice England:
>
> The rule of law now adopted by this

> Court is obviously one designed to have a prophylactic effect. It is precisely for that reasons that I join the majority. A "prejudice" rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent "harm," real or fancied.

Ivory, 351 So.2d at 28 (England, J., concurring).

Curtis at 1278-79 (emphasis supplied).

It is clear that the jury in Bradley was asking for instruction, and was further asking an evidentiary question. The trial court instructed them, in writing, that "You have to consider only the matters in evidence." Should not the jury also have been instructed that it also could consider the lack of evidence? More importantly, should not have counsel for the State and the defense been entitled to participate in formulating the response to the jury inquiry, and perhaps stipulate, albeit belatedly, to introduction of a document that would have furthered full consideration by the finder of fact?

The bottom line of Curtis is that, if a jury poses any inquiry directly concerning its deliberations, the record must indicate that the parties had notice of the inquiry and an opportunity to participate in formulating a response as a fundamental matter of due process. The holding in Bradley seeks to unduly restrict the notice requirement through myopic application of the provisions of rule 3.410, hypertechnically defined. The holding in Bradley thus expressly conflicts with the holding of this Court in Curtis.

CONCLUSION

Because the decision in the instant case expressly and directly conflicts with the decision of this Court in Curtis, supra, this Court is respectfully requested to exercise its discretionary jurisdiction and to entertain briefs on the merits if such are deemed necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Stephen W. Bradley, #044890, 500 Orange Circle Avenue, Belle Glades, Fla. 33430 on this 26th day of November 1986.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER