IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,223

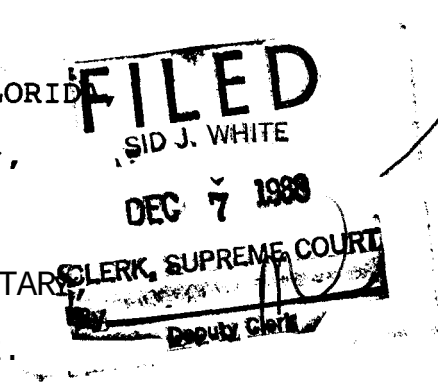
THE STATE OF FLORIDA,

Petitioner,

-vs-

JEROME SINGLETARY,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

Respondent

BRIEF OF ~~PETITIONER~~ ON THE MERITS

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INTRODUCTION

In the trial court, the Respondent, Jerome Singletary, was the defendant and the Petitioner, the State of Florida, was the prosecution. In this brief, petitioner will be referred to as the state and Respondent will be referred to as Respondent. The symbols **"R."** and "T." will be used to refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts and adopts the state's statement of the case and facts. However, respondent would bring to the court's attention that there is nothing in the record indicating that defense counsel ever discussed with his client his constitutional right to have the judge present in the courtroom during the jury voir dire. Furthermore, there is nothing in the record indicating that the judge made any inquiry as to whether Respondent was making a knowing and intelligent waiver of his right to have the judge present during the jury voir dire. Finally there is no written waiver in the file indicating that Respondent made a knowing and intelligent waiver of his right to have the judge in the courtroom during the jury voir dire.

QUESTION PRESENTED

MAY THE DEFENDANT'S RIGHT TO HAVE THE TRIAL JUDGE PRESENT DURING THE VOIR DIRE OF PROSPECTIVE JURORS BE VALIDLY WAIVED BY HIS ATTORNEY, OR MUST THE DEFENDANT PERSONALLY WAIVE SUCH RIGHT.

SUMMARY OF ARGUMENT

The jury voir dire was conducted outside the presence of the trial judge. The record is completely void of any evidence that Respondent knowingly and intelligently waived his constitutional right to have the judge present during the voir dire.

The Third District Court of Appeals in Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983) has held that the jury voir dire is a critical part of a criminal trial and that a defendant has a constitutional right to have the judge present during this stage of the proceeding.

In Carter v. State, 512 So.2d 284 (Fla. 3d DCA 1987) the Third District Court of Appeals held that before a judge can excuse himself from being present during the jury voir dire the defendant must knowingly and intelligently waive his constitutional right to have the Court present during this stage of the trial. In Carter v. State, supra, the Court specifically held that a defense counsel's stipulation is insufficient to establish that the defendant knowingly and intelligently waived his constitutional right to have the judge present during the jury voir dire.

Pursuant to the Court's holding in Peri v. State, supra, and Carter v. State, supra, the Third District Court of Appeals correctly ruled in this case that it is per se reversible error if a trial judge absents himself from the trial without the defendant making a knowing and intelligent waiver of his constitutional right to have the judge present during jury selection.

ARGUMENT

MAY THE DEFENDANT'S RIGHT TO HAVE THE TRIAL JUDGE PRESENT DURING THE VOIR DIRE OF PROSPECTIVE JURORS BE VALIDLY WAIVED BY HIS ATTORNEY, OR MUST THE DEFENDANT PERSONALLY WAIVE SUCH RIGHT.

Prior to the trial, counsel for Respondent and the State agreed that the trial court did not have to be present during the selection of the jury. The record establishes that defense counsel never indicated on the record that he discussed with his client the decision to waive the trial judge's presence during the jury voir dire. The record also establishes that the trial judge never made an inquiry with the Respondent as to whether he was making a knowing and intelligent waiver of his right to have the judge present during the voir dire. Finally there is no written waiver in the file indicating that Respondent knew he was waiving his constitutional right to have the judge present during the jury voir dire.

In reversing Respondent's conviction the Third District Court of Appeal held the following:

> We reverse the judgement of conviction under review because, as in *Carter* v. *State*, 512 So.2d 284, 286 (Fla. 3rd D.C.A. 1987) "the record before us fails, in any manner, to clearly establish that the defendant knowingly and intelligently waived his right to the trial judge's presence during voir dire." As Carter makes perfectly clear, a stipulation by the defendant's attorney to waive the judge's presence does not constitute a sufficient waiver of the defendant's right to have the judge present, and as Peri v. *State*, 426 So.2d 1021 (Fla. 3rd D.C.A. 1983), makes perfectly clear, no showing of prejudice arising from the judge's absence need be made by the defendant."

The Third District Court of Appeals recognized that the issue raised in this case is extremely important and certified the following question:

> MAY THE DEFENDANT'S RIGHT TO HAVE THE TRIAL JUDGE PRESENT DURING THE VOIR DIRE OF PROSPECTIVE JURORS BE VALIDLY WAIVED BY HIS ATTORNEY, OR MUST THE DEFENDANT PERSONALLY WAIVE SUCH RIGHT.

When a defendant is waiving a constitutional right it is necessary that the record establishes that the defendant knowingly and intelligently waived this constitutional right. **See,** Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461 (1938); McCollum v. State, 74 So.2d 74 (Fla. 1954); Peri v. State, supra: and Carter v. State, supra.

The courts have recognized that in certain situations counsel has the right to waive right for a defendant, and in other situations the waiver will not be valid unless the record clearly establishes that the defendant himself is knowingly and intelligently waiving the right. The crucial factor in determining what type of waiver is necessary has always been contingent upon the right is being waived. If the right is merely a procedural or a trial strategy decision, then counsel can waive the right. However, if the right is a fundamental right guaranteed by the Constitution to insure a fair trial, the waiver will only be considered valid if it is established that the defendant voluntarily, knowingly, and intelligently waived that right.

In its brief the State relies on this court's decision in Jones v. State, 484 So 2d 577 (Fla 1986) to support their position that a defense counsel can always waive a defendant's constitutional rights. In Jones this court held that a defense counsel can waive lesser included offenses and the record does not have to establish a personal waiver from the defendant. In reaching this conclusion this court specifically held that in a non-capital case a defendant does not have a constitutional right to have the jury instructed on lesser included offenses and therefore counsel can waive them without a personal waiver from the defendant. This Court never ruled in Jones that all rights can be waived by defense counsel. It is Respondent's position that Jones does not alter the long standing principle that in order for a defendant to waive a fundamental constitutional right there must be a knowing and intelligent waiver on the record.

Therefore in determining whether the Third District Court of Appeals was correct in ruling that a defense counsel's stipulation is not a valid waiver of a defendant's right to have the judge present during jury selection this court must first determine if Respondent had a constitutional right to have the judge present in the courtroom during jury selection.

A. Judge's Presence During Voir Dire Is A Fundamental Constitutional Right

Article I Section 16 of the Florida Constitution and the Sixth Amendment to the U.S. Constitution secure to one accused of a crime a trial by an impartial jury. The presence of the trial judge is at the very core of this constitutional guarantee. In

Peri v. State, supra, Judge Pearson recognized that a defendant's right to a jury trial includes the right to have the judge present during the entire trial. To support this position Judge Pearson cited the U.S. Supreme Court case of Capital Traction Company v. Hof, **174** U.S. **1, 19** S.Ct. **580, 43** L.Ed **873 (1898):**

> Trial by jury in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."
>
> * * *
>
> "**[A]** jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, that a presiding law tribunal is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference, that a mere commission, though composed of twelve men, can never be properly regarded as a jury. Upon the whole, after a careful examination of the subject, we are clearly of the opinion that the word 'jury' . . . in the Constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the alleaations, evidence, and arauments of the parties."
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> * * *
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> "The Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is

> that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial'." (Emphasis added).

Judge Pearson further recognized in Peri that it is settled law that a trial begins when the selection of a jury to try the case commences, State v. Melendez, 244 So.2d 137 (Fla 1971) and that it is axiomatic that the selection of the jury is a critical stage of any trial. See Francis v. State, 413 So.2d 1175 (Fla 1982). In reaching this conclusion the court relied on the fact that the process of picking an impartial jury is done through jury voir dire and it is the judge's function to supervise this process. In Cross v. State, 103 So. 636 (Fla. 1925) the court held the following:

> ". . .the selection of a jury to try a case is a work which devolves upon the court. His purpose is to secure such jurors as are qualified for jury service and who are without bias or prejudice for or against the parties in the cause".

In Carter v. State, supra, the Third District once again recognized that a defendant has a constitutional right to have the judge present during the jury voir dire when the Court held the following:

> ". . . It is well settled that it is the duty of the presiding judge to be present at all stages of a criminal proceeding. *Peri* v. ***State,*** 426 So.2d 1021 (Fla. 3d DCA), review denied, 436 So.2d 100 (Fla. 1983). In *Peri,* we held that it was error for the trial judge to have compelled the defendant, over his objection, to continue the voir dire of the prospective jurors in the judge's absence. Noting that courts condemn the act of a trial

> judge absenting himself during any stage of trial proceedings, *Peri*, 426 So.2d at 10024, and that the voir dire of prospective jurors is as critical as any other stage of a criminal trial, we concluded that a judge's presence is required if not waived by the accused."

In its brief the state does not even attempt to argue that the Respondent did not have a constitutional right to have the judge present during the jury voir dire. Instead the state argues that defense counsel's stipulation was a valid waiver of this constitutional right or in the alternative if their was no valid waiver any error that occurred was harmless. Both of the state's positions were correctly rejected by the Third District Court of Appeals in this case, Peri, and Carter.

B. Defense Counsel's Stipulation Is Not A Voluntary And Intelligent Waiver Of Defendant's Constitutional Right To Have The Judge Present During The Voir Dire

In Schneckloth v. Bustamonte, supra, the U.S. Supreme Court recognized the importance of setting a strict standard of waiver when a fundamental constitutional right is involved when the Court held the following:

> "A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize ever facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided." (Emphases added).

In reaching this conclusion the U.S. Supreme Court relied upon the following holding in Johnson v. Zerbst, supra, which also

emphasized the importance of establishing that any waiver of a fundamental constitutional right be made knowingly and intelligently when the Supreme Court stated the following:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the, accused-whose life or liberty is at stake-- is without counsel. This protecting duty imposes the serious weighty responsibility upon the trial judge of determining whether this is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. (Emphasis added).

Therefore, it is clear that the United States Supreme Court has recognized when a defendant waives a fundamental right guaranteed by the constitution such as the judge's presence during jury voir dire it is necessary that the waiver be knowingly and intelligently made.

The fact that counsel's stipulation without specific inquiry of the defendant is insufficient to waive a judge's presence is also supported by Florida law. In Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982) the issue presented to the court was whether a defendant can waive the Statute of Limitations. The court recognized that the Statute of Limitations was a substantive and fundamental right and therefore held that the waiver must meet the following criteria:

> The right not to be convicted of an offense for which prosecution is barred by limiting statute is substantive and fundamental. Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental

> rights. Waiver of any fundamental right must be express and certain, not implied or equivocal.

This court in Francis v. State, supra, has also recognized that when a defendant's Sixth Amendment right is being waived it is necessary that it be established that the waiver was knowingly and intelligently made. The Court further recognized when a Sixth Amendment right is being waived the mere fact that defense counsel may have stipulated to the waiver does not establish a voluntary waiver.

In Francis the issue before this court was whether a defendant's counsel can waive defendant's presence during the jury voir dire. In that case, the defendant left the courtroom voluntarily and the judge, the defense attorney and the prosecutor proceeded to pick the jury. When the defendant reappeared in the courtroom the judge never inquired whether the defendant himself had waived his right to be present during the jury voir dire. In ruling that defense counsel's actions alone was an insufficient waiver this Court held the following:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and the judge returned to the courtroom upon selecting a juror. His silence, when his counsel and the others retired to the jury room or when they returned after the selection process, did not constitute a waiver of this right. The state has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See ***Schneckloth*** v. ***Bustamonte,*** 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); ***Johnson*** v. ***Zerbst,*** 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461 (1938).

Since a defendant's right to have the judge present during the jury voir dire is similar to a defendant's constitutional right to be present during jury voir dire the Third District Court of Appeals correctly concluded that a stipulation by defense counsel to waive the judge's presence during jury voir dire is insufficient. In order for there to be a valid waiver there must be a personal, knowing, and intelligent waiver made by the defendant.

The state argues that this court's decision in Roberts v. State, 510 So.2d 885 (Fla. 1987) establishes that defense counsel can waive a defendant's constitititutional right to have the judge present during critical stages of the trial. It is Respondent's position that the Third District correctly concluded that the holding in Roberts is not applicable to the facts in this case. In Roberts the jury, after four hours of deliberations, requested that they be taken to the scene of the homicide. The trial judge instructed the jury that when they went to the scene they should just look at the scene and not talk to anybody including each other. Neither the defendant nor the judge went to the scene.

When the jury returned to continue deliberating, it was placed on the record that defense counsel discussed with his client the decision to waive his presence and the judge's presence at the scene. This court ruled that it was not necessary for the record to establish that the defendant knowingly and intelligently waived his right to have the judge present when the jury went to view the scene.

In reaching this conclusion this court recognized that the defendant's right to have the judge present when the jury went to the scene emanated from Florida Statute 918.05 which requires the judge to go to the scene with the jury. This court never concluded that a defendant has a constitutional right to have the judge present when the jury views the scene.

In its revised opinion in this case the Third District Court of Appeals distinguished Roberts from this case since in Roberts the defendant was only waiving a statutory right while in this case the defendant was waiving a fundamental constitutional right. The Third District Court of Appeals correctly concluded that a judge's presence at the scene of the crime during jury deliberations is not necessary to the fostering of the defendant's constitutional right to a jury trial. When a jury goes to the scene during deliberations no evidence is taken nor is anybody even allowed to talk to one another. Since the defendant did not have a constitutional right to have the judge present when the jury went to the scene of the crime this court correctly ruled that a personal waiver by the defendant was not required.

Whereas a defendant does not have a constitutional right to have the judge present during a jury view of a crime scene the same is not true of the judge's presence during the selection of a jury. The Sixth Amendment to the United States Constitution guarantees a defendant the right to a jury trial consisting of impartial jurors supervised by an impartial judge. One of the crucial functions of a trial judge is to insure the defendant that an impartial jury is being selected.

In Peri v. State, supra, Judge Pearson recognized the importance of the judge's presence during the jury voir dire when he held the following:

> The responsibilities of the judge in the jury selection process are manifold. The determination of impartiality in which the demeanor of the prospective juror plays such an important part is particularly within the judge's province. *Ristaino* v. *Ross,* 424 U.S. 589, 594-94, 96 S.Ct. 1017, 1020, 47 L.Ed.2d 258, 263 (1976). The latitude which is given the parties in examining prospective jurors is subject to the judge's sound discretion. *Essix* v. *State,* 347 So.2d 664 (Fla. 3d DCA 1977). The materiality and propriety of voir dire questions are to be decided by the judge. *Pait* v. *State,* 112 So.2d 380 (Fla. 1959); *Story* v. *State,* 53 So.2d 920 (Fla. 1951); *Pope* v. *State,* 84 Fla. 428, 94 So. 865 (1922); *Saulsberry* v. *State,* 398 So.2d 1017 (Fla. 5th DCA 1981); *Gibbs* v. *State,* 193 So.2d 460 (Fla. 2d DCA 1967). It is the judge who controls the time and extent of the voir dire, *Blackwell* v. *State,* 101 Fla. 997, 132 So. 468 (1931); *Barker* v. *Randolph,* 239 So.2d 110 (Fla. 1st DCA 1970), and the scope of the examination, *Underwood* v. *State,* 388 So.2d 1333 (Fla. 2d DCA 1980); *Jones* v. *State,* 378 So.2d 797 (Fla. 1st DCA 1979). The judge is the arbiter of a juror's fitness to serve, *Singer* v. *State,* 109 So.2d 7 (Fla. 1959); *Barker* v. *Randolph, supra; Johnny Roberts, Inc.* v. *Owens,* 168 So.2d 89 (Fla. 2d DCA 1964), and the superintendent of the construction of the jury panel, *Walsingham* v. *State,* 61 Fla. 67, 56 So. 195 (1911). See *Pinder* v. *State,* 27 Fla. 370, 8 So. 837 (1891). Where the bounds of a proper examination are overstepped or the law is misstated by the party, immediate correction by the judge through a curative instruction may overcome the possibility of prejudice and avoid a discharge of the panel. *Romero* v. *State,* 341 So.2d 263 (Fla. 3d DCA 1977). In sum, the presence of the judge is as essential to, and as much a critical part of, the voir dire of prospective jurors as it is of any other stage of the trial. We hold, therfore, that it was error for the trial judge to have compelled the defendant, over objection, to continue the voir dire process in the judge's absence.

Therefore, since the judge's presence during the jury voir dire is a fundamental constitutional right this court should adopt the opinion of the Third District Court of Appeals and hold that a stipulation by defense counsel without any evidence that the defendant is making a knowing and intelligent waiver should be insufficient to waive a judge's presence during jury selection.

C. HARMLESS ERROR DOCTRINE SHOULD NOT APPLY

Finally, the state takes the position that even if their was not a valid waiver of the judge's presence during the jury voir dire the harmless error doctrine should apply. To support this position the state relies on this Court's opinion in State v. Diguilio, 491 So.2d 1129 (Fla. 1986) and the United States Supreme Court opinion of Rose v. Clark, 92 L.Ed.2d 460 (1986). Both Diguilio and Clark stand for the proposition that all constitutional errors are not automatically reversible error. Both this court and the United States Supreme Court have recognized that some errors are so repugnant to a fair trial that reversal is automatic. In Rose v. Clark, supra, the United States Supreme Court recognized the following:

> . . . This limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, Tumey v. Ohio, supra with counsel to help the accused defend against the State's charge...Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,... and no criminal punishment may be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel,

> may present evidence before an impartial judge and jury.

Therefore, it is apparent that the United States Supreme Court in Rose v. Clark, supra, has recognized that the harmless error doctrine should not apply when a trial is conducted without a judge being present during all critical stages. As previously discussed the trial judge is the most essential ingredient to a fair trial and there can be no trial in the legal sense without him. See Slaughter v. United States, **82** S.W. **732 (1904).**

When a jury comes to a courtroom to serve on jury duty they expect that a judge will be present. It is impossible to determine what effect the judge's absence may have on the jury. It can be speculated that when a jury sees a trial being conducted without a judge present the jury may not take their responsibility as seriously.

In Peri v. State, supra, the court cited the following from State v. Smith, **49** Conn. **376 (1881)** which is just as applicable today as it was 100 years ago:

> "that it is the duty of the presiding judge at a criminal trials...to be visibly present every moment of their actual progress, so that he can both see and hear all that is being done. This is a right secured to the accused by the law of the land, of which he can not be deprived. All the formalities of the trial should be scrupulously observed, so that the people present may see and know that everything is properly and rightfully done."

In Peri, supra, the Third District Court of Appeals specifically ruled that when a judge is not present in the courtroom and there is not a valid waiver it is per se reversible error. Judge Pearson's reason for concluding that the harmless error rule should not apply is worth repeating:

> "If, then, the absence of the trial judge does not , ipso facto, render the proceedings a nullity, the question becomes whether reversal is required in a case, as here, where the defendant can point to no specific prejudicial event which occurred in the judge's absence.
>
> In our view, a rule requiring the defendant to show prejudice ,or one requiring the state to show lack of prejudice is both unworkable, and ill-advised. In *Ivory v. State*, 351 So.2d 26 (Fla. 1976) our Supreme court refused to adopt a rule calling for a showing of prejudice in an instance where the trial judge communicates with the jury in the absence of the defendant and his counsel. As former Justice England, there concurring, observed:
>
> > "The rule of law now adopted by this Court is obviously one designed to have a prophylactic effect. It is precisely for that reason I join the majority. A 'prejudice' rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in a search of evanescent 'harm', real or fancied. Id. at 28 (England, J., concurring).

The State argues in its brief that since Judge Pearson's decision was based on Ivory v. State, which has been abandoned by this Court, the court should now reject Judge Pearson's rationale for not applying the harmless error doctrine when a judge improperly absence himself from the courtroom. (State's brief page 9).

Initially, Respondent would argue that this Court has not abandoned its decision in Ivory. In both Williams v. State, 488 So.2d 62 (Fla. 1986) and Bradley v. State, 513 So.2d 112 (Fla. 1987) this Court specifically reaffirmed its opinion in Ivory and recognized that some errors do require automatic reversal. In Bradley v. State, supra, this Court held the following:

> In ***Ivory v.*** *State*, 351 So.2d 26, 28 (Fla. 1977), we held that "it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and the defendant's counsel being present having the opportunity to participate in the discussion of the action to be taken on the jury's request.'' We recently recognized, in Williams ***v. State,*** 488 So.2d 62, 64 (Fla. 1986), that the language of ***Ivory*** can be expansively read to mean that any communication between the judge and jury without notice to the state and defense is per se reversible error. In reaffirming ***Ivory,*** however, we held that violation of Florida Rule of Criminal Procedure 3.410 is per se reversible error, but communications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles. Id.

Therefore, this Court has continued to recognize that some errors are so egregious that automatic reversal is required. In ruling that the harmless error doctrine should not apply when a judge wrongfully absence himself from the jury voir dire. Judge Pearson concluded that it is impossible for a reviewing court to determine the extent of the error and therefore the harmless error doctrine should not apply. Judge Pearson also concluded the following in Peri, supra:

> For like reasons, we think a prejudice rule is unworkable in the setting of the trial judge's absence from trial proceedings. **As** one court has observed:
>
> > "During such an absence grave errors or abuses of privilege may occur, and this court may be left to the conflicting affidavits or over-zealous attorneys or parties in interest to determine what in fact took place. This Court is not organized nor authorized to try such questions, and we do not propose to do so. It avails not to say that error must be affirmatively shown. This is true, but, where the trial court has disabled itself from

> informing us as to what occurred, how is error to be shown save by affidavit? We cannot but regard this long absence from the bench during an important part of the trial as error which calls for a new rial. We feel we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses, and break down one of the most valuable safeguards to litigants." *Smith* v. *Sherwood,* supra, 70 N.W. at 683.

See also, *Francis* v. *State,* supra, (inability "to assess the extent of prejudice, if any," sustained by defendant who was not present during exercise or peremptory challenges requires reversal); *Cumbie* v. *State,* 345 So.2d 1061 (Fla. 1977) (trial court's failure to make full inquiry into the question of prejudice resulting from a discovery violation is reversible as a matter of law because of inability of appellant court to determine harm); *O'Connor* v. *Bonney,* 57 S.D. 134, 231 N.W. 521 (1930) (neither the trial court nor the reviewing court ought to be left to resolve conflicting affidavits of interested and partisan attorneys).

> But quite apart from the impracticality of a prejudice rule, we think such a rule will not sufficiently deter trial judges from absenting themselves from a trial in progress. We believe that only a rule which requires automatic reversal when a judge, over the defendant's objection, absents himself or herself from the proceedings will effectively remove any incentive to disregard the requirement of his or her presence and compel respect for the constitutional guarantee of a fair and impartial trial. See *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)." (emphasis added)

In conclusion, since a defendant has a constitutional right to have the judge present during the jury selection the Third District Court of Appeals correctly concluded that in order to waive this right the record must establish a knowing and

intelligent waiver by the defendant. The Third District Court of Appeals also correctly concluded that if there is no valid waiver of the judge's presence automatic error has occurred. Therefore this court should affirm the decision of the Third District Court of Appeals in this case.

CONCLUSION

Based upon the foregoing arguments and authorities it is respectfully submitted, that this Court should affirm the Third District Court of Appeals decision which holds that in order for a defendant to waive his constitutional right to have the judge present during jury voir dire there must be a knowing and intelligent waiver on the record.

Respectfully submitted,

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BY: _____
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Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Room N-921, Miami, Florida this 2nd day of December, 1988.

ROBERT KALTER
Assistant Public Defender