IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,807

THE STATE OF FLORIDA,

Petitioner,

vs.

MODEST0 HERNANDEZ,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The respondent, Modesto Hernandez, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the plaintiff in the trial court. The parties will be referred to as they stand in this Court. The symbol "A" will be used to refer to portions of the appendix attached to this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as being accurate. However, Respondent would emphasize the fact that the record is completely void of any waiver made by the Respondent of his right to have the judge present during the jury voir dire. Not only is there nothing in the record which establishes that Respondent waived his right to have the judge present during jury selection but more importantly there is nothing in the record to establish that Respondent even knew he had a constitutional right to have the judge present during jury selection.

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 voir selection.

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.

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.

The Third District Court of Appeals ruled that in order for there to be a valid waiver of defendant's right to have the judge present during jury voir dire the record must establish that the defendant made a knowing and intelligent waiver of this constitutional right. The court went on to hold that a stipulation of defense counsel does not establish a knowing and intelligent waiver. In reaching this conclusion the Third District Court of Appeals relied upon its previous opinions in Carter v. State, **512** So.2d **284** (Fla. 3d DCA **1987)** and Singletary v. State, 13 F.L.W. 2345 (Fla. 3d DCA **1988).** The court certified the same question that was certified in Singletary which was "whether a defense counsel's stipulation can be considered a knowing and intelligent waiver of a defendant's constitutional right to have the judge present during jury voir dire". Since the time Third District has certified the question in this case this Court has received briefs and heard oral argument in Singletary. (Supreme Court case # 73,223).

Since the issue in this case is identical to the issue in Singletary, Respondent would rely on the argument previously made to this Court in Singletary. (See Appendix A. A copy of the brief filed in Singelatary). However, since the state has raised new arguments which were not raised in Singletary, Respondent will briefly discuss the new arguments made by the state.

The state contends in its brief that this Court's holding in Brown v. State, 14 F.L.W. 53 (Fla. Feb. 2, 1989) is not controlling in this case. In Brown this Court held that a defendant can not waive the judge's presence during communication with the jury during deliberations. In reaching this conclusion this Court held the following:

> "We do find, however, that communication with the jury during the judge's absence constituted reversible error. Article I Section 16 of the Florida Constitution and the federal constitution's sixth amendment guarantee criminal defendant's trial by an impartial jury. The presence of a judge, who will insure the proper conduct of a trial is essential to this guarantee.

The court went on to hold that in certain situations a judge's presence can never be waived and in limited situations a judge's presence can be waived but only if the waiver is knowingly and intelligently made by the defendant. The court also recognized that a stipulation by defense counsel does not establish a valid waiver of the judge's presence during jury voir dire when the court held the following:

> "In reaching its conclusion that the trial judge's presence may be waived, 426 So.2d at 1026 the Peri court surveyed numerous cases condemning a judge's absence from any part of a trial because such absence destroys the existence of the tribunal, thereby creating an irreparable jurisdictional defect. 426 So.2d 1024. The court recognized, however, that later cases, such as Johnson v. Zerbst, 304 U.S. 458 (1938), have taken a less restrictive view of jurisdiction and have held that even fundamental constitutional rights can be waived. Notwithstanding these pronouncements, the presence of a judge during trial is a fundamental right which can be waived only in limited circumstances and then only by a fully informed and advised defendant, and not by counsel acting alone."

In Brown v. State, supra, this Court recognized that the Third District Court of Appeals had previously ruled that a judge's presence during voir dire can be waived. However, this Court specifically ruled that before this constitutional right can be waived, the record must establish a knowing and intelligent waiver made by the defendant personally. Therefore, the court in Brown has already answered the question that has been certified in this case.

The state attempts to distinguish Brown, supra on two grounds. First, the state argues that the decision in Brown was based on Florida Rules of Criminal Procedure Rule 3.410 and in the instant case no Rule of Criminal Procedure applies. In Brown, the trial judge never communicated to the jury outside the presence of the defendant. Therefore this Court specifically held the following:

> "We find no violation of rule 3.410 here because the judge did not communicate with the jury without notice to and outside the presence of the prosecution and the defense.

It is therefore clear that in Brown this Court relied on the Florida Constitution and not a rule of procedure when the court concluded that the judge's presence could not be waived. Therefore, this state's argument that Brown is based on a rule of criminal procedure should be rejected.

Next, the state attempts to distinguish Brown on the fact that in Brown there was a sufficient record from which it could be ascertained that Brown never consulted with his attorney and in this case there is nothing in the record indicating whether

Respondent spoke to his attorney prior to the attorney waiving the judge's presence.

The state's attempt to distinguish Brown on this ground is both factually and legally incorrect. An analysis of the opinion in Brown reveals that there was no sufficient record in Brown to establish whether there was a waiver. The record in Brown is similar to the record in this case in that the record is silent as to whether there was a valid waiver.

The law is clear that valid waivers cannot be assumed from silent records. In Griffith v. State, (14 FLW **781,** Fla. 3d DCA **1989)** the Third District Court of Appeal has recently held the defendant can not waive a defendant's right to a twelve man jury in a capital case when the court held:

> ". . . As the opinion in Rodriguez-Acosta elucidates, the record involved here is insufficient to demonstrate the required "knowing and intelligent" waiver of the defendant's rights in this regard. The recent decision of the supreme court in ***Brown*** v. *State, ___So.2d___ (Fla. Case No. 70,230, opinion filed Feb. 2, 1989 [14 FLW 53],* which deals with the requirements necessary to demonstrate a defendant's waiver of the right to the presence of the trial judge - a point conceptually undistinguishable from this one - conclusively establishes the invalidity of the waiver undertaken only by defense counsel in this case."

Roberts v. State, 510 So.2d **885** (Fla. **1987);** also does not help the state because in Roberts the record was not silent. In Brown this Court distinguished Roberts since in Roberts the record established that defense counsel consulted with his client before he waived the judge's presence during the jury view of the scene. Therefore, the fact that the record is silent in this

case does not distinguish Brown but instead supports Respondent's position that the Third District Court of Appeals correctly ruled that there was no valid waiver in this case.

The state next argues that this Court should adopt the holding of two federal cases that hold that a defense counsel can waive a defendant's right to have the judge present during jury voir dire. See, Haith v. United States, 342 F.2d 158 (3d Cir. 1965) and Stirone v. United States, 341 F.2d 253 (3d. Cir 1965). The two cases cited by the state were 1965 cases that have been dissaproved by many federal courts. Since Haith and Stirone the federal courts have gone so far as to hold that jury selection is such an important part of the trial that a Magistrate can not substitute for a judge during jury selection. See, United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) and U.S. v. Trice (Criminal Law Reporter volume 44, No. 16, case no. 87-2452).

In United States v. Ford, supra, the court recognized the importance of jury selection when the court held the following:

> "The selection of a petit jury from a venire is an important part of a trial. At common law only the judge could preside over jury selection in felony cases. Its tie to the trial is also illustrated by consistent judicial insistence upon fairness as a component of a trial. The Supreme Court has noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." Only this past term the Court has attempted to free the selection process of racial bias by prescribing a process for claims that the prosecutor is using peremptory challenges to exclude racial minorities. Such concern plainly rejects the view that jury selection is a preliminary and essentially ministerial act. At the least it is an essential instrument to the delivery of a

> defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the trial guarantees of the sixth amendment and section 2 of article III themselves."

It is Respondent's position that if this Court is going to look to federal cases for guidance, the court should adopt the logic of the court in United States v. Ford, supra, rather than the logic in Haith and Stirone. This Court, similar to the United States Supreme Court, has recognized the urgency of eliminating racial discrimination in jury selection. In order to assure fair jury selection it is essential that a trial judge be present in the courtroom. Therefore, if a defendant can waive this fundamental constitutional right this Court should require that the waiver be made by the defendant personally so that the trial court can be assured that the waiver was knowing and intelligent.

Next the state argues that the proper procedure to raise the issue whether a defendant has made a knowing and intelligent waiver is by filing a Motion for Post Conviction Relief pursuant to Rule 3.850. In Dumas v. State, supra, the Third District Court of Appeals recognized that when a defendant signs a written waiver of his right to a jury trial a presumption exists that the waiver is knowing and intelligent. Therefore, the proper remedy to attack this type of waiver is through a Rule 3.850 motion.

The rationale that exists in Dumas, supra, does not apply to the situation in this case. In this case there was no waiver signed by defendant and therefore there is no presumption that there was a knowing and intelligent waiver. It is Respondent's

position that the best time to determine when a defendant is waiving a constitutional right is at the time the request is being waived not years later on a 3.850 motion.' See Griffith v. State, supra.

In Dumas, supra, Judge Schwartz in his dissenting opinion clearly discussed why the proper remedy in this case is a new trial rather than a remand for a 3.850 hearing when he stated the following:

> " . . . In this present instance, the disadvantages of that technique are exacerbated by the fact that the issue later to be determined will likely involve the resolution of obviously undesirable disputes between the defendant and his lawyer about who said what to whom in the hallway or the holding cell or in whispered conversations at counsel table months or years later... Moreover, the professional self interest of the (now previous) attorney will be in unseemly conflict with that of his former client, who must, in turn establish that his lawyer did not act with competence. Since all this can be avoided in almost every case by the simple expedient of a brief colloquy between the court and the defendant spread upon the record, the most elementary principles of sound judicial administration dictate the adoption of that requirement.

Therefore, it is Respondent's position that this Court should adopt the holding of the Third District Court of Appeals which states that when the record does not establish that a defendant has waived his right to have the judge present during jury voir dire the proper remedy is a new trial.

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This Court in Amazon, a case relied upon by the state, correctly recognized that it is bad practice to resort to 3.850 motions to determine whether constitutional rights have been validly waived.

The state next argues that the Third District Court of Appeals incorrectly concluded that the judge's presence during the jury voir dire is a fundamental constitutional right since jeopardy does not attach until after the jury has been selected. The fact that jeopardy does not attach until after the jury has been sworn in no way effects the issue as to whether a defendant has a fundamental constitutional right to have the judge present during the jury voir dire.

Numerous federal constitutional rights exist prior to the jury being sworn, such as the right to counsel and the right to be present in the courtroom during the trial. In United States v. Ford, supra, the court correctly recognized the following:

> "At some point the accusatory process shifts from a fact-gathering and charging phases to its primary task of deciding guilt. It is suggested that this ought to be a floating point that adjusts to the issue. This suggestion gathers strength from the circumstance that double jeopardy does not attach until the jury is sworn. But all other trial protections are in force when jury selection begins. For example jury selection is a part of the trial for purposes of the Speedy Trial Act. The rights of the accused to be present, of confrontation, of counsel, and of public proceedings do not await the swearing of the petit jury, but are all enjoyed at the jury selection stage. That defendants enjoy such rights during jury selection ought not be surprising. Due process implies a tribunal both impartial and mentally competent to afford a hearing, a jury capable and willing to decide the case solely on the evidence before it."

The Fifth Circuit correctly went on to hold "that double jeopardy does not attach until a jury is sworn does not suggest that selection of the petit jury is preliminary." Similarly, this court should reject the state's contention that since

jeopardy does not attach until after the jury has been selected it is not necessary that the record establish that a defendant has waived his right to have the judge present during the jury voir dire.

Finally, the state contends that even if error has occurred when the judge wrongfully excludes himself from the courtroom the harmless error doctrine should apply. The Third District Court of Appeals in Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983) has held that the error that occurs when the trial judge is not present in the courtroom is always harmful and therefore the harmless error doctrine should not apply.

In arguing that no harm occurs when the judge wrongfully excluded himself from the courtroom the state of Florida completely ignores the pyschological impact that the judge's absence may have on a jury. It is impossible to measure the impact on a juror when he looks to the bench to see the judge and he notices no judge in the courtroom. (See appendix B).

It is Respondent's position that the Third District Court of Appeals correctly concluded that the harmless error doctrine should not apply to a situation where the trial judge wrongfully excludes himself from the trial.

In conclusion, the Third District Court of Appeals consistent with this Court's opinion in Brown v. State, supra, correctly concluded that a defendant has a fundamental constitutional right to have the judge present in the courtroom during jury voir dire and in order for there to be a valid waiver of this right the record must establish a knowing and intelligent

waiver of this right made by the defendant. Furthermore, a defense counsels stipuation does not establish a knowing and intelligent waiver of the constitutional right to have the judge present in the courtroom during jury voir dire.

Therefore, this Court should answer the certified question in such a way as to affirm the Third District Court of Appeals decision in this case.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, respondent respectfully requests this Court to affirm the decision of the Third District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General, RICHARD L. POLIN, 401 N.W. 2nd Avenue, Suite #N-921, Miami, Florida this 13th day of April, 1989.

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