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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 79,~~416~~ 146

ROOSEVELT FRANKLIN,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS,
BUREAU CHIEF
ASSISTANT ATTORNEY GENERAL
FLORIDA EAR NO. 0325791

CHARLES T. FAIRCLOTH, JR,
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0878936

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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TABLE OF CITATIONS

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 79,146

ROOSEVELT FRANKLIN,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, will be referred to herein as "Petitioner" or "the State". Respondent, ROOSEVELT FRANKLIN, will be referred herein as either "Respondent" or "FRANKLIN." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcripts of proceedings below will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

After a jury trial below, respondent was convicted of burglary of a dwelling and he appealed. The First District Court of Appeal affirmed two of the three issues respondent raised on appeal without comment but reversed and remanded for a new trial on the third issue because the trial court erroneously submitted a copy of the jury instructions to the jurors without first consulting with the attorneys. (App. A, p. 1-2). The district court based its decision on this Court's opinion in Williams v. State, 488 So.2d 62 (Fla. 1986), a progeny of this Court's opinion in Ivory v. State, 351 So.2d 26 (Fla. 1977).

The district court in the same opinion, however, certified as a matter of great public importance the question:

> DOES A TRIAL COURT COMMIT PER SE REVERSIBLE ERROR WHEN, IN RESPONSE TO THE JURORS' REQUEST TO GIVE THEM AN ADDITIONAL PORTION OF THE ORIGINAL INSTRUCTIONS PREVIOUSLY FURNISHED THEM, IT GIVES THEM INSTEAD AN ENTIRE SET OF THE WRITTEN INSTRUCTIONS, WITHOUT PROVIDING PRIOR NOTICE TO THE ATTORNEYS FOR THE DEFENSE AND THE STATE?

The state filed its notice invoking the discretionary review of this Court on December 24, 1991. This Court entered its order postponing decision on jurisdiction and setting the briefing schedule on January 8, 1992. This brief on the merits follows.

SUMMARY OF ARGUMENT

This Court should answer the certified question "no". A trial court does not commit per se reversible error when, in response to the jurors' request to give them an additional portion of the original instructions previously furnished them, it gives them instead an entire set of the written instructions, without providing prior notice to the attorneys for the defense and the state. By using the **proper** analysis as described in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court will find that the error complained of is harmless beyond a reasonable doubt and therefore cannot be per se reversible error. This Court should reverse the First District's opinion in the present case and affirm the conviction below.

ARGUMENT

ISSUE I

DOES A TRIAL COURT COMMIT PER SE REVERSIBLE ERROR WHEN, IN RESPONSE TO THE JURORS' REQUEST TO GIVE THEM AN ADDITIONAL PORTION OF THE ORIGINAL INSTRUCTIONS PREVIOUSLY FURNISHED THEM, IT GIVES THEM INSTEAD AN ENTIRE SET OF THE WRITTEN INSTRUCTIONS, WITHOUT PROVIDING PRIOR NOTICE TO THE ATTORNEYS FOR THE DEFENSE AND THE STATE?

This Court should answer the certified question "no". A trial court does not commit per se reversible error when, in response to the jurors' request to give them an additional portion of the original instructions previously furnished them, it gives them instead an entire set of the written instructions, without providing prior notice to the attorneys for the defense and the state. The First District's holding to the contrary in the present case is based on two prior, opinions of this Court; Williams v. State, 488 So.2d 62 (Fla. 1986) and its progenitor Ivory v. State, 351 So.2d 26 (Fla. 1977). Neither of these decisions applied the proper analysis to the issue here. A trial court's alleged error in furnishing a jury with jury instructions without notice to either counsel is subject to a harmless error analysis. This Court should either overrule its prior holdings, or limit them to their facts, reverse the First District's decision below, and affirm the conviction below.

The state agrees that the trial court erred by not consulting with either counsel before it elected to answer the jury's request for reinstruction by giving the jury the entire

set of written instructions. However, the state does not agree that such an error is per se reversible and cannot be found to be harmless. This Court finding such an error to be per se reversible contributes nothing to the administration of justice and in fact is detrimental to the administration of justice by requiring reversal and retrial where a defendant has plainly suffered no prejudice or harm.

In Ivory, supra this Court stated:

> Any communication with the jury outside the presence of the prosecutor, the defendant, the defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless . . . We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id. at 28, citing Slinsky v. State, 232 So.2d 451, 453 (Fla. 4th DCA 1970) ("We feel that the practice here employed . . . violated the defendant's rights in a harmful way and entitles him to a new trial . . .").

Two problems exist with this analysis. First, any communication with the jury outside the presence of the defendant and opposing counsels is not harmful per se. Harmful

defendant and opposing counsels is not harmful per se. Harmful error occurs when a trial judge or anyone else interferes with the jury deliberation process. Hendrickson v. State, 556 So.2d 440, 441 (Fla. 4th DCA 1990), receded from on other grounds, Farrow v. State, 15 F.L.W. D2762 (Fla. 4th DCA 1990). No one interfered with the jury deliberation process in the instant case, least of all the trial judge. Subsequent to Ivory, this Court wrote extensively on harmless and per se reversible error, and the analysis required to find such error, in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986):

> The harmless error test . . . places the burden on that state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.
>
> * * * * *
>
> In comparing the per se reversible rule and the harmless error rule, and determining their applicability, it is useful first to recognize that both rules are concerned with the due process right to a fair trial. The problem which we face in applying either rule is to develop a principled analysis which will afford the accused a fair trial while at the same time not make a mockery of criminal prosecutions by elevating form over substance.
>
> * * * * *
>
> Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." In other words, those errors which are always harmful. The

> test of whether a given type of error can be as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved in not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmful error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless.

Id. at 1135 (citations omitted) (emphasis supplied); see, Ivory, supra, at 64-66 (Shaw, J. and McDonald, J., concurring in result only),

This Court in Williams v. State, 488 So.2d 62 (Fla. 1986), citing Ivory, supra, held that a violation of Rule 3.410 is per se reversible error. The First District in the case at bar based its decision on Williams. Williams, however, is totally lacking in any analysis of why the denial of a procedural right constitutes per se reversible error. This Court merely recited the words of Ivory and Slinsky, supra, and agreed with their holdings. Id. at 64. In fact, when one looks closer, neither Ivory nor Slinsky contain any analysis as to whether the error alleged was or was not reversible per se.

This court in Ivory set out the question as "is the failure to follow the rule [3.410] so prejudicial that a new trial is required?" Id., 351 So.2d at 27. This Court quoted Slinsky and agreed that failure to follow the rule's requirement of notice to counsel was "so fraught with potential prejudice that it cannot be considered harmless." Id. at 28. This Court then held it was prejudicial error for a trial court to respond to a jury request without the prosecutor, the defendant and the defense attorney being present and having the opportunity to participate in the discussion. This Court did not engage in any analysis of whether the error was prejudicial or harmless, it merely quoted Slinsky and held that it was prejudicial.

But when one examines the Fourth District's opinion in Slinsky, one finds that the specifics of the jury's request in that case were not recorded, and for that reason the court could not determine whether the denial of the request had any effect in the guilt determination. Id. 232 So.2d at 452. Since the precise test for prejudicial error is whether the error had any effect on the verdict or the conviction, DiGuillo, supra, the record in Slinsky obviously provided no basis for such an analysis. Instead, the Slinsky court merely set out a number of quotations from cases holding various communications between judge and jury to be error. Id. at 452-453. None of these cases discuss why the alleged error could not be held to be harmless.

In the present case, however, the request is part of the record as well as being set out in the First District's opinion. (App. A, p. 2). In addition, this Court now has the benefit of its DiGuilio analysis for application to the certified question. In sum, the jury in the present case sent the judge a request to hear or see a portion of the instructions that concerned inferences usable to find guilt of a burglary of a dwelling. The judge sent back to the jury a copy of all the written instructions. Applying the DiGuilio analysis to the question, one quickly finds that the error is not per se reversible.

The DiGuilio analysis to find per se reversible error is the harmless error test, i.e., can the state prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or that there is no reasonable possibility that the error contributed to the conviction. Id. 491 So.2d 1135. When this Court properly applies the harmless error test to the facts of the instant case it quickly becomes apparent that the state carried its burden to show that the error complained of did not contribute to the verdict and that there was no reasonable possibility that the error contributed to the conviction.

This is for three reasons; one, the alleged error, sending in a copy of the written jury instructions without notifying counsel, is an act permitted by the Florida Rules of Criminal Procedure. Two, under recent case law, it would have been error

for the trial court to not have sent the jury complete written instructions upon their request. Three, what the trial court gave the jury was what they had already heard with no objection from the defense. If the trial court's action is permitted by the rules and it is error to not do what the trial court did, the trial court's action cannot possibly be always harmful. Further, if the jurors had already heard the instructions of which the trial court gave them a written copy, the copy cannot have affected the verdict. The jurors had already heard what they were given.

Rule 3.400 of the Florida Rules of Criminal Procedure allows a trial court to permit a jury to take a copy of any instructions given into its deliberation, but if the jury takes any instruction all of the instructions must be taken. Fla.R.Crim.P. 3.400(c). Rule 3.410 requires that after the jurors have retired, if they request additional instructions the court may give them additional instructions, but only after notice to the opposing counsels. Fla.R.Crim.P. 3.410. Applying these rules to the present case leads one to find that while it is within a trial court's discretion to let a jury take written instructions when they first retire, it is procedural error for the court to exercise its discretion to send the jurors the same written instructions after they begin deliberations unless both counsels are notified.[1]

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[1] How a written copy of exactly the same instructions as

Yet several Florida **cases** hold that it is error if a trial court does not send the entire set of written instructions when the jury requests reinstruction on a portion of the instructions. See, e.g. Zarattini v. State, 571 So.2d 553 (Fla. 4th **DCA** 1990) (applying requirements of Fla.R.Crim.P. 3.400(c), not 3.410, to issue); Byrd v. State, 582 So.2d 640 (Fla. 3rd **DCA** 1991) (same comment) and cases cited therein.[2] If the rules require that the trial court send the jurors the entire set of written instructions, and it is error to not do so, then the trial court's actions in the present case, while erroneous because of the lack of natice to counsel, were plainly harmless error. At most, the counsels could have objected. But the court would have been required to overrule any objection and perform as it did in order to not err. The jurors would have

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previously orally given a jury constitutes "additional instructions" escapes the state. The contents are precisely the same. See, Williams, supra (jury's request for copy of instructions). Such classification, however, has no bearing on the lack of harm caused by the error in the present case.

[2] The state would point out that both districts found authority under Fla.R.Crim.P. 3.400(c) to require the respective trial courts to reinstruct the jury with the entire written set of instructions. Unlike Rule 3.410, Rule 3.400(c) has no notice requirement. If Rule 3.400(c) is applicable to a trial court's reinstruction of a jury and requires the judge to reinstruct the jury by sending the jurors a copy of the entire set of written instructions, then the trial court ,in the present **case** did not err by failing to notify counsel when it sent the jury the complete set of written instructions. Even if the trial court did err, the error must be subjected to a harmless error test. See Williams, supra at 64 ("Communications outside the express notice requirement of Rule 3.410 should be analyzed using harmless error principles.")

received exactly the same instruction whether the counsels were there or not. The error was thus harmless.[3]

Further, since the jurors received a written copy of the entire oral instructions they had already heard, there is no reasonable possibility that the error affected the verdict. Cf., Byrd, supra (reinstruction with only portion of written instructions allows jury to place undue emphasis on reinstruction given); Chappell v. State, 423 So.2d 984 (Fla. 3rd DCA 1982) (same comment). The jurors in the present case received a written copy of instructions they had already heard, instructions permitted into the jury room by rule, and instructions that the trial court was required to give in their entirety. The presence or absence of counsel at the time the court sent the written instructions to the jury could not have contributed to the verdict, the jury received exactly that to which it was entitled. For the same reason, there is no reasonable possibility that the alleged error contributed to the conviction, especially when one considers the overwhelming evidence presented against the respondent at trial, including an

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[3] The state would briefly note that the federal courts have consistently applied a harmless error an analysis to communications between judge and jurors without notice to counsel. See, e.g., Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 257 (1983); United States v. Brooks, 786 F.2d 638 (5th Cir. 1986), cert. denied, 93 L.Ed.2d 126 (1986); United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986), cert. denied, 93 L.Ed.2d 84; and United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986). This court should do the same.

eyewitness to his carrying away items from the victim's house (T 50-64).

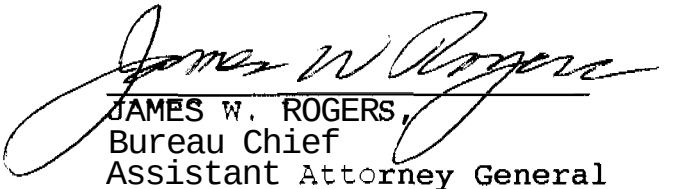
When this Court applies the analysis directed by DiGuilio, supra, to the certified question it is plainly apparent that the trial court's procedural error in failing to notify counsel was harmless and cannot be categorized as per se reversible error. It could not have affected the verdict or contributed to the conviction; the jurors received only what they should have received. The error being harmless, this Court must reverse the First District's decision and affirm the conviction below. For this Court to do otherwise is to commit the very error it warned of in DiGuilio; "if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless." Id., at 1135. This Court should affirm the conviction below.

CONCLUSION

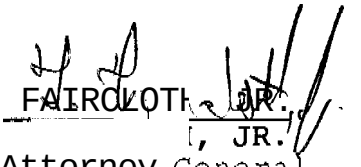
For the reasons and argument set forth above, the state request this Court reverse the First District's decision in the present case and affirm the conviction below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS,
Bureau Chief
Assistant Attorney General
Florida Bar #0325791



CHARLES T. FAIRCLOTH, JR.
Assistant Attorney General
Florida Bar #0878936

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to James C. Banks, Esq., 307 West Park Avenue, Tallahassee, Florida 32301, this 3rd day of February, 1992.

CHARLES T. FAIRCLOTH, JR.
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 79,416

ROOSEVELT FRANKLIN,

Respondent.

APPENDIX

90-111081-TR

N

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOV 27 1991

ROOSEVELT FRANKLIN,

Appellant,

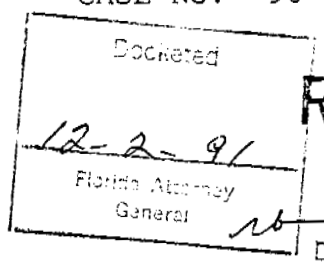
vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 90-1868



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NOV 26 1991

DEPT. OF LEGAL AFFAIRS
Division of General Legal Services

Opinion filed November 26, 1991

An Appeal from the Circuit Court for Alachua County.
Robert P. Cate, Judge.

Nancy Daniels, Public Defender; and James C. Banks, Special Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General: and Charles T. Faircloth, Jr., Assistant Attorney General, for Appellee.

ERVIN, J.

Appellant, Roosevelt Franklin, appeals his conviction and sentence for burglary *of* a dwelling. We affirm without comment Franklin's first two issues, but, as *to* the third issue, we reverse and remand for new trial because the trial court

erroneously submitted a copy of the jury instructions to the jurors without first consulting with the attorneys.

After retiring to deliberate, the jury submitted the following question to the court:

> Could we hear or see that portion of the instructions to the jury concerning inferences that may be used to conclude guilt of burglary of a dwelling? There was an element concerning observing an individual in possession of items taken from the dwelling.

Without notifying either counsel, the trial judge gave a copy of the entire set of written instructions in the case to the jury, which thereafter returned a verdict of guilty of burglary of a dwelling and of the lesser included offense of petit theft.

This case **appears** to be controlled by Williams v. **State**, 488 So.2d 62 (Fla. 1986), in which the jury, after retiring for deliberations, asked the bailiff for a copy of the jury instructions. Without advising the attorneys of the jury's request, the judge told the jurors that he could not provide them with a written copy but that he would reread the instructions to them, notwithstanding that they did not request the rereading, The supreme court construed the jury's request for a copy of the instructions as a request for "additional instructions," as provided for in Florida Rule of Criminal Procedure 3.410, and concluded that, pursuant to the rule, the state and the defense should first have been given an opportunity to be heard on the question. The court also held that a violation of Rule 3.410 is per *se* reversible error. Rule 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attornev and to counsel for the defendant.

(Emphasis added.)

Similarly, in the case at bar, although the trial court could have, in its discretion, given a copy of the instructions to the jurors at the time the latter retired, as provided in Florida Rule of Criminal Procedure 3.400,[1] the court did not do so, and when the jurors later submitted their question to the court, the court should have consulted with counsel before causing the instructions to be delivered to the jury room. Because it appears from Williams that permitting the jurors to take with them written instructions without prior notification to the attorneys is a direct violation of Rule 3.410, and thus per se reversible error, the harmless error doctrine is inapplicable.

Pursuant to a request by the state, we certify the following question to the Florida Supreme Court as one of great public importance:

> **DOES A TRIAL COURT** COMMIT PER SE REVERSIBLE **ERROR** WHEN, **IN RESPONSE** TO THE **JURORS'**

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[1] **The rule provides, in part,** "The **court may permit the** jury, **upon retiring for deliberation, to take to the jury room: . . . (c) any instructions given; but if any instruction *is*** taken **all the instructions shall be taken."**

REQUEST TO GIVE THEM AN ADDITIONAL PORTION OF THE ORIGINAL INSTRUCTIONS PREVIOUSLY FURNISHED THEM, IT GIVES THEM INSTEAD AN ENTIRE SET OF THE WRITTEN INSTRUCTIONS, WITHOUT PROVIDING PRIOR NOTICE TO THE ATTORNEYS FOR THE DEFENSE AND THE STATE?

REVERSED and REMANDED for new trial.

SHIVERS AND WIGGINTON, JJ., CONCUR.