IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,146

ROOSEVELT FRANKLIN,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Franklin v. State, 16 FLW D2981 (Fla. 1st DCA Nov. 26, 1991) (copy attached as an appendix).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate, with the following additional information.

Respondent was convicted of burglary of a dwelling upon the testimony of the victim's neighbor, Joseph Miller, who observed respondent carrying a microwave oven wrapped in a white pillowcase or sack from the victim's house. Respondent placed the item on the porch of a nearby abandoned house and walked away (T 50-56).

The jury was instructed on two inferences of guilt -- the inference from stealthy entry (T 241-42), and the inference from possession of recently stolen property (T 242-43).

After the jury had been deliberating for 20 minutes (T 252-54), the court read the following question from the jury and made the following announcement:

> 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 consulting counsel for the state or for the defense, I have elected to give a copy of the written instructions to the jury. (T 254).

No other reference to this event is found in the record. Whether the court met with the jury, talked to the jury, brought the jury into the courtroom, or had the bailiff communicate with the jury is not disclosed by the record.

Exactly what "written instructions" were delivered to the jury is not disclosed by the record.

There are written instructions in the record (R 27-43), containing the instructions on the two inferences noted above (R 30-31).

III SUMMARY OF ARGUMENT

There is no need for this Court to accept review. It has reaffirmed the per se reversible error rule on numerous occasions when the trial judges of this state overstep their bounds and instruct a jury without the presence of counsel or the defendant.

This Court has held that the type of question asked by the jury in the instant case is a request for additional instructions which triggers the need for counsel to be notified prior to answering the question.

The per se reversible error rule is the only adequate solution to the problem of judicial misconduct, and the only way to evaluate the error in the absence of a record.

The state has not demonstrated that this Court should abandon its precedent and adopt a harmless error approach.

This Court should approve the decision of the First District Court of Appeal below and answer the certified question in the affirmative.

Even if a harmless error approach is adopted, the error in the instant case was not harmless beyond a reasonable doubt.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

A TRIAL COURT DOES COMMIT PER SE REVERSIBLE ERROR WHEN, IN RESPONSE TO THE JURORS' REQUEST TO GIVE THEM AN ADDITIONAL PORTION OF THE ORIGINAL INSTRUCTIONS PREVIOUSLY FURNISHED TO 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.

There is no need for this Court to accept review. It has reaffirmed the per se reversible error rule on numerous occasions when the trial judges of this state overstep their bounds and instruct a jury without the presence of counsel or the defendant.

Florida Rule of Criminal Procedure 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 qiven and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

(emphasis supplied).

A violation of the notice requirements of Rule 3.410 is per se reversible error. Williams v. State, 488 So.2d 62 (Fla. 1986). Accord: Ivory v. State, 351 So.2d 26 (Fla. 1977); Taylor v. State, 385 So.2d 149 (Fla. 3d DCA 1980); Coley v. State, 431 So.2d 194 (Fla. 2d DCA 1983); Cherry v. State, 572 So.2d 521 (Fla. 1st DCA 1990); Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991); and Porr v. State, 585 So.2d 944 (Fla. 2nd DCA 1991). Actual notice is not dispositive; failure

to consult counsel in open court is alone sufficient to find error. Curtis v. State, 480 So.2d 1277 (Fla. 1985).

The state argued in the lower tribunal that the jury in the instant case did not request "additional instructions" at all, but rather was asking for the written instructions which the court could have delivered under Florida Rule of Criminal Procedure 3.400(c). This Court has not construed the rule in the manner contemplated by the state.

The term "additional instruction" in the rule has been given a flexible construction by the courts. In Ivory, the Court held it prejudicial error to respond to a request from the jury without notifying and receiving input from counsel.

In Curtis, the jury did not ask for further instruction in the strict sense, but rather asked the court if there was a record of a certain statement attributed to the defendant, and if the statement could be treated as evidence. The question in the instant case is highly analogous, since the question in both this case and in Curtis involved how the evidence is to be interpreted by the jury.

In ruling that the facts of Curtis triggered the requirements of Rule 3.410, this Court observed:

> The "response" contemplated by Ivory, 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.
>
> "Additional instructions" are defined thusly: "If during the course of deliberations

> the jury is unclear about a particular point of law or aspect of the evidence it may request the court for additional or supplementary instructions." Black's Law Dictionary 769 (rev. 5th ed. 1979). A "jury instruction" is a "direction given by the judge to the jury concerning the law of the case." Id. Obviously, the trial judge's response in this case was a "direction ... concerning the law of the case" in response to a question about an "aspect of the evidence" -- in short, the trial judge gave additional instructions to the jury without complying with rule 3.410.

480 So.2d at 1278.

Likewise, in Bradley v. State, 513 So.2d 112 (Fla. 1987), the jury sent out a note asking to read the original police report. The judge sent back a note saying "No," because the report was not in evidence, The state convinced the Fifth District that this was not a request for instructions or for testimony to be reread within the meaning of Rule 3.410. Bradley v. State, 497 So.2d 281 (Fla. 5th DCA 1986). This Court relied upon the above-quoted language in Curtis and disagreed.

In this case, the jury's question dealt with an "aspect of the evidence." The state presented evidence that respondent committed a burglary stealthily and was seen shortly thereafter carrying some of the property, thereby giving rise to the statutory inferences of guilt to be drawn from stealthy entry under Section 810.07(1), Florida Statutes, and possession of recently stolen property under Section 810.022(2), Florida Statutes. Thus the question implicated both "an aspect of the evidence" and the "law of the case."

The state now asserts that this Court should overrule Ivory and its progeny and apply a harmless error analysis to the admittedly blatant violation of Rule 3.410. The state has not demonstrated any compelling reason to do so.

In Ivory, this Court quoted favorably from Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970) in adopting the per se rule of reversal without regard to harmless error:

> As to whether to open court and have the defendant and his counsel present constituted harmful error, the court in Slinsky, at 453, said:
>
> > [W]e feel that the practice here employed, innocently intended as undoubtedly it was, violated the defendant's rights in a harmful way and entitles him to a new trial, ... [T]he trial court, faced with such request, should have advised counsel of it and re-convened court with defendant in attendance. ... This would afford counsel an opportunity to perform their respective functions. They could advise the court, object, request the giving of additional instructions or the reading of additional testimony, and otherwise fully participate in this facet of the proceeding. ...
>
> We agree. Any communication with the jury outside the presence of the prosecutor, the defendant, and the defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

Ivory, 351 So.2d at 27-28; emphasis added,

In the instant case, the jury apparently wanted to be reinstructed on the inferences of guilt to be applied to the facts of this case. No other reference to this event is found in the record. Whether the court met with the jury, talked to

the jury, brought the jury into the courtroom, or had the bailiff communicate with the jury is not disclosed by the record.[1]

The judge only disclosed that he had "elected to give a copy of the written instructions to the jury." Respondent asks: Which written instructions?

We do not know whether the judge sent all of the written instructions to the jurors. We do not know whether he sent just the part they were requesting. We do not know whether he highlighted the part they were requesting. We do not know whether he omitted the portions relating to reasonable doubt and the presumption of innocence. We do not know if the jury ever found the answer to its question in whatever written instructions it had received.

We do know that neither respondent nor his attorney was present when this event occurred.

Because of all of these unknowns, the procedure used by the judge "is so fraught with potential prejudice that it cannot be considered harmless." Ivory, supra. The presence of counsel is necessary for four reasons: (1) to make a record of what transpired; (2) to give the opportunity to object to answering the jury's question; (3) to give the opportunity to argue the reasons why the jury's inquiry should or should not

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[1]Respondent would note that the judge also violated Florida Rule of Judicial Administration 2.070, which requires all proceedings to be reported.

be answered; and (4) to aid the court in drafting a correct answer.

The state has failed on at least three occasions in the last six and one half years to convince this Court to overrule Ivory. This Court emphatically rejected the state's argument with the following language in 1985 in Curtis:

> The state urges that when the record is adequate to show lack of prejudice, reversal is not 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. [emphasis in original] Without this process, preserved in the record, it is impossible to determine whether prejudice has occurred during one of the most sensitive stages of the 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 [sic] 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, 480 So.2d at 1278-79 (emphasis added).

This Court recently explained its reason for the prophylactic rule in Colbert v. State, 569 So.2d 433, 435 (Fla. 1990):

> This per se reversible error rule evolved as a prophylactic procedure to ensure that a trial judge's response to a jury request for additional instructions or to have testimony read is made in the presence of counsel. ... The particular evil rule 3.410 and the per se error standard of Ivory were designed to prevent is the lack of notice to counsel, coupled with the lost opportunity for counsel to argue and to place objections on the record.

The state failed in 1986 to convince this Court to overrule Ivory in Williams, supra. It failed in 1987 in Bradley, supra. Nothing has changed in the last six and one half years to cause this Court to overrule Ivory and its progeny.

This Court has held that the presence of the judge is absolutely required when the jury asks a question. In Brown v. State, 538 So.2d 833 (Fla. 1989), the judge left the courthouse during the jury's deliberations and when the jury requested to have transcripts of some testimony, both counsel telephoned the judge. Although the judge offered to return to the courthouse, it was agreed that counsel could inform the jury that it could not have the transcripts.

In addition to holding that Brown did not personally waive the judge's presence, this Court also adopted a per se rule of reversal:

> More importantly, however, we hold that the judge's presence cannot be waived when a jury wishes to communicate with the court

> during its deliberations. Free discourse is essential in such a situation but is thwarted by the judge's absence. ... No one can say at this point that the judge's absence did not have a detrimental effect on the jury's deliberations. The possibility of prejudice is so great in this situation that it cannot be tolerated. We hold, therefore, that communications from the jury must be received by the trial judge in person and the absence of the judge when a communication is received and answered is reversible error. We disagree with the state that Brown's failure to object precludes our consideration of the judge's absence.

Brown, 538 So.2d at 836; emphasis added. See also Young v. State, 16 FLW D3101 (Fla. 1st DCA Dec. 13, 1991), in which the lower tribunal interpreted Brown as a per se rule of reversal.

The same is true when the judge responds to a jury request in the absence of counsel and the defendant. The state cannot claim at this point that counsel's absence "did not have a detrimental effect on the jury's deliberations.''

The state seeks to have this court extend the harmless error rule of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) to respondent's situation. DiGuilio held that a comment on a defendant's post-arrest silence may be harmless error, depending upon the circumstances. It is not a panacea or a cure of all sins visited upon a defendant during a trial, as the state seems to believe. Indeed, the DiGuilio court noted that some errors cannot be harmless:

> Denial of counsel is always harmful, regardless of the strength of the admissible evidence, and can be properly classified as per *se* reversible.

DiGuilio, 491 So.2d at 1137.

DiGuilio cannot apply to the instant case because respondent was denied the right to counsel and to be present when the judge reinstructed the jury in counsel's absence. Moreover, DiGuilio did not consider the prophylactic effect a per se rule of reversal has on judicial misconduct.

Of course, the burden is on the state to demonstrate harmless error, by showing beyond a reasonable doubt that the error did not affect the jury in any way nor contribute to the verdict. Traylor v. State, 17 FLW S42, 48 (Fla. Jan. 16, 1992).[2] There is no way to measure harmful/harmless error when we do not know the procedure used by the judge, nor what he told the jury, nor its effect on the jury. The only way to measure harmful/harmless error is to have the entire procedure on the record, in the presence of counsel and the defendant.

The state invites this Court to blindly follow the federal courts, and broadly asserts they "have consistently applied a harmless error an [sic] analysis to communications between judge and jurors without notice to counsel." Brief of petitioner at 12, note 3. This is not entirely true, if one reads the cases cited by the state.

Rushen v. Spain, 464 U.S. 114 (1983) approved an ex parte communication between the judge and a juror when the juror told the judge during a 17-month-long trial that she did recall

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[2]The state is still mentioning the "overwhelming evidence'' test, brief of petitioner at 12, even after Traylor.

knowing that a member of the Black Panther Party had killed her friend in 1968, contrary to what she said during jury selection. The Supreme Court found the communication to be harmless because:

> Their ex parte communication was innocuous. They did not discuss any fact in controversy or any law applicable to the case.

Rushen v. Spain, 464 U.S. at 121. The instructions given here can hardly be called "innocuous." They did discuss the "law applicable to the case."

In United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986), when a jury became deadlocked, the judge caused a note to be delivered which said: "Please continue your deliberations in the above entitled case.'' The federal court found the ex parte communication to be error, but harmless beyond a reasonable doubt. The note did not coerce a verdict, since the jury was out for 3 1/2 more hours after receiving it.

United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986) is not entirely on point. Although counsel was not permitted to address the court prior to reinstruction, counsel was present when the judge reinstructed the jury.

In United States v. Brooks, 786 F.2d 638 (5th Cir. 1986), the jury requested transcripts of the testimony of two witnesses. The judge denied the request, without consulting counsel, because it would have taken two days for the court reporter to prepare the transcripts. The appellate court found

error in denying the request without consulting counsel, but harmless under the circumstances.

None of these cases cited by the state is persuasive. None deals with the judge communicating with the jurors and reinstructing them on a material matter in the absence of counsel.

If we must turn to the federal courts to decide what is fair for the citizens of Florida, respondent would cite Rogers v. United States, 422 U.S. 35 (1975). There, the jury sent out a note asking whether it could find the defendant "Guilty as charged with extreme mercy of the Court." The judge instructed the marshal to tell the jury the answer was "yes." This was done without notice to the defendant or his attorney. Even though the issue had not been raised in the appellate court or in the Supreme Court, the high court unanimously reversed:

> Federal Rule Crim. Proc. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the empaneling of the jury and the return of the verdict. Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded,

Rogers, 422 U.S. at 39.

Likewise, in United States v. De Hernandez, 745 F.2d 1305 (10th Cir. 1984), the jury sent out a question: "Do all decisions have to be unanimous?" The judge responded, in the absence of the parties or counsel: "All verdicts you return

have to be unanimous one way or the other." The appellate court found the answer to be a reinstruction and confusing and reversed:

> The trial court's instruction, delivered ex parte, deprived the defendants of any opportunity of clarifying the ambiguity created by the supplemental instruction. That deprivation constitutes reversible error.

De Hernandez, 745 F.2d at 1308.

Since noncompliance with the notice requirement is per se reversible error in Florida, and since the state has shown no compelling reason to overrule the Ivory line of cases, this Court should approve the decision of the First District Court of Appeal below and answer the certified question in the affirmative. Even if the harmless error test is adopted, the error in the instant case cannot be harmless beyond a reasonable doubt.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court decline to accept review; or, in the alternative, answer the certified question in the affirmative and approve the decision of the First District Court of Appeal below.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charles T. Faircloth, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Roosevelt Franklin, #092580, P.O. Box 2000, Blountstown, Florida 32424, this 12 day of February, 1992.

P. DOUGLAS BRINKMEYER
. DOUGLAS BRINKMEYER

picked up litter on the property. While the resident manager had indicated that the city had forbidden them to cut down trees (or tree roots), no one from the city testified to that effect. The level of control and responsibility was a factual question to be resolved by the jury. Even if we accept Regency's arguments that they had no duty to warn and that they were legally unauthorized to correct the defect, the jury could still find that Regency was negligent in maintaining the pet walk in a location with exposed tree roots.

IV. Natural Conditions

Regency asserts that a natural condition may not be considered a defect. A natural condition on a piece of property is not normally considered a defect. ***Sullivan v. Silver Palm Propenies, Inc.***, 558 So.2d 409 (Fla. 1990); ***Cassel v. Price,*** 396 So.2d *258* (Fla. 1st DCA 1981), ***rev. denied,*** 407 So.2d 1102 (Fla. 1981). A natural condition, however, may constitute a danger depending upon the use of the property. Thus, a person who invites people to utilize a piece of property in a particular manner may become liable if their invitee is injured as a result of a natural condition. ***Butler v. Sarasota County,*** 501 So.2d 579 (Fla. 1986); ***Bailey Drainage Dist. v. Stark, 526*** So.2d 678 (Fla. 1988). In *Butler, supra*, the county asserted that it was not responsible 'when a child drowned because the undercurrents and tides which caused the condition were naturally occurring conditions not created by the county. The supreme court rejected the county's argument and held that when the county created the swimming area, it assumed the duty to operate it safely:

> The duty of care is no different for a public owner than a private owner. In this instance, the public owner did not create the specific dangerous condition but did create a designated swimming area where the dangerous condition existed.

Id. at 579. In the instant case, the jury could have held Regency responsible for creating and maintaining a pet walk where a dangerous condition existed.

We, therefore, find that the trial court did not err in denying the defendant's motion for a directed verdict.

As to the points on cross appeal, we find that the trial court did not abuse its discretion in entering the order of remittitur. *Zambrano v. Devanesan,* 484 So.2d 603 (Fla. 4th DCA 1986), rev. *denied*, 494 So.2d 1150(Fla. 1986). Section 768.74(4), Fla. Stat., provides, however, "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." The statutory section has been construed to mean that when a court enters an order of remittitur, the order itself must provide the adversely affected party the option of accepting a remittitur or of having a new trial limited to the issue of damages. *Shalhub v. Andrews Roofing and Improvement Co., 530* So.2d 1052 (Fla. 3rd DCA 1988). The order in the instant case fails to provide for the option of a new trial. We, therefore, remand to the trial court to enter an order giving the appellees/cross appellants the opportunity to either accept the remittitur or have a new trial on the issue of damages. (JOANOS.C.J., and WENTWORTH, Senior Judge. concur.)

'A duty may arise to take some form of corrective action even if the defect is not on the property being utilized for a particular purpose. Conditions on adjoining property may create a dangerous condition. Bailey Drainage Dist. v. Stark, 526 So.2d 678 (Fla. 1988).

* * *

TUMELTY v. BURNUP & SIMS. 1st District. #91-247. November 20, 1991. An Appeal from an order of the Judge of Compensation Claims. AFFIRMED. *T.G. Lee Foods, Inc. v. Farley,* 544 So. 2d 265 (Fla. 1st DCA 1989).

SMITH v. STATE. 1st District. #90-3684. November 20, 1991. An Appeal from the Circuit Coun for Escambia County. AFFIRMED. *See Myrick v. State,* 582 So.2d 797 (Fla. 1st DCA 1991).

DUGGER v. HUGELIER. 1st District. #91-71. November 15, 1991. An Appeal from the Circuit Court for Lon County. AFFIRMED. *Dugger v. Anderson,* 16 F.L.W. D2696 (Fla. 1st DCA Oct. 14, 1991).

ROBERTS v. DUGGER. 1st District. #90-3751. November 13, 1991. An Appeal from the Circuit Court for Leon Counly. AFFIRMED. See *Miller v. Dugger, 565* So.2d *846* (Fla. 1st DCA 1990).

HOWARD v. STATE. 1st District. 490-2718. November 12, 1991. Appeal from the Circuit Court for Duval County. AFFIRMED. *State v. Phillips,* 575 So.2d 1313 (Fla. 4th DCA 1991).

* * *

Criminal law—Jury instructions—Trial court committed per se reversible error when, in response to jurors' request to give them an additional portion of the original instructions previously furnished them, it gave them instead an entire set of the written instructions without providing prior notice to the attorneys for the defense and the state—Question certified

ROOSEVELT FRANKLIN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90.1868. 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 far 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 3.4 10provides:

> 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 attorney 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,' 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' 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.)

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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."

* * *

Criminal law—Sentencing—Habitual offender—Life felony is not subject to enhancement under habitual felony offender statute—First degree felony punishable by term of years not exceeding life imprisonment is subject to enhanced sentence of life imprisonment under habitual felony offender statute—Question certified

RANDY LEON GHOLSTON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-02826. Opinion filed November 26, 1991. An Appeal from the Circuit Court for Columbia County. John W. Peach, Judge. Barbara Linthicum, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING OR CERTIFICATION

[Original Opinion at 16 F.L.W. D46]

(PER CURIAM.) Appellee seeks rehearing, arguing that the statutory provisions proscribing sexual battery with a deadly weapon, a life felony, and burglary while armed with a dangerous weapon, a first-degree felony punishable by life, permit enhancement of sentences for these offenses under the habitual offender statute. However, this court's recent opinion in *Sibley v. State*, 16 F.L.W. D2493 (Fla. 1st DCA Sept. 23, 1991), holds that life felonies are not subject to enhancement under the habitual felony offender statute. Further, this court in *Burdick v. State*, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), receded from the rule announced in our original *Gholston* opinion. *Burdick* holds that first-degree felonies punishable by life may be enhanced under the habitual felony offender statute. As in *Burdick*, we certify the following question as one of great public importance:

IS A FIRST-DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

Appellee's motion for rehearing or certification is granted to the extent indicated herein. (BOOTH and BARFIELD, JJ., CONCUR. ERVIN, J., CONCURS & DISSENTS WITH OPINION.)

(ERVIN, J., concurring and dissenting.) I concur with the majority in its certification of the question, and in its holding that life felonies may not be enhanced under the habitual felony offender statute. I otherwise dissent for the same reasons expressed in my dissent in *Burdick v. State*, 584 So.2d 1035 (Fla. 1st DCA 1991) (en banc).

* * *

Criminal law—Sentencing—Habitual offender—Question certified whether Section 775.084(1)(a)1., Florida Statutes (Supp. 1988), which defines habitual felony offenders as those who have "previously been convicted of two or more felonies," requires that each of the felonies be committed after conviction for the immediately previous offense

ANTONIO LAVET MALONE, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-01481. Opinion filed November 26, 1991. An Appeal from the Circuit Court for Okaloosa County. G. Robert Barron, Judge. Nancy A. Daniels, Public Defender, and Nada M. Carey, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) REVERSED AND REMANDED for resentencing under the authority of *Barnes v. State*, 576 So. 2d 758 (Fla. 1st DCA 1991). We certify the following question as one of great public importance:

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE.

(BOOTH, SMITH, AND BARFIELD, JJ., CONCUR.)

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Administrative law—Licensing—Reinstatement of license to practice medicine—Board of Medicine did not err in finding that physician was not qualified to practice medicine at the time it denied reinstatement—Board acted within its authority when it rejected hearing officer's recommended conclusions of law and determined that the hearing officer's findings of fact were not based upon competent substantial evidence—Board erred in permanently barring physician from petitioning for reinstatement where hearing officer's recommended order did not contain that bar, and the issue was not litigated before the hearing officer

MURRAY COHEN, M.D., Appellant, v. DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICINE, Appellee. 1st District. Case No. 90-3516. Opinion filed November 26, 1991. Appeal from an Order of the Department of Professional Regulation, Board of Medicine. Paul Watson Lambert, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Ann Cocheu, Assistant Attorney General, for appellee.

(KAHN, J.) Dr. Murray Cohen appeals an order entered by the Board of Medicine refusing to reinstate Cohen's license to practice medicine in Florida. A hearing officer from the Division of Administrative Hearings issued a Recommended Order recommending to the appellee Board of Medicine that appellant's license to practice medicine be reinstated subject to the practice plan of two years of supervision proposed by appellant. The Board's attorney filed exceptions to the recommended order and urged the Board to permanently bar Dr. Cohen from reinstatement. The Board granted the attorney's exceptions to the recommended order, denied reinstatement and permanently barred Dr. Cohen from reinstatement. Dr. Cohen contends that the Board erred in rejecting the hearing officer's order finding him fit to practice and that the Board erred in permanently revoking his license. We affirm in part and reverse in part.

We agree with the Board that Dr. Cohen has failed to establish any right to reinstatement of his medical license. We note that once a medical license is revoked, there is no absolute right to reinstatement. Although Florida Administrative Code Rule 21M-20.003(1)[1] affords certain former licensees the opportunity to be reinstated, neither the rule nor the governing legislative enactments provide a guaranteed mechanism for relicensure. The Board relies upon the express language of §458.331(4), Florida Statutes (1987), which provides:

> (4) The board shall not reinstate the license of a physician, or cause a license to be issued to a person it deems or has deemed unqualified, until such time as it is satisfied that he has complied with all the terms and conditions set forth in the final order and that such person is capable of safely engaging in the practice of medicine.

The Board acted within its authority pursuant to