IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,146

ROOSEVELT FRANKLIN,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Respondent, Roosevelt Franklin, defendant below, will be referred to herein as "respondent." Petitioner, the State of Florida, will be referred to herein as "the state.'' References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s). References to the Respondent's brief on the merits will be by the use of the symbol "RBM" followed by the appropriate page number(s). References to the Petitioner's brief on the merits will be by the use of the symbol "PBM" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The respondent and petitioner are substantially in agreement on the statement of the case and facts.

SUMMARY OF THE ARGUMENT

Respondent in his brief on the merits essentially contends that the state has not shown any compelling reason for this Court to apply a harmless error analysis to violations of Fla.R.Crim.P. 3.410 and that even if one did apply the analysis the error in the present case was not harmless. The compelling reasons to apply the harmless error test to the facts of the instant case are the laws of Florida and this Court's own prior decisions. Under the required test, the error respondent claims cannot be harmless is plainly harmless. This Court should answer the certified question "no," reverse the decision of the First District, and affirm the conviction below.

ARGUMENT

ISSUE

DOES A TRIAL COURT COMMIT PER SE REVERSIBLE ERROR WHEN, IN RESPONSE THE JUROR'S 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?

Respondent in his brief on the merits essentially contends that the state has not shown any compelling reason for this Court to apply a harmless error analysis to violations of Fla.R.Crim.P. 3.410 and that even if one did apply the analysis the error in the present case was not harmless. The compelling reasons to apply the harmless error test to the facts of the instant case are the laws of Florida and this Court's own prior decisions. Under the required test, the error respondent claims cannot be harmless is plainly harmless. This Court should answer the certified question "no," reverse the decision of the First District, and affirm the conviction below.

The state would first take issue with respondent's repeated assertion that "we" do not know what written instructions the trial judge gave the jurors when he reinstructed them (RBM 9). The written instructions are included in the record in a complete set (R 27-43). There are no other separate instructions in the record. Thus respondent's speculation as to which written instructions

the jury received is just that, speculation, and is unsupported by the record. Reversible error cannot be predicated upon speculation. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1975). Respondent's claims are thus not pertinent to the issue before this Court.

The Legislature has required that appellate courts analyze the injurious effect, the harmfulness, of any alleged error. The Legislature in **8924.33,** Fla. Stat. (1989) mandated that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

This Court, then, must examine the harmfulness of the error in the instant case under the statute and cannot presume the error to be harmful. In doing so, the test to be applied is the one described in DiGuilio, infra, for the analysis of allegedly per ***se*** reversible, i.e., always harmful, error. The First District in its opinion in the instant case simply held that the error was per se reversible and thus the harmless error doctrine was inapplicable. Had the district court applied the proper test as outlined in DiGuilio the harmlessness of the error

below would have been plainly apparent. Since it did not but rather certified the issue to this Court, the state is now asking this Court to perform the proper analysis.

Respondent contends that nothing has changed in the past six and one-half years to cause this Court to overrule its decision in Ivory v. State, 35 So.2d 26 (Fla. 1977) and its progeny (RBM 1-11). What has changed is the test this Court uses to define harmless and per se reversible error. In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court set out the test:

> In comparing the per se reversible error 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 properly categorized as per se reversible is the harmless error test itself...If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible...

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

In short, when the issue before this Court is whether the error in this case is the per se reversible type the test to be applied is the harmless error test as set out in DiGuilio, supra. The problem with Ivory and its progeny, as the state pointed out in its brief on the merits, is that this Court in neither Ivory or the Fourth District in its predecessor Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970), applied any analysis to determine if the error complained of was in fact per se reversible error. Today, however, the DiGuilio test, as that case directs, is to be applied whenever the question of the type of error arises. In the present case the certified question squarely presents this issue. The test is therefore the harmless error test, not an automatic reliance on unanalytical cases decided prior to DiGuilio and without benefit of its analysis.

Respondent, however, counters that DiGuilio cannot apply to the instant case because he was denied the right to counsel and to be present when the judge reinstructed the jury in counsel's absence. Moreover, according to respondent, DiGuilio did not consider the prophylactic effect a per se rule of reversal has on judicial misconduct (RBM 13). Neither one of these reasons to not apply DiGuilio bear close examination, especially when one considers the statutory provisions concerning harmless error and when it may or must be found.

Absent a specific constitutional right to appellate review on a particular issue, the scope of appellate review may be modified by the legislature. Booker v. State, 514 So.2d 1079, 1081 (Fla. 1987). The Florida Legislature has specifically modified the scope of appellate review of alleged errors at trial, including procedural errors as in the present case. *See,* Sections 924.33 and 59.041, Fla. Stat. (1989). Respondent ignores this limitation and instead claims that various rights of his were violated (RBM 13).

First, no one denied respondent's right to counsel. He had counsel throughout his trial, as the record attests (T 1-260). Even if he had been denied his right to counsel, a violation of that right is subject to a harmless error analysis. *See,* Bova v. State, 410 So.2d 1343 (Fla. 1982); McFadden v. State, 424 So.2d 918 (Fla. 4th DCA 1982), rev. denied, 436 So.2d 99 (Fla. 1982). What respondent was actually denied was the procedural right of notice to his counsel pursuant to Fla.R.Crim.P. 3.410 when the jury requested further instruction.

The Legislature has specifically required that procedural errors are to be found harmless unless they have resulted in a miscarriage of justice. Section 59.041, Fla. Stat. (1989) states:

> No judgment shall be set aside or reversed, or new trial granted by any court of this state in any case, civil

> or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

The procedural error below in the present case did not result in a miscarriage of justice since the result of notice to the counsels would have been no different, as the state showed in its brief on the merits (PBM 10-12). The error did not effect the jury's verdict and was thus harmless. Respondent's absence or presence during the reinstruction suffers under the same comparison; the verdict would have been no different. For that matter, Rule 3,410 only requires notice to the counsels, not the defendant.

Second, respondent's claim that DiGuilio does not apply to the instant case because it did not consider "the prophylactic effect of a per se rule of reversal on judicial misconduct" ignores this Court's statements in DiGuilio concerning the function of the per se reversal and harmless error rule. This Court stated:

> The unique and only function of the rule of per ***se*** reversal is to conserve judicial labor by obviating the need to apply harmless error analysis to errors which are always harmful. It is, in short, a rule of judicial convenience. The unique function of the harmless error rule is to conserve judicial labor by holding harmless those errors which,

> in the context of the case, do not vitiate the right to a fair trial and, thus, do not require a new trial, Correctly applied in their proper spheres, the two rules work hand in gloves. Both provide an equal degree of protection for the constitutional right to a fair trial, free of harmful error.

DiGuilio, 491 So.2d at 1135.

In sum, the purpose of the rule of per se reversal is to avoid a court having to analyze under the harmless error test which errors are always harmful. It is a rule of convenience, circumscribed by statute in Florida. The purpose of the rule is not to scare trial courts away from making errors by threatening them with reversal, or to preserve some alleged right of a defendant. The state even doubts whether the per ***se*** reversal rule has any prophylactic effect whatsoever on trial judges. The only punishment such a rule leads to for a trial judge is having to sit and preside over the same trial again. A judge sits and presides over trials every day, reversed or not. If'this Court wants a prophylactic effect it should admonish the trial court in the opinion, not reverse a proper conviction supported by the evidence.

Respondent also attempts to distinguish the federal cases the state cited in its brief on the merits (RBM 13-15) and sets out two federal cases of his own; Rogers v. United States, 422 U.S. 35 (1975) and United States v. Hernandez, 745 F.2d 1305 (10th Cir. 1984) (RBM 15-16). In fact, respondent's attempt to distinguish the state's federal

cases actually emphasize the applicability of the harmless error doctrine to procedural error. Both of respondent's federal cases are easily distinguishable rom the instant case.

Respondent claims that Rushen v. Spain, 464 U.S. 114 (1983) does not apply to the present case because the trial court's instructions in the present case could hardly be called "innocuous" because they "discussed the law applicable to the case." The set of instructions the trial court gave to the jury in the present case did not "discuss" anything. They were a written copy of the verbal instructions the jury had already received, not a conversation between a juror and the judge as in Rushen. The state cited Rushen as one example of a communication between judge and jury without notice to counsel that the federal courts treated as harmless error (PBM 12, fn. 3), not as authority on the lack of harmfulness of the instructions given in the present case.

Respondent does not effectively distinguish any of the state's remaining federal cases. In United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986), the Ninth Circuit found an ex parte communication between the judge and jury to be error, but harmless. Apparently respondent would distinguish Frazin from the instant case by claiming the communication in Frazin, a note, did not coerce a verdict. However, he makes no claim that the communication in the

instant case, a written copy of the instructions, did coerce a verdict. The state would note that the eyewitness' account of the defendant taking items from the victim's house most likely coerced the verdict if anything did.

Respondent also fails to distinguish the state's other federal cases on the point the state for which the cited them: the application of the harmless error teat to ex parte communications between judge and jury without notice to counsel. Respondent's federal cases, however, are easily distinguished. In Rogers, supra, the United States Supreme Court reversed a conviction when the trial court replied to a jury question asking if it could find the defendant "guilty as charged with extreme mercy of the court." The court told the marshal to tell the jury "yes" and the marshal did so. While stating that a violation of Federal Rule 43 (requiring the defendant's presence) may be treated as harmless error, the court held the nature of the information in Rogers did not permit that conclusion. The nature of the information in Rogers was informing the jury that the judge would accept the verdict with the attached sentencing requirement, which was improper. Id., 422 U.S. at 40. That is not the present case.

In the present case, the information the trial court gave the jury upon its question was written copy of the jury instructions the court had previously orally given in the jury in the defendant's presence. The reply did not

indicate an acceptance of any verdict and did not allow the jury to speak to respondent's sentencing, Rogers is thus not authority for reversal of the present case.

In Respondent's second federal case, De Hernandez, supra, the Tenth Circuit reversed a conviction because the judge answered a jury question without notice to counsel. The problem that caused the error in De Hernandez to be harmful, however, was the confusion and possible prejudice caused by the judge's answer speaking to verdicts, while the jury had asked a question concerning decisions. Id., 745 F.2d at 1307. There was no confusion or prejudice caused by the judge's answer in the present case. The jurors received a written copy of instructions they had already heard. The De Hernandez court also wrote:

> An ex parte communication by the trial judge with the jury in violation of Rule 43 may, of course, be harmless error.... Courts have found the harmless error exception to apply when the trial judge has merely repeated an instruction that he had given in the defendant's presence. A reply to a legal question in "strict and exact conformity" with the charge previously given in the presence of the defendant and counsel has been held harmless error.

Id., 745 F.2d at 1310 (citations omitted).

Since the trial court in the present case replied to the jury's legal question by sending in a written copy of the jury instructions the reply was obviously in "strict and exact conformity" with the charge given the jury in the

defendant's and his counsel's presence (T 221-226). There was no ambiguity in the court's response. De Hernandez thus actually supports the state's contention in the instant appeal.

In sum, the Florida Legislature has directed the appellate courts of this state to not presume the harmfulness of any error but review the alleged harmfulness, and to not reverse a conviction for procedural error if the error did not result in a miscarriage of justice. The standard for review of allegedly per se, always harmful, error was set by this Court in DiGuilio, supra. Applying that standard to the facts on the instant case results in finding that the error complained of was harmless beyond a reasonable doubt. This Court should **so** find, reverse the First District's decision, and affirm the conviction below.

CONCLUSION

For the reason set forth above, the state requests this Court analyze the harmfulness of the error below, as the law requires, by applying the proper analysis as outlined in DiGuilio, supra. This Court should then reverse the First District's decision in the instant case and affirm the conviction below.

Respectfully submitted,

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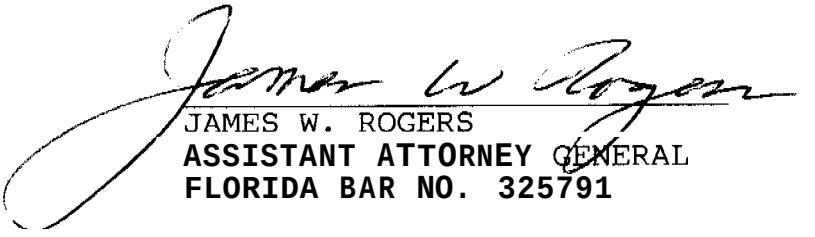

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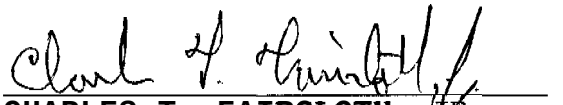

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 9th day of March, 1992.

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