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JUN 12 1992
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S U P R E M E C O U R T O F F L O R I D A

CASE # 79003

CHARLES MILLS,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

[Respecting a Decision of the Fourth District Court of Appeal Announcing Conflict with a Decision of Another District Court of Appeal Rendered in the Petitioner's Direct Appeal in the Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida, Case #88-15979CFA, for Review by the Fourth District Court of Appeal an Adverse Jury Verdict, Appeal #91-905]

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

Petitioner herein is the Appellant below in the Fourth District Court of Appeal and was the Defendant in the Circuit Court at trial.

Respondent herein is the Appellee below, and was the Plaintiff at trial.

Exhibits comprise the attached Appendix and are referred to hereinafter as Exhibit 'A', 'B', 'C', or 'D' as the case may be.

TABLE OF CASES

Additional Authorities

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted in felony circuit court in Broward County, Florida, in case #88-15979CFA, the 17th Judicial Circuit for trafficking and conspiracy to traffick in cocaine, after jury trial. He duly prosecuted his appeal in the Fourth District Court of Appeal, raising eight points of error therein. The district court rendered its written opinion 25 March 1992 affirming on all points. [Exhibit 'A' attached hereto]. The district court wrote only as to the Point I on appeal respecting the trial court sua sponte answering a jury's question during deliberations but without giving Petitioner, or his counsel, an opportunity to know the nature of the question or to participate in forming a response to such question.

The district court in its written opinion on the said point acknowledged that it's holding expressly and directly conflicted with the First District Court of Appeal upon the same issue, citing therefor to Cherry v State, 572 So2d 521 (1DCA 1990).

Petitioner on 6 April 1992 served and filed his 'Motion for Re-Hearing and Clarification' [Exhibit 'B' attached hereto]. The district court denied same by order dated 11 May 1992 [Exhibit 'C' attached hereto].

Petitioner on 31 May 1992 served and filed his 'Notice to Invoke Discretionary Jurisdiction' in the Fourth District Court of Appeal for review of the certified conflict in this Court in order to resolve same [Exhibit 'D' attached hereto].

Pursuant to the aforesaid the instant brief on jurisdiction is submitted.

SUMMARY OF ARGUMENT FOR JURISDICTION BEING ACCEPTED

The Fourth District Court of Appeal in its written opinion expressly acknowledges that it's holding in Petitioner's case conflicts with the reasoning and holding in the First District Court of Appeal's case of CHERRY v STATE, 572 So2d 521 (1DCA 1990). Specifically, the district court in Petitioner's case recognized that the trial court erred when it excluded Petitioner from an opportunity to participate in forming the appropriate response to a question of "law" posited by the jury during that jury's deliberations (viz 'what is the law of trafficking). The district court further recognized that decisions in this Court, and in the First District Court of Appeal as aforesaid, have regarded such error to be per se reversible and not subject to the harmless error doctrine. However, and notwithstanding such extant authority the district court determined to announce a contrary position to the effect that such error is not per se reversible but is rather subject to harmless error analysis. The court then examined the record and determined beyond a reasonable doubt that the error did not affect the verdicts. The district court then further considered the merits of the objection made to the re-instruction (which was allowed to be posed at all only after the jury was sent back to deliberate as re-instructed sua sponte by the trial judge) and determined that the judge had correctly reinstructed the jury and did not have to include the "law" as to entrapment vis-a-vis the crime of trafficking in cocaine and its bearing on the latter offense.

The Fourth District Court of Appeal in Petitioner's case has plainly embarked on a rationale and standard in conflict with the due processes of law heretofore recognized in the other district courts of appeal, in its own prior opinions, and in the decisions of this Court in a very significant, sensitive context of a criminal trial. Such a departure from established precedent ought be addressed by this Court. The discretionary jurisdiction of this Court is specifically designed therefor when a district court of appeal's decision expressly and directly certifies conflict with another district court of appeal's decision upon the point in issue, such as sub judice.

Therefore, this Court ought accept jurisdiction and dispose of the conflict.

BASIS FOR JURISDICTION

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE OF MILLS v STATE, 17 FLW D798 (4DCA 1992), CERTIFIES THAT IT'S HOLDING EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT COURT OF APPEALS DECISION IN CHERRY v STATE, 572 So2d 521 (1DCA 1990), AND AS WELL CONFLICTS DIRECTLY AND EXPRESSLY WITH OTHER DECISIONS INCLUDING ITS OWN, AND AS WELL WITH DECISIONS OF THE FLORIDA SUPREME COURT

The Fourth District Court of Appeal issued its written decision affirming on direct appeal in this cause (Appeal #91-905) the adverse verdict, judgment, and sentence rendered in the circuit court (L.T. case #88-15979CFA) for the 17th Judicial Circuit in and for Broward County, Florida. See Exhibit 'A' attached hereto. The district court affirmed as to all issues on appeal, but wrote its decision explaining affirmance as to only one issue. That issue involves the right of the defendant to participate in the response to be given to a jury when that jury poses a question to the court during its deliberations. The Fourth District Court of Appeal in its written opinion recognizing "the trial judge violated the rule when he failed to give defense counsel the opportunity to be heard" [Exhibit 'A', page 3] but affirming the adverse jury verdict declared: "Therefore, in direct conflict with Cherry [v State, 572 So2d 521 (1DCA 1990)], we hold that the harmless error rule applies where defense counsel and the defendant have notice of a jury question but the trial judge fails to give defense counsel the opportunity

to be heard as to the appropriate response". Exhibit 'A', page 4. [Mills v State, 17 FLW D798, 799 (4DCA 1992)].

In addition to CHERRY v STATE, supra, the district court's opinion and holding sub judice directly and expressly conflicts with FRANKLIN v STATE, 590 So2d 476 (1DCA 1991); its own decisions - ALEXANDER v STATE, 575 So2d 1370 (4DCA 1991)("a trial judge may not respond to a jury's request for additional instructions without both counsel being present and having an opportunity to participate in the action to be taken by the court. Violation of that rule is per se reversible error") and LACUE v STATE, 562 So2d 388 (4DCA 1990)(same); and decisions of this Court, see BRADLEY v STATE, 513 So2d 112 (Fla 1987), and WILLIAMS v STATE, 488 So2d 63 (Fla 1986). See Exhibit 'B', the motion for rehearing, attached hereto.

This Court has discretionary jurisdiction to resolve such conflict pursuant to Article V, section 3(b)(3), Florida Constitution. CROSSLEY v STATE, 17 FLW S179 (Fla. 1992). See Fl.R.App.Pr. 9.030(a)(2)(A)(iv)and (vi); 9.120.

Petitioner submits that if this Court finds it has jurisdiction then it ought exercise its discretion to entertain the case on its merits. The issue as to which conflict is apparent is an important feature of criminal trials, involving as it does the de facto participation of an accused in such trials' important decisions as well as the perception of the accused that he is a contributing and respected participant in the resolution of the case in accord with due process of law. It is submitted that to condone such 'exclusion' of an accused's participation

during trial, particularly in such a sensitive context as jury instructions, undermines the integrity of the courts and citizens' (including defendants) confidence in same. Accordingly, the clear announcement of this Court's posture thereon is of high significance. Therefore, this Court ought exercise it's discretion to accept jurisdiction to determine the merits.

CONCLUSION

WHEREFORE, this Court ought accept jurisdiction and resolve the express and direct conflict, and determine any and all other matters appropriate to the cause.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY a copy hereof has been mailed to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL, 33401, this 9th day of June, 1992.

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APPENDIX

J U R I S D I C T I O N A L B R I E F

E X H I B I T S

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

CHARLES MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-0905.

Opinion filed March 25, 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge.

Kayo E. Morgan, Fort Lauderdale, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

GARRETT, J.

Charles Mills appeals his armed trafficking in cocaine and conspiracy to traffic in cocaine convictions and sentences. We affirm as to all issues. We write, however, to state that the trial court committed harmless error when it responded to a question from the jury without first giving defense counsel the opportunity to be heard.

During jury deliberations, the jury sent a note to the trial judge. The trial judge notified both counsel that the jury had a question. In the defendant's presence, defense counsel asked what the question was so that it could be discussed. The

EXHIBIT 'A'

trial judge refused to tell defense counsel the question, and told him there was no need to talk about it. The jury was then brought into the courtroom. The trial judge said to the jury, "I have your question, 'Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.'" The trial judge told the jury that he could not do that, but would reread to them the instruction on trafficking. The trial court then reread the instructions on armed trafficking that he had earlier given the jury. The trial judge then asked, "Does that answer your question?" The jury said, "yes" and then retired to continue their deliberations. After the jury left the courtroom, the trial judge and defense counsel engaged in the following colloquy:

> MR. MORGAN: Judge, show my objection. We didn't get a chance to discuss that.
>
> THE COURT: Well, what's your objection?
>
> MR. MORGAN: I'd like to have entrapment read to them. It's not an offense to traffic if he was entrapped.
>
> THE COURT: I responded to their question exactly as they requested that I respond and your objection is noted.

Rule 3.410, Florida Rules of Civil Procedure (1991) reads:

> After the jurors have retired to consider their verdict, if they request additional instructions . . . [s]uch instructions shall be given . . . only <u>after notice</u> to the prosecuting attorney and to counsel for the defendant. [Emphasis added.]

We acknowledge that defense counsel's right to be present at re-instruction of the jury includes the right to participate, to

place objections on the record, and to make full argument as to the reasons the jury's request should or should not be honored. Ivory v. State, 351 So.2d 26, 28 (Fla. 1977). However, although the trial judge violated the rule when he failed to give defense counsel the opportunity to be heard, we find such error to be harmless.

Initially, we distinguish those cases that hold per se reversible error occurs when a trial judge fails to notice defense counsel or the defendant of a jury question. Bradley v. State, 513 So.2d 112 (Fla. 1987); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977); Lacue v. State, 562 So.2d 388 (Fla. 4th DCA 1990). In this case, the trial judge notified defense counsel and the defendant that the jury had a question.

Williams v. State, 488 So.2d 63, 64 (Fla. 1986) reaffirmed the per se rule announced in Ivory, but held that "[c]ommunications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles." Cherry v. State, 572 So. 2d 521, 522 (Fla. 1st DCA 1990)(emphasis added) found reversible error because defense counsel did not have "notice and an opportunity to be heard regarding the appropriate response" to a jury question. The First District, however, relied on Curtis, 480 So.2d 1277, which held that per se reversible error occurred when the trial judge responded to jury questions out of the presence of defense counsel and the defendant even though the trial judge refused to answer the questions. The state unsuccessfully argued in Curtis that the

supreme court should recede from its per se rule and adopt a harmless error standard. The Curtis court also "reaffirmed the viability of Ivory" and concluded its opinion with the words of then Justice England that "[a] 'prejudice' rule would . . . unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm,' real or fancied." Curtis, 480 So.2d at 1279. Since Curtis the supreme court decided DiGuilio v. State, 491 So.2d 1129, 1134 (Fla. 1986) and held that "automatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial" and limited per se reversible errors "to those errors which are so basic to a fair trial that their infraction can never be treated as harmless." Id. at 1135. DiGuilio requires appellate courts to determine if harmless error has occurred. Id. Therefore, in direct conflict with Cherry, we hold that the harmless error rule applies where defense counsel and the defendant have notice of a jury question but the trial judge fails to give defense counsel the opportunity to be heard as to the appropriate response.

Our examination of this entire record reveals that the rule 3.410 error had no effect on the trier-of-fact and we can say beyond a reasonable doubt that the error did not affect the verdict. See DiGuilio, 491 So.2d at 1139.

As to the merits of the objection, we find no error as to the re-instructions given. The scope of re-instruction of a jury is within the discretion of the trial judge. Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

A trial judge may properly limit the repetition of charges to those requested by the jury. Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). The trial judge, in this case, correctly re-instructed the jury. He did not have to re-instruct the jury as to entrapment. Unlike the instructions for excusable and justifiable homicide which must be given when a trial judge re-instructs on the degrees of unlawful homicide, Hedges v. State, 172 So.2d 824 (Fla. 1965), the standard jury instruction for the defense of entrapment, Fla. Std. Jury Instr. (Crim.) 3.04(c)(2), does not define any crime. See Gitman v. State, 482 So.2d 367 (Fla. 4th DCA 1985), called into doubt on other grounds, Fletcher v. State, 508 So.2d 506 (Fla. 4th DCA 1987)(where jury requested a re-instruction on the "laws" of the alleged crimes, theft and scheme to defraud, the trial court did not abuse his discretion in re-instructing the jury only on the elements of the crimes and refusing the defense's request to re-instruct on "specific intent").

When given the opportunity to object, defense counsel did not object to the re-instruction that was given. He only objected to the trial judge's failure to also give the entrapment instruction. Defense counsel had notice, an opportunity to argue, and to object, both before and after the trial judge denied his request for re-instruction on entrapment. Colbert v. State, 569 So.2d 433, 435 (Fla. 1990).

AFFIRMED.

DOWNEY, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.

IN THE DISTRICT COURT OF APPEALS

STATE OF FLORIDA

Fourth District

CHARLES MILLS, Appeal #: 91-0905

Appellant,

vs

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR RE-HEARING AND CLARIFICATION

COMES NOW Appellant and moves the Court grant re-hearing or clarification, and says:

1. This Court's decision dated 25 March 1992 affirms "as to all issues", but announces its "direct conflict with Cherry[v. State, 572 So2d 521 (1DCA 1990)]" as to Appellant's POINT I on appeal respecting re-instruction per jury question.

2. That this Court must have overlooked that its instant decision directly and expressly conflicts with its own existing decisions in other cases upon the same issue as in POINT I sub judice, to wit: ALEXANDER v STATE, 575 So2d 1370 (4DCA 1991), that

> The Supreme Court of Florida in IVORY [v. STATE, 351 So2d 26 (Fla 1977)] and WILLIAMS [v. STATE, 488 So2d 62 (Fla 1986)] held that a trial judge may not respond to a jury's request for additional instructions without both counsel being present and having an opportunity to participate in the action to be taken by the court. Violation of that rule is per se reversible error.
>
> We hold that it is the burden of the court, or the state, to make the record show that all requirements of due process, including the opportunity to be heard on the instruction to be

— EXHIBIT 'B' —

given, have been met. [Emphasis supplied].

and, LACUE v. STATE, 562So2d 388 (4DCA 1990), that

> More recently, the supreme court [in BRADLEY v STATE, 513 So2d 112 (Fla 1987)] reaffirmed the principle that it is reversibe error for the trial judge to respond to a request from a jury without * * * counsel being present and having an opportunity to participate in the discussion of the action to be taken on the jury's request. [Emphasis supplied].

Likewise this Court must have overlooked FRANKLIN v. STATE, 590 So2d 476 (1DCA 1991), that the supreme court has construed Fl.R.Cr.Pr.3.410 to require "the defense should first [be] given an opportunity to be heard on the question" posed by a jury, violation of which requirement "is per se reversible error" as to which "the harmless error doctrine is inapplicable".

3. This Court has misapprehended the controlling principle of law set forth in the foregoing authorities, and the instant decision conflicts therewith. This Court also has misapprehended the circumstances of COLBERT v. STATE, 569 So2d 433 (Fla 1990), cited in its decision, in that the defense therein had an opportunity to participate in the action to be taken with the jury but prior to such action being taken (vis and 'Allen charge'). The Court overlooks that no such opportunity was given the defense below. The Court's instant decision in principle conflicts as well with DiGUILIO v STATE, 491 So2d 1129 (Fla 1986), given the recognition in ALEXANDER v STATE, supra, that due process of law includes the opportunity to be preliminarily heard on any re-instruction to be given a jury. Therefore, the constitutional right so violated "vitiates the right to a fair trial".

4. This Court must have overlooked as to POINT IV the

trial court's wholesale failue to conduct any Richardson inquiry or hearing at all upon numerous discovery violation objections made by the defense during trial. The Court must have overlooked the per se reversible error committed thereby, in accord with following very recent authorities: A.M. v STATE, 17 F.L.W. D399 (4DCA 1992); HARRISON v STATE, 17 F.L.W. D448 (3DCA 1992); McLYMONT v STATE, 17 F.L.W. D63 (2DCA 1991).

5. The Court must have overlooked the following recent authorities respecting Appellant's POINT III on appeal with regard to entrapment as a matter of law being established of record below. STATE v ANDERS, 17 F.L.W. D695 (4DCA 1992); BEATTIE v STATE, 17 F.L.W. D657 (2DCA 1992); RICARDO v STATE, 17 F.L.W. D1 (4DCA 1991); STATE v BERGERON, 16 F.L.W. D2957 (4DCA 1991); STATE v PHAM 17 F.LW. D607 (1DCA 1992); STATE v EVANS, 17 F.L.W. D431 (2DCA 1992); MORALES v STATE, 17 F.L.W. D661 (2DCA 1992). This Court apparently misapprehends that the record below does not support affirmance on Appellant's POINT III. Rather, the Court overlooks that the record categorically establishes that no specific on-going criminal activity was interrupted by the police vis-a-vis Appellant and that it was the police that influenced and persuaded Appellant to become involved in criminal activity as to which Appellant had no pre-disposition to commit.

6. As to POINT VII on appeal, respecting the insufficency of evidence to support the conspiracy conviction, the Court did not have the benefit of WILLIAMS vs STATE, 17 F.L.W. D196 (1DCA 1992). The Court has been mislead to perceive evidence not of record sub judice, and avoids that the trial court itself found

not even a predicate to admit alleged co-conspirator statements during the trial. A correct perception of the record evidence mandates that a judgment of acquittal be granted, and this Court ought so decree.

7. Appellant requests this Court clarify its 'affirmance' in all respects, and articulate the bases on which this Appellant is to be denied the law set forth in the authorities cited herein and in his initial brief in his case. Especially is this request posited as to POINT VIII wherein is set forth the many instances of extreme ill-treatment by the trial judge of Appellant's counsel in the jury's presence, which treatment was plainly designed to and did demean and embarass counsel to Appellant's detriment. Such ought not be condoned, tacitly or otherwise, by our courts. This Court must have overlooked or failed to recognize the gravity and extensiveness of the trial judge's contemptible and injudicious behavior below.

WHEREFORE, Appellant moves the Court grant re-hearing and clarification in this cause.

I HEREBY CERITFY a copy hereof has been mailed to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL, this 6 April 1992.

KAYO E. MORGAN
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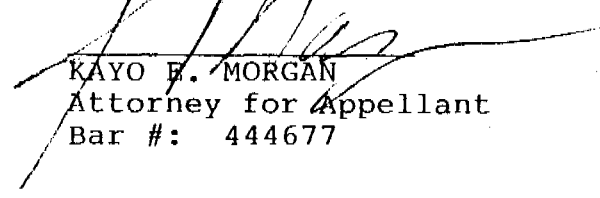

KAYO E. MORGAN
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

CHARLES MILLS

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 91-00905

L.T. CASE NO 88-15979 CFA
BROWARD

May 11, 1992

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed April 6, 1992, for re-hearing and clarification is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Kayo E. Morgan
Attorney General-W. Palm Beach

/CH

EXHIBIT 'C'

IN THE DISTRICT COURT OF APPEALS

STATE OF FLORIDA

Fourth District

Case #: 91-905

CHARLES MILLS,

Defendant/Petitioner,

vs

STATE OF FLORIDA,

Plaintiff/Respondent.

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Charles Mills, the Defendant/Petitioner aforesaid, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered 25 March 1992 and the order denying motion for rehearing and clarification rendered 11 May 1992. The decision is within the Supreme Court's jurisdiction in that it expressly and directly conflicts with a decision of another district court of appeal on the same question of law, to wit: Cherry v State, 572 So2d 521 (1DCA 1990).

I HEREBY CERTIFY a copy hereof has been mailed to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL, 33401, this 31st day of May, 1992.

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EXHIBIT 'D'