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FILED

SID J. WHITE

NOV 7 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SHAWN THOMAS, :

Petitioner, :

v. :

CASE NO. 91,719

STATE OF FLORIDA, :

Respondent. :

_____ /

JURISDICTIONAL BRIEF OF PETITIONER

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA



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(T108)¹ The judge informed counsel that he had directed the bailiff to "advise the jury that they should consider that as part of the evidence and continue to deliberate on their verdict." The court asked counsel if either had an objection.

(T108) Both replied in the negative, but defense counsel asked if the judge had communicated with the jurors strictly through the bailiff. (T109) The judge replied in the affirmative. (T109) Immediately after this exchange, the jury returned and rendered its verdict finding appellant guilty of sale of cocaine and possession of cocaine as charged. (R13-14, T109)

On appeal, Thomas argued that in answering the jury's question without notice to counsel and without conducting the jury into the courtroom, the judge violated Florida Rule of Criminal Procedure 3.410 and committed *per se* reversible error under Ivory v. State, 351 So. 2d 26 (Fla. 1977), Curtis v. State, 480 So. 2d 1277 (Fla. 1985), State v. Franklin, 618 So. 2d 171 (Fla. 1993) and Mills v. State, 620 So. 2d 1006 (Fla. 1993).

The district court affirmed, stating:

¹Herein, citations to the first volume of the record, which includes documents and the sentencing transcript, appear as (R[page number]). References to the supplemental record, which contains the trial transcript, are designated (T[page number]).

Although such a violation of rule 3.410 would ordinarily constitute *per se* reversible error under Ivory v. State, 351 So. 2d 26 (Fla. 1977), here we conclude that the appellant's trial counsel affirmatively waived the issue by communicating to the trial judge his acceptance of the procedure employed when later given an opportunity to object.

Thomas v. State, 22 Fla. L. Weekly D2284a (1st DCA Sept. 26, 1997).

Thomas, the petitioner, seeks conflict review of the district court decision.

SUMMARY OF THE ARGUMENT

In Ivory v. State, 351 So. 2d 26 (Fla. 1977), this Court held that a trial court commits reversible error when it responds to a question from the jury without first giving counsel notice and an opportunity to contribute to the answer. As stated in Mills v. State, 620 So. 2d 1006, 1007 (Fla 1993), the Court has reaffirmed the Ivory rule of *per se* reversible error many times. In Mills, the Court applied the Ivory rule in a case in which the trial court instructed the jury without counsel's prior input, then gave counsel an opportunity to place an objection on the record. 620 So. 2d at 1007. In this case, the district court declined to apply Ivory and reverse Thomas' convictions because, after the fact, counsel offered no objection to the procedure employed by the trial judge. In so holding, the district court created direct, express conflict with Ivory and Mills, which can only be resolved by this Court. Resolution of this conflict will help bench and bar gauge the bounds of the prophylactic rule of Ivory and its progeny. Petitioner prays that the Court will accept this case for review and order briefing on the merits.

ARGUMENT

THE COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO RESOLVE DIRECT, EXPRESS CONFLICT ON WHETHER AN OPPORTUNITY TO OBJECT AFTER THE JUDGE HAS ENGAGED IN AN UNAUTHORIZED COMMUNICATION WITH THE JURY MAY RESULT IN WAIVER OF THE IMPROPRIETY AS AN ISSUE ON APPEAL.

Under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court has discretionary jurisdiction to review cases in which the decision of the district court is in direct or express conflict with the decision of this Court or of another district court on the same point of law. This is an appropriate case in which to exercise jurisdiction to resolve conflict between the district court decision and a prior decision of this Court on the subject of unauthorized communication between a judge and jury.

The precise issue is whether an improper judicial communication with the jury can be waived as an issue on appeal by what comes afterward. The district court held that trial counsel waived the issue by acquiescing in the action taken by the court, after the fact. In Mills, this Court indicated that nothing counsel does after the unauthorized communication is of any legal effect. The Court held that Mills' counsel "was not given a meaningful opportunity to argue his position as to how the jury's

question should be answered," and further observed:

There is a substantial difference between allowing discussion before the question is answered and the jury is sent back to deliberate. It is unrealistic to believe a judge would be equally willing to encompass defense counsel's suggestion in both situations, and it is impossible to tell how the judge would have reacted to counsel's suggestions had they been made before the question was answered.

Id. at 1008.

The petitioner respectfully urges this Court to accept jurisdiction to resolve the conflict with this language in Mills created by the district court decision in this case. If the Court accepts jurisdiction and orders briefing on the merits, the petitioner will argue that the district court decision is an aberration, from the line of precedent commencing with Ivory. He will argue that, in accord with Ivory and its progeny, the prophylactic rule of *per se* reversible error for improper judicial communication with a deliberating jury must be applied to the facts of this case. He will argue that the error cannot be waived when counsel communicates his "acceptance of the procedure employed when later given an opportunity to object," because such an after-the-fact opportunity is not, in the words of Mills, "a meaningful opportunity to argue his position."

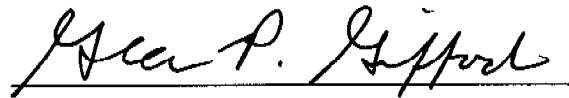
Finally, he will explain why this result is necessary to ensure scrupulous compliance with Rule 3.410 and to maintain the vitality of Ivory.

The petitioner requests an opportunity to better articulate his position in a brief on the merits.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Honorable Court will exercise its discretion to accept this case for review, and order briefing on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 7th day of November, 1997.



GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

22 Fla. L. Weekly D2284a

Criminal law--Jury instructions--No reversible error where trial judge sent an instruction to jury during its deliberations without first notifying prosecutor and defense counsel and giving them an opportunity to discuss proposed instruction--Defense counsel affirmatively waived issue by communicating to trial judge his acceptance of procedure employed when later given an opportunity to object

SHAWN THOMAS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 96-4639. Opinion filed September 26, 1997. An appeal from Circuit Court for Wakulla County. F.E. Steinmeyer, III, Judge. Counsel: Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) The appellant contends that his convictions should be reversed because the trial judge committed error when he sent an instruction to the jury during its deliberations without first notifying the prosecutor and defense counsel and giving them an opportunity to discuss the proposed instruction. *See Fla. R. Crim. Pro. 3.410*. Although such a violation of rule 3.410 would ordinarily constitute *per se* reversible error under *Ivory v. State*, 351 So. 2d 26 (Fla. 1977), here we conclude that the appellant's trial counsel affirmatively waived the issue by communicating to the trial judge his acceptance of the procedure employed when later given an opportunity to object. We accordingly affirm the convictions. (MINER, ALLEN and PADOVANO, JJ., CONCUR.)

* * *