IN THE SUPREME COURT OF FLORIDA

SHAWN THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,719

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

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COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State rejects the petitioner's statement of the case and facts because he cites to the record on appeal, rather than limiting himself to the facts in the First District's opinion. The opinion in its entirety states the following:

> 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.

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

SUMMARY OF ARGUMENT

The decision in the case at bar does not expressly and directly conflict with four decisions from this Court on the same question of law. The trial court in the case at bar asked defense counsel whether he objected to the procedure that was used, and defense counsel affirmatively accepted it. The First District held that by affirmatively accepting the procedure that was used at trial, the defendant could not then claim error in that procedure on appeal.

This issue was not presented in the four cases cited by Thomas. In two of the cases, defense counsel had in fact objected, Ivory and Mills, infra, and in the other two, Curtis and Franklin, infra, the opinions are silent on when and how defense counsel learned of the communication between the judge and the jury. The issues there related to the existence of error (did the judge violate a procedural rule) and its nature (can this error be harmless), not to whether the issue was properly before the Court in the first place, which was what the First District addressed.

ARGUMENT

ISSUE

DOES THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN FOUR CASES FROM THIS COURT ON THE SAME QUESTION OF LAW? (RESTATED)

Review in the district court is generally "final and absolute." Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). As with all general rules, however, there are exceptions. One exception is when a decision of the district court "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. Const., art. V, § 3(b)(3) (e.s.). The express and direct conflict "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). It is "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction." Jenkins, 385 So. 2d at 1359.

In the instant case, the First District held that when a trial judge asks defense counsel whether he has any objection to the procedure that was used to communicate with the jury, and instead of objecting, defense counsel affirmatively accepts that procedure, he cannot raise on appeal after his client has been convicted a violation of Florida Rule of Criminal Procedure 3.410.

To establish express and direct conflict, Thomas, therefore, must have cited a case in which (1) the judge asked defense counsel whether he objected to the procedure that was used; (2) defense counsel had no objection and in fact accepted the procedure; and (3) defense counsel was allowed to raise on appeal the claim of a violation of Florida Rule of Criminal Procedure 3.410.

The four cases cited by Thomas do not satisfy this test: Ivory v. State, 351 So.2d 26 (Fla. 1977); Mills v. State, 620 So.2d 1006 (Fla. 1993); Curtis v. State, 480 So.2d 1277 (Fla. 1986); State v. Franklin, 618 So.2d 171 (Fla. 1993).

In Ivory and Mills, defense counsel objected to the procedure that was used: Ivory at 27 ("After the jury had the [medical] report for approximately 45 minutes, the trial judge ordered it withdrawn, whereupon the **defendant filed a motion for mistrial**"); Mills at 1007 ("After the jury left the courtroom, **defense counsel objected** to the fact that he did not get a chance to discuss the question. He asked the judge to read the entrapment instruction to the jurors so that they would be given a more complete answer to their question. The judge noted the objection and refused defense counsel's request.").

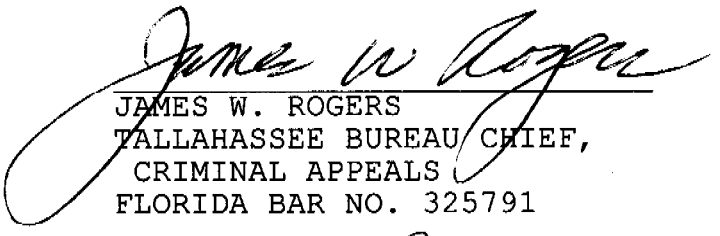
In the other two cases, Curtis and Franklin, we do not know how or when defense counsel learned of the communication. The record is silent.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to decline to exercise jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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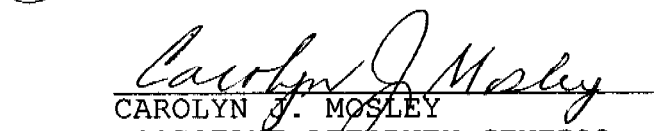

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 1st day of December, 1997.

Carolyn J. Mosley
Attorney for the State of Florida

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