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IN THE SUPREME COURT OF FLORIDA

SHAWN THOMAS, :

Petitioner, :

v. : CASE NO. 91,719

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

PER SE REVERSIBLE ERROR, CAUSED WHEN A JUDGE RESPONDS TO A JURY QUESTION DURING DELIBERATIONS WITHOUT CONDUCTING THE JURORS INTO THE COURTROOM OR PROVIDING NOTICE TO COUNSEL, IS NOT WAIVED BY COUNSEL'S FAILURE TO OBJECT WHEN INFORMED OF THE COMMUNICATION AFTER THE FACT.

Respondent takes the low road by accusing petitioner of a lie. (AB2)[1] In reply, petitioner is not telling the appellate courts something different than he told the trial court. Asked whether he objected after the fact to the judge's communication with the jury, defense counsel replied in the negative. On appeal, Thomas argues that this was insufficient to constitute a

[1]Herein, citations to the inital and answer briefs appear as (IB[page number]) and (AB[page number]).

waiver of the error. Forbearance from objection does not constitute waiver of a fundamental right.

None of the precedent cited by respondent (AB5-6) is to the contrary. Each of these cases involved an opportunity to cure an error before it occurred, not the chance to place an objection to the incurable error on the record after the fact, as here. Moreover, none of this precedent concerned the fundamental right to be present during all judicial communications with the jury. Respondent's parenthetical citation to State v. Lucas, 645 So. 2d 425 (Fla. 1994), actually undermines its position. There the court observed that fundamental error warrants relief when raised initially on appeal except "where defense counsel affirmatively agreed to or requested" the erroneous act. Id. at 427. Defense counsel did neither here; just as mere acquiescence to apparent authority is not voluntary consent, forbearance from objection to a *fait accompli* is not affirmative agreement or request. Of greater significance, Thomas himself was never consulted on the matter *on the record*.

Respondent speculates on the reasons for defense counsel's forbearance, and asserts that he "had no reason to doubt the trial judge's explanation." (AB6) As stated in the initial

brief, no criminal defendant or his lawyer should ever be placed in the position of having to trust a judge as to his conduct toward the jury outside the presence of either lawyer or client. (IB11-12)

Respondent provides an excerpt from Meek v. State, 487 So. 2d 1058, 1059 (Fla. 1986), for the proposition that the presence of the defendant during communications with the jury is not required by Rule 3.410. However, in Meek, defense counsel had input into the response to the jury question, though the defendant was absent when the response was formulated and when the jury was brought into court to hear the response. In Roberts v. State, 510 So. 2d 885 (Fla. 1987), the defendant was absent when the court and attorneys discussed how to respond to the jury's request for a view, present during the response and instruction on the view, but absent from the view itself. In neither case did the trial court commit reversible error. The upshot of these cases is that participation by counsel in formulation of the response is an effective substitute for the defendant's presence at that stage. In contrast, an opportunity by counsel to place an objection on the record after the fact does not ameliorate for the absence of *both* the defendant and counsel from the formulation of a response and the communication of that response to the

jury.

Respondent's only answer to petitioner's assertion that Thomas' absence from the process constituted fundamental error is to distinguish petitioner's precedent (IB13) on the facts. However, the requirement of an affirmative waiver of the presence of the judge during a critical stage of proceedings is wholly analogous to the situation here. As to this court's observation in State v. Franklin, 618 So. 2d 171, 173 (Fla. 1993), that due process requires an opportunity for both the defendant and counsel to be present (IB12) during communications with the jury, respondent has no answer. Because the state is unable to equate forbearance from objection after the fact with waiver of this fundamental error, Thomas is entitled to a new trial.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court and remand with directions to reverse Thomas' convictions and order a new trial.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I 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, this 30th day of March, 1998.

Respectfully submitted
& Served,

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