IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs. Case No. 93,037

ROBERT HARBAUGH,
Respondent.
_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

# INITIAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA TERENZIO
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 656879

ETTIE FEISTMANN
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0892830
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**FEDERAL CASES**



**STATE CASES**

**MISCELLANEOUS**

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs. Case No. 93,037

ROBERT HARBAUGH,
Respondent.
_____/

## PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court below in the 17th Judicial Circuit in and for Broward County and appellee in the fourth district court of appeal and will be referred to herein as "petitioner" or "the State." Respondent, Robert Harbaugh, was the defendant in the trial court below and appellant in the fourth district court of appeal and will be referred to herein as "respondent." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to any supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

On January 26, 1996, respondent was charged by information with one count of felony driving under the influence (R 1-2). Pre-trial, respondent filed in the trial court a motion to suppress all evidence obtained by the Broward Sheriff's Office as a result of the alleged illegal seizure of respondent and his car on the evening of January 5, 1996 (R 34-46). The state responded to respondent's written motion to suppress (R 49-52). On July 19, 1996, a hearing on respondent's motion to suppress was held before Judge Backman, and on July 23, 1996, the trial court issued a written order, denying respondent's motion to suppress (R 54-56). Respondent's motion in limine to exclude the portions of the videotape showing respondent being administered the HGN test (T 82-96), was granted by the trial court (T 239).

After the jurors retired to deliberate they asked to review the videotape (T 549). Because the video had been redacted to omit the excluded portion, the judge discussed with the parties the procedure to be employed (T 551-554). After a long discussion, the court explained to the jury the procedure to be employed, whereby the TV, the VCR and the tape were going to be sent back into the jury room and the prosecutor and defense counsel would also go back into the jury room (T 555-556). The judge asked whether the state or the defense had any objection to its colloquy with the jury, and no one objected (T 557). After the playback of the videotape to the jury, defense counsel in response to the court's question stated that he did not perceive any problem (T 558). The jury

found respondent guilty of misdemeanor driving under the influence of alcohol to the extent his normal faculties were impaired, as charged in the information (R 88; T 559-560). The trial judge denied defense counsel's request to have the jury come back after deciding the misdemeanor DUI and listen to evidence regarding his prior DUI convictions, and discharged the jury (T 512, 565).

The jury found respondent guilty of misdemeanor DUI (T 559). At the sentencing hearing after the jury found respondent guilty of misdemeanor DUI, the state introduced into evidence certified copies of respondent's driving records (ST 19-21), and three New Jersey DUI judgments (ST 21-22, 24). The trial judge found that the state established the three prior New Jersey convictions beyond a reasonable doubt (ST 47). The court adjudicated respondent guilty of felony DUI, and then sentenced respondent as follows: to four years probation with a special condition of 364 days in jail; respondent's license was permanently revoked and he was ordered to participate in the advanced CASAP, pay a $5,000.00 fine and court costs, perform 300 hours of community service per year and attend the Sober Program (ST 50-51).

Respondent appealed his conviction to the fourth district court of appeal. Respondent appealed the denial of the motion to suppress, the absence of the judge during the replay of the videotape to the jury during deliberations, and the denial of calling the jury to decide on his prior DUI convictions. As to the first issue, the district court held that the trial court correctly denied respondent's motion to suppress; as to the second issue, the

court held that respondent's conviction should be reversed because the videotape was replayed to the jury in the judge's absence; and as to the third issue, the court affirmed the trial court's denial of respondent's request to call the jury back to decide the fourth element of felony DUI. The fourth district certified a question of great public importance. This appeal follows.

## SUMMARY OF ARGUMENT

Issue I - The case of U.S. v. Gaudin, 515 U.S. 506 (1995) does not overrule the case of State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991), because Gaudin does not apply to this case. In Rodriguez this Court held that the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI. In Gaudin the Supreme Court held that the fifth and sixth amendments guarantee a defendant the right to have a jury determine the guilt of every element of the crime of which he is charged. However, unlike Rodriguez, Gaudin does not address a case where the requirement that the state prove each element of the crime conflicts with the defendant's presumption of innocence.

In Rodriguez this Court devised a bifurcated procedure which balanced the defendant's right to a presumption of innocence and his right to be tried by a jury. This Court decided that the procedure of Rodriguez was the best solution for such balancing. Thus, since Gaudin never addressed such a situation it does not apply to this case.

Both the trial court and the Fourth District Court of Appeal correctly found that Rodriguez is the law in Florida, and thus even if this Court decides that Gaudin overruled Rodriguez, application of this Court's decision should be prospective only.

Issue II - The state contends that no error occurred in this case, and the cases relied on by the Fourth District do not apply to the circumstances of this case. Here, the jury requested to view an exhibit. A view of an exhibit does not require the judge's

presence. In the cases relied on by the Fourth District the judge was required to be present because the jury requested a read back of testimony.

Moreover, even if this Court agrees with the Fourth District that the judge's presence was required, the state contends that the error was harmless. The state urges this Court to review this case on its facts and recede from its blanket per se reversible error review standard. Here, during the viewing of the videotape the jury was totally prohibited from communicating with the attorneys. Most importantly, neither party voiced any objection. On the contrary, defense counsel expressly agreed with the court's suggestion to have the procedure done in that way, and assured the judge afterwards that nothing improper occurred during the viewing of the tape.

## ARGUMENT

### ISSUE I

WHETHER THIS COURT'S DECISION IN STATE V. RODRIGUEZ, 575 SO. 2D 1262 (FLA. 1991), SHOULD BE AFFECTED BY THE SUPREME COURT'S DECISION IN UNITED STATES V. GAUDIN, 515 U.S. 506 (1995).

Respondent's charge was for DUI in violation of § 316.193(1), (2)(b) of the Florida Statutes (1995). Section 316.193(2)(b) provides that "[a]ny person who is convicted of a fourth or subsequent [DUI violation] is guilty of a felony of the third degree."

In Rodriguez v. State, 575 So. 2d 1262 (Fla. 1991), this Court addressed the method of handling a defendant's prior convictions in the context of a felony DUI trial. This Court has consistently held that the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI as defined by section 316.193(1), (2)(b). Following State v. Harris, 356 So. 2d 315 (Fla. 1978), the Court explained that to comply with general principles of law, evidence of the prior convictions must be presented in the separate proceeding when a statute elevates a misdemeanor count to a third-degree felony upon the third or subsequent conviction of prior DUI convictions. Rodriguez, 575 So. 2d at 1266. The Court devised a procedure to protect the defendant's interest in such cases as follows:

> We conclude that if a defendant charged with felony DUI elects to be tried by jury, [f.n.o] the court shall conduct a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of

> the alleged prior DUI offenses. If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions. All evidence of the prior DUI convictions must be presented in open court and with full rights of confrontation, cross-examination, and representation by counsel. The trial court must be satisfied that the existence of three or more prior DUI convictions has been proved beyond a reasonable doubt before entering a conviction for felony DUI.

575 So. 2d at 1266.

Subsequently, in U.S. v. Gaudin, 515 U.S. 506 (1995) the Supreme Court held that the constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. The Gaudin Court decided a case where the defendant was charged with violating 18 U.S.C. § 1001 by making false statements on Department of Housing and Urban Development (HUD) loan documents.[1] In Gaudin the statements had to be "material" to the governmental inquiry, and "materiality" was an

---

[1] Section 1001 of Title 18 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

element of the offense that the government had to prove.

The district court in Gaudin instructed the jury that to convict the defendant the government was required to prove that the alleged false statements were material to HUD's activities and decision, that the issue of materiality was a matter for the court to decide rather than the jury, and that the statement in question was material. The Supreme Court rejected this procedure and held that the trial judge's refusal to submit the question of "materiality" to the jury was unconstitutional. The Court held that the defendant was entitled to have this element of the crime determined by the jury.

In the instant case, the trial judge correctly followed Rodgriguez. After the jury returned a verdict of guilty on the misdemeanor DUI (T 560), the trial judge discharged the jury and denied defense counsel's request to have the jury listen to evidence regarding the existence of three prior DUI convictions (T 512, 565). On appeal, relying on Gaudin, respondent raised the issue of the judge's refusal to allow the jury to decide the fourth element of felony DUI. The Fourth District affirmed the trial court's denial, stating that

> "this court is not free to disregard the binding precedent of the supreme court. See Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973. The supreme court is the appropriate forum for determining whether the procedure set forth in Rodriguez should be revisited."

Accordingly, the fourth district certified the following question, as one of great public importance.

> WHERE A DEFENDANT REQUESTS THAT THE JURY DETERMINE THE EXISTENCE OF PRIOR DUI CONVICTIONS IN A FELONY DUI TRIAL, SHOULD THE BIFURCATED PROCEDURE OF STATE V. RODRIGUEZ, 575 SO. 2D 1262 (FLA. 1991), BE AMENDED IN LIGHT OF UNITED STATES V. GAUDIN, 515 U.S. 506(1995)?

The state contends that the certified question should be answered in the negative. In Gaudin, the defendant was charged with making a false statement to a federal agency, where materiality is an element of the offense, and the issue was whether the defendant was entitled to have this element determined by the jury. Gaudin merely held, as a general statement of the law, that the jury is to determine guilt of every element of the crime charged. However, Gaudin is clearly distinguishable from this and similar cases. As was pointed out in Rodriguez and Harris, since the existence of prior DUI convictions is an essential element of felony DUI, it necessarily follows that the requisite notice of these convictions must be given in the charging document. However, due process also requires that a defendant's presumption of innocence be preserved. This presumption of innocence would be compromised if jurors were to become aware of prior similar convictions. Due to the overlap of these two due process concerns, this Court construed this and similar statutes in a manner to make them constitutional and dictated the procedure, whereby the trial court in a separate proceeding determines the existence of the prior convictions. It is this very procedure, that appellant

complains of, that makes this and similar criminal statutes constitutional. However, the procedure adopted in Rodriguez strictly inures to the benefit of the defendant.

Because Gaudin merely held that a defendant is entitled to have the jury determine every element of the crime with which he was charged, Gaudin did not address a situation such as in this case where in order for a jury to decide an element of the crime, it must hear evidence which destroys his presumption of innocence. Therefore, Gaudin does not apply to this case. Gaudin was not a case where there was a need to balance a defendant's competing interests. In Gaudin there was no detriment to the defendant that the jury heard and decided materiality.

In contrast, the Rodriguez's bifurcated procedure protects the defendant's presumption of innocence, while not relieving the state of the burden of proving every element of the crime beyond a reasonable doubt. Therefore, Gaudin is distinguishable and does not apply to this particular case.

While the state agrees that a defendant may waive even a fundamental and constitutional right, see Torres-Arboledo v. State, 524 So. 2d 403, 410 (Fla. 1988), respondent's suggested procedure (at trial) is not a viable alternative. If a defendant waives his due process right to have a felony DUI charge tried under the bifurcated procedure set forth in Rodriguez, the defendant would then be tried by one jury who would hear evidence on all elements of the crime, *including* the three prior DUI convictions. E.g. Weaver v. State, 1997 WL 703057 (Miss. Nov.

13, 1997)(trial court denied defendant's request for a bifurcated trial for a felony DUI and the state was allowed to publish to the jury the prior convictions); Williams v. State, 1998 WL 133809 (Miss. March 26, 1998)(no requirement that the prosecution for a felony DUI comply with the guidelines for bifurcation found in URCCC 11.03). Faced with this prospect, the state does not believe any defendant would choose to waive the Rodriguez procedure safeguards.

This is because persons charged with felony DUI cannot have piecemeal litigation as to the different elements of the crime. The jury cannot be given some evidence as to one element and then after deciding the defendant is guilty of that element, come back to hear the evidence on the remaining elements of the crime. Further, the trial court in this case was bound by Rodriguez and by Rule of Fla. R. Crim. P. 3.430, which states:

> After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence. [e.s.]

Thus, once the jury deliberated on the misdemeanor DUI, the court cannot call them back to determine the fourth element of felony DUI. At that point the jury's role is completed.

In sum, the state contends that Gaudin does not apply to cases such as the case before this Court. Gaudin stands for the general proposition that a defendant is entitled to have the jury decide every element of his crime. Further, if this Court disagrees and holds that Gaudin applies to this case, then the state contends that in such a situation, the defendant may waive his right to have

the Rodriguez bifurcated procedure, and the jury must be given *all* the evidence at once to decide the felony DUI, otherwise, rule 3.430 would have to be amended.

In any event this court's decision would be prospective with respect to this case. See Boyett v. State, 688 So. 2d 308 (Fla. 1996)(unless the court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced).

## ISSUE II

WHETHER THE TRIAL COURT'S ABSENCE DURING THE REPLAY OF THE VIDEOTAPE TO THE JURY WHILE BOTH COUNSEL WERE PRESENT CONSTITUTE ERROR.

The record reflects that after counsel made their closing arguments and the trial judge charged the jury, the trial judge told the jury that they were free to retire to the jury room to begin deliberations (T 540-548). Then the court stated that although normally it would permit an exhibit which was admitted into evidence to go back to the jury room, he could not do so in this case, because the tape included a part which should have been excluded (T 548). The court explained that if the jury would ask for the exhibit then "we'll bring them in, we'll go back through the same routine" (T 548). Defense counsel said, "[t]hat's fine. I didn't want to have a deputy here just handing it to the jury and Bingo" (T 548). Then, the following ensued:

> THE COURT: I understand that the jury sent out a note saying to see the video. We would like to view the video. Okay.
>
> MR. CAGNEY [defense counsel]: Is there any objection to the lawyers look at the note?
>
> THE COURT: Now you can see it. It says exactly what I just said.
>
> MR. CAGNEY: Judge, I assure you, I think it does. I am just looking for little hidden messages.
>
> MR. KOVAC [the prosecutor]: We would like to see the video again.
>
> MR. CAGNEY: No problem, Judge.
>
> MR. KOVAC: I will take responsibility for the video.

THE COURT: The procedure would be the same as that employed during the state's case in chief. It's my understating that Mr. Kovacs will operate the machine. When the pertinent portion comes on with regard to the horizontal gaze nystagmus, it will be turned around, fast forwarded and then shown back to them for their consideration.

We discussed whether or not the audio portion needed to be transcribed by the court reporter. It's my understanding we all agreed that in the event that there is an adverse determination in this case to the defendant, and an appeal transcription prepared, that the audio portion has already been typed and prepared as part of the transcript.

MR. CAGNEY: Yes, Judge.

THE COURT: Okay, let's bring them in.

MR. CAGNEY: Again, Your Honor has no problem with us moving?

(T 549-550). Then the jury entered the courtroom and the following ensued:

A juror: Can we talk among ourselves during the video, ask for the video to be stopped or restarted so that we could discuss a particular point?

THE COURT: Tell you what, give me a couple seconds to deal with this. I will call you right back.

A JUROR: Thank you.

(T 551). The record shows that the following colloquy ensued:

THE COURT: Let me make a suggestion in consideration of the juror's request. I certainly have a concern with the jury watching portions of the video, and in an open courtroom conducting their deliberations.

My suggestion is going to be, considering that the video is an exhibit that's been introduced into evidence and would be normally one that the jury would be entitled to see in the jury room, I am going to ask both lawyers,

with the TV and video, to go back into the jury room, show those portions of the video that the jury wants to see, and any time that the jury wants to have a discussion with regard to the video, they can ask the lawyers to leave and to let you know when you want them to come back.

I have a slight concern, and I am going to voice what my concern is. And that is that while the lawyers are out of the room, the jurors potentially could look at the video. Now I have a solution to that as well. I am going to tell the jury all of this, if everybody is in agreement, and that is when they want to discuss any aspect of the video and ask the lawyers to leave, that the two lawyers take the video with them; just pop it out of the machine, take it. And when they call you back, put it back. It's already keyed into where you are. That way, we don't have any concerns that the jurors are looking at something that they are not supposed to look at.

MR. KOVACS: How about when they say run that part back?

THE COURT: Run it back. I think they are entitled to it.

MR. CAGNEY: My only -- Is it my turn?

THE COURT: I don't see why not. No one else was speaking.

MR. CAGNEY: My only problem is you have the lawyers present with the jury without a court reporter. My real problem is I don't think my colleague would intentionally use that as a situation to do anything, but, what is going to happen is one of the jurors may direct a question or make a comment in out presence that --

THE COURT: I am going to address that.

MR. CAGNEY: -- starts to get into the question of how they stand.

THE COURT: I am going to address all of that with the jury. I am going to explain to them

that while the two lawyers are present, there can be no comment, conversation of any kind between themselves, to the lawyers. If they have a question that they need to address to the Court, it needs to be written down.

MR. CAGNEY: Can they tell us to play it back at that point in time, though?

THE COURT: I don't have a problem with that.

MR. CAGNEY: I don't either. That part, they could tell us would you stop it there, and play that back one more time.

THE COURT: I will tell them, if the two lawyers **and** the **defendant** have no objection, because all of this can be covered on the record, that the only thing they will be permitted to say to the lawyers is please play it again, or we need to excuse you for a few moments. Anything other than that, no communications.

That way, when they do that, you can come out here, we can put that on the record, and the record will be complete with anything that took place back there.

MR. CAGNEY: So you will leave it up to the two lawyers to come back and report on the record how it went and what happened?

THE COURT: Sure. I trust the integrity of you two. If you come out here with adverse positions, I am going to think something strange is going on.

MR. CAGNEY: I just want to make sure that I am aware, that's all.

THE COURT: Bring them in.

MR. CAGNEY: **That's fine, Judge. I don't have a problem.**

(Thereupon, the jury entered the courtroom, after which the following proceedings were had:)

THE COURT: You have sent out a note asking to be able to view the video again. It's not going to be a problem. I also heard the comments that you made with regard to whether

or not you can ask questions or whether you can talk with yourselves concerning things.

Let me tell you the procedure we're going to employ. The first thing I have to tell you, I can't permit you to be in an open courtroom and discuss any aspect of this case in your deliberations. That is private and the exclusive province of the six of you in the jury room.

What I am going to propose, if you can buy into this, is the following: I am going to send the TV, with the VCR and the tape, back into the jury room with the six of you. Accompanying the VCR, the television and the tape are going to be Mr. Kovacs and Mr. Cagney. Mr. Kovacs, because he seems to be mechanically inclined enough to operate the VCR, will play the video for you.

While that is taking place, there are only two things that you can say to the lawyers. One, if you have a desire to see a part again, would you please rewind it, play it again. That's okay. Or, if you want to discuss some aspect of what it is you have seen, you will simply ask the lawyers to excuse you, they will remove themselves from the jury room.

So that you are aware of it, they will be taking the tape with them when they exit. And when you are finished and wish to see further portions of the tape, you will simply ring the buzzer, indicate that you are ready for them to come back, and they will come back and we'll continue with that process.

What I cannot permit you to do, and this has to be very clear, is as it's being played, you can't make a comment with regard to anything that you are seeing in their presence, you can't ask them a question. If there is any type of a question that needs to be addressed, it has to be done in the same procedure that we have employed before. You need to write it down and it needs to be addressed to me.

Please don't ask the lawyers anything. I tell you they will stand there with their mouths absolutely tight-lipped. They will not respond to a thing. Please don't put them in that position.

Is everybody comfortable with the ground rules?

THE JURY: Yes, sir.

THE COURT: In that case, you can go back. Mr. Kovacs and Mr. Cagney, stay.

(Thereupon, the jury left the courtroom, after which the following proceedings were had:)

THE COURT: Do either the State or the defense have an objection to the colloquy that the Court just had with the jury?

MR. CAGNEY: No, Your Honor. The only thing I thought of afterwards was then say to the jury, having heard the ground rules, do you want to go out and discuss it and find out if you want to go through with it that way, or do it a different way. Meaning, they may now look at each other --

THE COURT: I think this jury would have told me.

MR. CAGNEY: That was the only thing that came to my mind. Thank you, Your Honor.

MR. KOVACS: No objection.

(Thereupon, a recess was taken, after which the following proceedings were had:)

THE COURT: Mr. Cagney, were there any problems that arose during the course of the jury's view of the video?

MR. CAGNEY: I didn't perceive anything. I didn't know if you wanted a general report on the record.

THE COURT: At least now the record is not silent, and the issue is clear that there were no problems with the procedure that was employed by the Court. And, I guess, I can appreciate the fact that you did raise that, that's exactly what I should have asked you.

MR. CAGNEY: On the other issue, you would rather have me wait to see?

THE COURT: Why raise an issue that --

MR. CAGNEY: I also think we can get out of here a little quicker.

> THE COURT: Here's the reality, in the absence of the verdict finding the defendant guilty, I would find its moot, therefore, I don't want to go into the argument. Let's bring them in.
>
> MR. CAGNEY: I will address that briefly, if necessary.
>
> THE COURT: If necessary.

(T 551-559). The jury found respondent guilty of misdemeanor DUI (T 559).

The fourth district court of appeal in Harbaugh v. State, 23 Fla. L. Weekly D955 (Fla. 4th DCA April 15, 1998), reversed respondent's conviction, holding that "the procedure used by the trial judge to play the videotape amounted to fundamental error." The fourth district based its holding on Bryant v. State, 656 So. 2d 426 (Fla. 1995), in which this Court held that because Bryant did not knowingly, intelligently, and voluntarily waive the trial judge's presence during the read back to the jury, per se reversible error occurred. The court quoted from Bryant and said that because "Bryant was not consulted about this procedure by his attorney or the trial court" he did not knowingly, intelligently and voluntarily waive the trial judge's presence during the read back.

The state acknowledges that in Bryant v. State, 656 So. 2d 426 this Court held that the trial judge's absence during read back testimony was reversible error. The state, however, contends that the facts of this case are substantially different from those in Bryant, and from those in Brown v. State, 538 So. 2d 833 (Fla.

1989). Thus, even though the court found that it could not conclude beyond a reasonable doubt that the error in Brown and in Bryant did not contribute to the outcome of the case, the same result is not required here. Indeed, this case should not even be analyzed and reviewed under those line of cases.

In Brown, both counsel actually verbally communicated to the jury, and in Bryant the court reporter read back testimony, while here, the jury merely viewed an exhibit, as opposed to engaging in any conversation with the attorneys. The jury viewed an exhibit which had been admitted into evidence during trial. However, the tape had not been redacted as to a certain portion. Therefore, counsel were present *only* to operate the VCR and assure that the jury viewed the correct portion of the videotape. The trial judge told the jury that they were not allowed to speak to the attorneys and stressed that they should keep their "mouths absolutely tight-lipped" (T 557). But for the unredacted portion of the tape, the jury would have been able to take the exhibit to the jury room and view it for *itself* without requiring the presence of the judge, as they could any other exhibit which was admitted into evidence. See Fla. R. Crim. P. 3.410, and 3.400(a)(4). Because viewing of exhibits during deliberations does not require the judge's presence at the jury room, and because the attorneys were there only for the purpose of operating the VCR, the cases of Bryant and Brown did not apply to this case, and no error occurred here.

The state submits that there is a difference between the replay of a tape previously played for the jury and a read back of

trial testimony. While it is possible that a court reporter misread testimony back to the jury, it is not possible for the tape to be any different than it was when it was first presented to the jury. As there exists a possibility of misreading the trial testimony, the presence of the judge may be necessary to hear objections to the read back and to correct any misreading which has occurred. This is clearly not true where, as here, the jury is watching and listening to tapes previously presented to them. The content and character of the tapes cannot be changed. Thus, presence of the judge during replays of such tapes is not required. Therefore, Brown and Bryant do not apply to the circumstances of this case. Cf. U.S. v. Grant, 52 F. 3d 448 (2d Cir. 1995)(jurors viewed exhibits and there was nothing for the judge to rule on).

However, if this Court disagrees, the state urges this Court to revisit its per se rule of reversal as set forth in Bryant and its progeny, and review it based on the particular facts presented in this record. Reversing a case in which an appellate court could find harmless error would elevate form over substance and would create a "gotcha" situation. Defendants would be encouraged to invite errors and wait to see the outcome of their case before raising the issue on appeal.

The facts of this case present this Court with a clear and classic example of a "gotcha." The court asked the defense counsel and respondent whether there was an objection; defense counsel waived presence of the judge, but then after an unfavorable verdict, claimed he was entitled to relief. Such "gotcha'

maneuvers cannot be allowed to succeed in criminal litigation. State v. Belien, 379 So. 2d 446, 447 (Fla. 3d DCA 1980); State v. D.C.W., 426 So. 2d 970, 971 (Fla. 4th DCA 1982)(the court "will not countenance such 'gotcha' maneuvers").[2]

The error in this case was harmless beyond a reasonable doubt. In Brower v. State, 684 So. 2d 1378, 1380 (Fla. 4th DCA 1996), the fourth district held that:

> A showing of harmless error requires the state to prove, beyond a reasonable doubt, that the error in question did not contribute to the verdict, or that there is no reasonable possibility that it contributed to the conviction. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).
>
> The harmless error doctrine can be applied to certain cases of fundamental error. State v. Clark, 614 So.2d 453 (Fla.1992). In Clark, the supreme court recognized that appellate courts can find harmless error when a violation of sixth amendment rights is raised for the first time on appeal. In that case, the fundamental error concerned the admission of evidence in violation of the confrontation clause.
>
> Rather than an evidentiary right, rule 3.180(a) seeks to protect the constitutional right of the accused to be present "at the stages of his trial where fundamental fairness might be thwarted by his absence." [c.o] Application of harmless error analysis in cases involving fundamental error requires that we consider whether it is shown that fundamental fairness to the accused was not

---

[2] In deed, it is arguable that respondent waived the trial court's presence here, as in Roberts v. State, 510 So. 2d 885 (Fla. 1987)(the state represented that "all parties concerned" agreed to the procedure of viewing the tract of the beach *without* the judge, and defense counsel stated that he had waived the presence of the judge. The colloquy was done in Roberts' presence in open court. Based on that record, this Court found that such the defendant's personal acquiescence or ratification was not required), cert. denied, 485 U.S. 943 (1988).

prejudiced.

Based on the record in this case, the error was harmless and did not affect the outcome of this case. See § 924.051(7), Fla. Stat. (Supp. 1996). There is no reasonable probability that the judge's absence during the viewing of the videotape while he and his counsel were present, prejudiced respondent. There is nothing in this record to show that there was any impropriety by any one at the time the jury reviewed the videotape. The judge specifically instructed the jury not to communicate with counsel, and to refer questions only to him. Further, defense counsel affirmatively represented to the court that no impropriety occurred. Thus, respondent cannot show any prejudice.

As stated by Justice Wells in Bryant, there is no claim by respondent that anything improper happened during the replaying of the videotape that required the judge's presence or caused harm to respondent. Indeed, defense counsel expressly told the judge that there were no problems during the course of the jury viewing the videotape (T 558). See Ray v. State, 403 So.2d 956 (Fla. 1981)("The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial"). The showing of the videotape in the state's case in chief was merely repeated at the jury's request during deliberations and the judge specifically instructed the jury not to speak to the attorneys (T 550, 557). See Bryant, (Wells, J. concurring in part and dissenting in part).

It should be also noted that Judge Gross stated in his concurring opinion in Harbaugh v. State, 23 Fla. L. Weekly D955 (Fla. 4th DCA April 15, 1998), that he concurred with the majority's reversal only because such a result was required by Bryant. Judge Gross stated that "[b]ut for Bryant, it would seem *harmless* error analysis would appropriately apply in this case." [e.s] (Gross, J. Concurring specially). Judge Gross further noted that

> When faced with other types of constitutional errors, the supreme court has receded from a per se reversal approach and adopted a harmless error test. See State v. DiGuilio, 491 So. 2d 1129, 1134-35 (Fla. 1986); State v. Marshall, 476 So. 2d 150 (Fla. 1985). Adoption of such a method of review would not do violence to the bright line rule drawn by the supreme court for this area; a harmless error approach would apply only when the defendant did not timely claim that anything improper had occurred during the judge's absence. In the face of any objection, reversal would be required...

In addition to the examples pointed out by Judge Gross, there are instances worth mentioning where the court has determined that a per se reversible approach should not be applied to error of constitutional magnitude.

For example, in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court receded from a long line of cases which held that a prosecutor's comment on a defendant's silence was per se reversible error. In doing so, this Court acknowledged that section 924.33, Florida Statutes, made harmless error analysis applicable to all judgments regardless of the type of error involved and provided that there shall be no presumption that errors are reversible

unless it can be shown that they are harmful. Id. at 1134. Faced with dissenters who believed that "the rule of harmless error cannot cope with comments on post-arrest silence or failure to testify and that only a per se rule [would] suffice," id. at 1135, the majority countered with the following rationale:

> 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 to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. 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. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless. [e.s.]

Id.

Similarly, this Court recently receded from another long line of cases which held that the failure to conduct a Richardson hearing was per se reversible error. State v. Schopp, 653 So. 2d 1016 (Fla. 1995). For twenty years this Court had applied a rule of per se reversal in such cases. Its reason for doing so was because "a reviewing court is in no position to determine from a cold record whether a discovery violation is harmless." Id. In receding from this well-established line of cases, this Court once again acknowledged the restriction of section 924.33: "While the

courts may establish a rule of per se reversal for certain types of errors, a per se rule is appropriate only for those errors that always vitiate the right to a fair trial and therefore are always harmful." Id. This Court also recognized that

> there are cases, such as this, where a reviewing court can say beyond a reasonable doubt that the defense was not prejudiced by the underlying violation and thus the failure to make adequate inquiry was harmless error. While this case is clearly the exception rather than the rule, it illustrates that a per se reversal rule is not warranted in this context. It also leads us to agree with the State that continued application of the per se reversal rule to all Richardson violations would have the effect of "elevating form over substance," contrary to section 924.33.

Id. at 138.

Yet, in Schopp, this Court stated that "the mere fact that there is a high probability that a given error will be found harmful does not justify categorizing the error as per se reversible."

In the context of cases involving communications between the judge and the jury, this Court limited its per se rule, however, to situations where the trial court gives additional jury instructions or answers jury questions about testimony or evidence without providing any notice to the parties as required by Rule 3.410. Williams v. State, 488 So.2d 62 (Fla. 1986).

Harmless error analysis is now applied to all other factual situations relating to communications outside of the parties' presence. For instance, in Meek v. State, 487 So.2d 1058 (Fla. 1986), this Court found that the judge's response to the jury's

legal question in counsel's presence but in the defendant's absence harmless error where the defendant made no objection to his absence either during the remainder of the trial or in either of his two motions for new trial. See also Stano v. State, 473 So.2d 1282 (Fla. 1985) (finding judge's response to jury's request for a tape player, a list of evidence, and a photograph in presence of counsel but in absence of defendant harmless error where counsel waived defendant's presence and defendant did not object to his absence), cert. denied, 474 U.S. 1093 (1986); Brantley v. State, 570 So.2d 364 (Fla. 3d DCA) (finding judge's response to jury in counsel's presence but defendant's absence harmless error where defense counsel waived defendant's presence), cause dismissed, 576 So.2d 285 (Fla. 1990). Similarly, in Vileenor v. State, 500 So.2d 713 (Fla. 4th DCA 1987), the Fourth District found that the judge's charge to the jury in defense counsel's absence harmless error even though the defendant's right to counsel at every critical stage of the proceedings is a fundamental right: "The possibility that the appellant may have been prejudiced by the absence of counsel under the facts of this case is purely speculative and unsubstantiated."

This Court has also applied harmless error analysis to violations of other fundamental rights. For example, in Coney v. State, 653 So. 2d 1009 (Fla. 1995), Superseded, 20 Fla. L. Weekly S255, this Court held that defendants have a constitutional right to be present during the exercise of pretrial juror challenges, but may personally waive such right or ratify the strikes after they are made. In Coney, the defendant was neither present for the

challenges, nor waived his presence, nor ratified the strikes afterward. This Court, however, found the error harmless. "[T]he record shows no prejudice to Coney." Id. at 17. Likewise, this Court found Coney's absence from a pretrial conference without an express waiver harmless because "Coney's presence would not have assisted the defense in any way." Id. See also Roberts v. State, 510 So.2d 885 (Fla. 1987) (finding defendant's absence from two pretrial conferences without an express waiver harmless error), cert. denied, 485 U.S. 943 (1988); Fruetel v. State, 638 So.2d 966 (Fla. 4th DCA 1994) (finding absence of both defense counsel and defendant during codefendant's suppression hearing harmless error even though focus of hearing was the defendant's taped drug transaction with police which referenced codefendant); Hudson v. State, 23 Fla. L. Weekly S71, S73 (Fla. February 5, 1998); Pomeranz v. State, 23 Fla. L. Weekly S8, S10 (Fla. December 24, 1997)(harmless error to conduct pre-trial conference without the defendant).

Similarly, in State v. Clark, 614 So.2d 453 (Fla. 1992), this Court reaffirmed that the use of a pretrial deposition as substantive evidence by the State at trial where the defendant was not present for the deposition and was not informed of its possible use at trial "'created fundamental error by depriving [the defendant] of his constitutional right to confront and cross-examine the witnesses against him.'" Id. at 454 (quoting Brown v. State, 471 So.2d 6, 7 (Fla. 1985)). However, citing to DiGuilio and several United States Supreme Court cases, this Court held that

harmless error analysis should be applied to the constitutional violation: "'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" Clark, 614 So.2d at 454 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

In addition, this Court reaffirmed that harmless error analysis could be applied where the jury was given an unconstitutional jury instruction. State v. Breedlove, 655 So. 2d 74 (Fla. 1995).

As referred to above, section 924.33, Fla. Stat. (1993), provides that

> [n]o 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. [e.s.]

Then in § 924.051(3), Florida Statutes (Supp. 1996), the legislature said that

> the party challenging the judgment ... has the burden of demonstrating that a prejudicial error occurred....

Other jurisdictions have also applied a harmless error test to factual situations identical to that in this case. For example, in People v. Perry, 115 Mich.App. 533, 321 N.W.2d 719, 722 (1982)

(citations omitted), the Michigan Court of Appeals held the judge's absence during the re-reading of the preliminary examination testimony during a trial will not constitute reversible error unless prejudice has resulted to the defendant. See also Bakhit v. Thomsen, 193 Neb. 133, 225 N.W.2d 860, 867 (1975) (finding that the judge's absence during the read back of testimony was harmless); People v. Garcia, 826 P.2d 1259, 1265-66 (Colo. 1992) (finding judge's absence during state's presentation to jury of defendant's videotaped statements harmless error where no objection was made to the judge's absence or to anything occurring during the tape's presentation).

Further, other courts have held the error of absence of the judge from the bench to be harmless. See Haith v. U.S., 342 F. 2d 158 (3d Cir. 1965)(judge was absent during the jury selection); Stirone v. U.S., 341 F. 2d 253, 256 (3d Cir. 1965); Hefling v. U.S., 125 F. 2d 700 (5th Cir. 1942); U.S. v. Grant, 52 F. 3d 448, 449 (2d Cir. 1995); People v. Monroe, 90 N.Y. 2d 982, 665 N.Y. 2d 617, 688 NE. 2d 491 (1997).

Here, at no time did anyone express a complaint or concern regarding the propriety of the replay of the videotape. Respondent and his counsel had numerous opportunities to pose an objection either to the judge's absence in general or to any problem that may have occurred during the viewing of the exhibit. No such objections were made. Unlike in Brown where the judge was not even accessible and the attorneys improperly communicated with the jury, and unlike Bryant where a court reporter read back evidence, the

judge here was available at all times to consider any questions or problems that may have arisen during the view of the video.

While this Court may hereafter mandate a trial judge's presence during every phase of the trial absent the defendant's personal waiver, the interests of justice demand that reviewing courts assess the relative harm of any violation of that mandate. As this Court stated many years ago, "the modern trend in criminal cases 'is to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure. A defendant is entitled to a fair trial, not a perfect trial.'" Hoffman v. State, 397 So.2d 288, 290 (Fla. 1981) (emphasis added) (quoting Lackos v. State, 339 So.2d 217, 219 (Fla. 1976)).

Here, the record shows that defense counsel not only affirmatively agreed to the procedure, he actually assured the judge that nothing improper occurred while the jury viewed the video tape. Any alleged argument of possible improper behavior by the prosecutor is pure speculation and conjecture. See Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)("Reversible error cannot be predicated on conjecture"), cert. denied, 428 U.S. 911.

Based on the record in this case, it cannot be said that error was committed which injuriously affected the substantial rights of respondent. Thus, given the mandate of section 924.051(7), Florida Statutes (1997), and given this Court's analysis in DiGuilio and Schopp, and given this Court's application of harmless error

principles to other violations of fundamental constitutional rights, the state respectfully requests that this Court reconsider its rule of per se reversal, apply a harmless error analysis to the facts of this case, and reinstate respondent's conviction.

## CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm respondent's judgment and sentence.

Respectfully submitted,

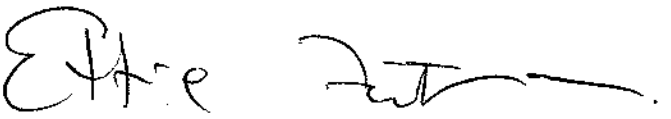
ROBERT A. BUTTERWORTH
Attorney General

CELIA TERENZIO
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 656879

ETTIE FEISTMANN
Assistant Attorney General
Fla. Bar No. 0892830
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
TEL (561) 688-7759
FAX (561) 688-7771

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail to ALAN LIPSON, ESQUIRE, 18305 Biscayne Blvd., Ste. 400, Aventura, Florida 33160, on May 27, 1998.



Ettie Feistmann
Assistant Attorney General