

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
 Petitioner, :
vs. :
ADOLPHUS MERRICKS, :
 Respondent. :
_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On August 17, 2001, the Second District Court of Appeal reversed the conviction of Respondent, Adolphus Merricks, and remanded for retrial. The majority opinion was based on Fla. R. Crim. Pro. 3.410 and cases from this Court saying such violations of the rule are *per se* reversible when preserved by objection. See Merricks v. State, 25 Fla. L. Weekly D2302 (Fla. 2d DCA August 17, 2001). But the two-judge majority also certified to this Court a question said to be of great public importance, to wit: whether such violation is subject to harmless-error analysis when a bailiff, rather than a judge, violates Rule 3.410.

On September 4, 2001, this Court postponed a decision on jurisdiction and directed the parties to serve merit briefs. The Petitioner, State of Florida, by and through the Attorney General, served its brief September 27, 2001. Respondent's brief follows.

The Respondent generally accepts the statement of case and fact set out by Petitioner in his initial brief. He would however emphasize that the jury began deliberating at 4:55 p.m. and Judge Shames advised counsel of the improper communication at or about 6 p.m. (R225) Court and counsel discussed the violation and at 6:06 p.m. the jury returned and tendered its verdict. (R229)

SUMMARY OF THE ARGUMENT

In this case the Attorney General is asking this Court to excuse the failure of a bailiff to follow the mandates of both Fla. R. Crim. Pro. 3.410 and Florida Statute 918.07. But in this nation's legal history such "ignorance of the law" has rarely if ever been a valid excuse. This Court should reject Petitioner's invitation to make it so, but *only* for bailiffs.

The significant fact here is that relying on the bailiff's presumed knowledge of law, the jury returned its verdicts *before* the trial judge had a chance to correct the error, and indeed apparently before he even had a chance to fully advise counsel. Thus any attempt to correct this error after the fact would have been like trying to "unring a bell."

In the future, this Court might find some valid ground to allow a bailiff's "ignorance" to excuse a violation of Rule 3.410, but this is not such a case. To the extent he could do so, and considering that he was forced to act *after* the damage had been done - that is, after the jury reached its verdicts - the defense attorney objected to the bailiff's improper communication. Thus under the clear mandate in both Ivory v. State, 351 So. 2d 26 (Fla. 1977), and Thomas v. State, 730 So. 2d 667 (Fla. 1998), this Court should reject the Petitioner's invitation to permit harmless-error analysis to excuse a bailiff's apparent ignorance of Rule 3.410.

ARGUMENT

ISSUE

THIS COURT SHOULD NOT CARVE OUT THE REQUESTED SPECIAL EXCEPTION, MAKING "IGNORANCE OF THE LAW" A VALID EXCUSE, BUT ONLY FOR BAILIFFS.

The Petitioner himself aptly described what happened in this case when - after the jury retired - it asked that some testimony be read back. In violation of Rule 3.410, the bailiff told jurors to "rely on your memories," then notified the judge:

The trial judge was advised, and summoned defense counsel and the prosecutor. (T. 225-226) *One minute later*, the bailiff returned and advised that the jury reached a verdict. The judge [then] discussed the incident with defense counsel and the prosecutor before receiving the verdict.

Petitioner's brief, page 2, emphasis added. In other words, after relying on the bailiff's improper communication, the jury reached its verdicts *before* the judge could do anything about it.

Despite the inherent difficulty of trying to "unring such a bell," the Respondent Attorney General is asking this Court to do something it has never done before. The Attorney General is in essence asking this Court to excuse ignorance of the law for the the first time in our legal history. But no one other than a bailiff would benefit from this special exception. Private citizens, attorneys and judges would all continue to labor under that most basic legal tenet, *Ignorantia legis neminem excusat*.¹

¹ I.e., "Ignorance of law excuses no one." See, Black's Law Dictionary, Fifth Edition, page 673.

Such a drastic change in law would not *just* grant bailiffs an excuse never before available to any citizen, it would also embroil this state's courts in fruitless "evanescent searches."

That is, this Court issued Ivory v. State, 351 So. 2d 26 (Fla. 1977), some twenty-four years ago. In that case Justice England wrote a concurring opinion saying the majority crafted a rule "obviously" intended to have a prophylactic effect in preventing improper communication with a deliberating jury. He added:

A 'prejudice' rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm,' real or fancied.

See, 351 So. 2d 26, England, J. concurring. In this case, the Attorney General is asking this Court to ignore Justice England's sage advice, issued twenty-four years ago in Ivory.

In essence, the Attorney General is asking this Court to carve out an exception to the simple rule announced in Ivory, because in this case a bailiff, not a trial judge, violated Rule 3.410. The Attorney General seems to believe an exception is needed because the rule cannot be understood by anyone but a learned trial judge. But on the contrary, the rule's language seems perfectly clear:

After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read back to them *they shall be conducted into the courtroom* by the officer who has them in charge...

(Emphasis added.) To be blunt, what part of "they shall be conducted into the courtroom" is too difficult to understand?

To be equally blunt, this Court's past decisions make it clear that "ignorance of the law" should not for the first time in our legal history be made a valid excuse for an impropriety committed by an officer of the court. Third, this Court's past decisions make it clear that it matters not in the least whether a trial judge or a bailiff violates Rule 3.410. As Justice Pariente noted in her dissent in Thomas v. State, 730 So. 2d 667 (Fla. 1998):

This rule could not be clearer -- there shall be *no ex parte* communications between judge and jury *or bailiff and jury* before the State and defendant have an opportunity to participate in the discussion... Allowing a trial court *or bailiff* to communicate *ex parte* with the jury is fraught with the dangers of unauthorized, unrecorded, substantive communications that we should not endorse.

(Emphasis added.) Of course the Attorney General may say Justice Pariente's learned analysis in Thomas "doesn't count," because it was a dissent. But in Thomas, three of this Court's seven Justices said the rule was so clear it required reversal even when the trial attorney acquiesced in the judge's attempt to correct the error.

That is, the four-justice majority said the *only* reason the error was not reversible in Thomas was that not only did the defense attorney fail to object, he "communicate[d] to the trial judge his acceptance of the procedure employed." 730 So. 2d 667.

Accordingly, this Court should rule that its decision to accept even temporary jurisdiction of this issue was "improvident," and affirm the two-judge majority in Merricks.

It should also be noted that if this Court were to accept the Attorney General's invitation, it would have to establish guidelines. Those guidelines would be necessary to help lower courts determine just when such an improper communication is "harmless."

Such guidelines might include such factors as: 1) the length of time between the improper communication and the jury verdict(s), and/or whether the jury rendered its verdict before the trial judge could address the issue, 2) the total time the jury spent deliberating, and 3) whether the jury returned verdicts of guilty-as-charged on all counts or returned some lesser-included verdicts.

As to the first factor, the presumption might be that the longer a jury deliberated after the improper communication, the less likely it was that harmful error occurred. In other words, when a jury deliberates at length after an improper communication - again, by a *bailiff*, and not by a judge - it would be more likely that the improper "taint" was "dissipated." On the other hand, where the improper communication was followed immediately by a return-of-verdict, there would in all likelihood have to be a strong presumption of prejudice. And needless to say, where - as in this case - the jury returned its verdict even before the trial judge could properly advise counsel of the error, there would be a virtually insurmountable presumption of prejudice.

In this case, the trial judge² told counsel about the improper communication at or about 6:00 p.m., and (in the words of the Petitioner), the jury returned its verdicts "one minute later."³ So again, asking Judge Shames to correct the error after the fact would be tantamount to trying to "unring a bell." And as relating to factors which might result in a finding of harmless error, "Factor One" noted above would certainly not apply here.

The presumption in Factor Two might be similar to that in the first factor. Where a jury spends a long *total* time deliberating, it might be more likely that such an improper "tainting" was dissipated or diluted. On the other hand, where as here the jury spent a *short* total time deliberating, that short time would likely raise a strong presumption of harm. This jury spent little more than an hour *in toto*, deliberating on the charges.

As to the third factor, there might be a strong presumption that where a jury ultimately convicts on all counts, the evidence against a defendant was "open and shut." But where the jury returns a lesser-included verdict on one or more counts, there might well be a greater presumption of harmful error.

Beyond that and in all likelihood, in many cases such factors would conflict with and have to be weighed against each other.

² The Honorable Mark Shames, Circuit Judge. (T1)

³ See, Petitioner's brief, page 2.

For example, a short total time deliberating and verdicts of guilty-as-charged on all counts might combine to form a presumption of harmless error. On the other hand, a short time deliberating, combined with a return of one or more lesser verdicts, might well raise a presumption of harmful error. And unlike the case here, there might be a situation where the improper communication was followed immediately by a return-of-verdicts, and including one or more "lesser" verdicts, but where the jury spend a total time of several hours or days deliberating the charges. In such a case Factors One and Three would raise a strong presumption of harm, but Factor Two would dilute the impact of that presumption.

The bottom line is that such semantic rigamarole is wholly unnecessary. Rule 3.410 could not be made any simpler. It is simple enough that any and every bailiff should be able to understand it as readily as a learned judge. There is no sound reason to accept the Attorney General's invitation to "muddy the waters." There is no sound reason to change centuries of legal history and hold for the first time that ignorance of the law now excuses the misconduct of an officer of the court.

A bailiff is defined as a "*court officer* or attendant who has *charge of a court session* in the matter of keeping order, *custody of the jury*, and custody of prisoners while in the court." Black's Law Dictionary, Fifth Edition, at page 129.

So again, a bailiff is a court officer or in plain words "an officer of the court." He or she is "in charge of court," and as

such should reasonably be expected to know the rudiments of court procedure. A bailiff is charged with the "custody of the jury" during its deliberations, and as to that custody a bailiff is given instructions utterly charming in their simplicity:

After the jurors have retired..., if they request additional instructions or to have any testimony read back to them *they shall be conducted into the courtroom* by the officer who has them in charge...

In plain words, the bailiff as officer of the court is the personification of the judge when he or she is not present. It should not be too much to expect such an officer to be - at the very least - familiar with the simple mandate of Rule 3.410.

* * * *

As the Petitioner noted, in Merricks v. State, 25 Fla. L. Weekly D2302 (Fla. 2d DCA August 17, 2001), the majority certified the following question, said to be of great public importance:

IS A BAILIFF'S OFF-THE-RECORD ANSWER TO A JURY'S QUESTION AN ERROR REQUIRING PER SE REVERSAL OR MAY IT BE SUBJECTED TO HARMLESS ERROR ANALYSIS UNDER STATE V. DIGUILIO, 491 So. 2d 1129 (Fla. 1986)?

The majority apparently felt that question should be answered in the negative, based on previous decisions of this Court. See, 25 Fla. L. Weekly D2302. But the majority also agreed to certify the question above, having been persuaded by Judge Altenbernd's dissenting opinion. 25 Fla. L. Weekly D2302.

Judge Altenbernd said he would limit the "per se error rule" to instances where a judge - not a bailiff - improperly communicates with a jury contrary to Rule 3.410. 25 Fla. L. Weekly

D2302. He further said that when a bailiff violates Rule 3.410, he would subject that error to harmless error analysis under DiGiulio.

The Attorney General phrased the issue presented to this Court by tracking the language of the certified question raised by that dissenting opinion. See Petitioner's brief, page 9.

With all due respect to both the Attorney General and Judge Altenbernd, this Court has already effectively answered the question. In Thomas v. State, 730 So. 2d 667 (Fla. 1998), this Court indicated that it makes no difference whether a bailiff or trial judge violates Rule 3.410. This Court also made abundantly clear that where - as here - the defense attorney preserved the issue by timely objection, any violation of Rule 3.410 is per se reversible and not subject to "harmless error."

In Thomas, the four-justice majority affirmed only because at trial the defense attorney not only failed to object to the Rule 3.410 violation, he "communicate[d] to the trial judge his acceptance of the procedure employed," by the trial judge and in response to the violation by a bailiff. 730 So. 2d 667.

Significantly and as noted, three of this Court's seven justices would reverse for the Rule 3.410 violation, despite the trial attorney's acquiescence to the violation. 730 So. 2d 667.

That is, Justice Pariente filed a dissent in Thomas, joined by Justices Kogan and Anstead, and those three justices said the trial judge's violation of Rule 3.410 was *still* per se reversible, even though the defense "acquiesced." See, 730 So. 2d 667.

Justice Pariente began by saying the defense's "after-the-fact acquiescence to a patently impermissible procedure" did not constitute an effective waiver of the "*fundamental* right to be present when the judge communicates with the jury." See, 730 So. 2d at 669, Pariente, J. dissenting, emphasis added. She indicated the state properly conceded the Rule was violated and was "per se reversible," then explained again the *reason* for that rule:

The per se reversible error rule ... exists for two distinct reasons. First, it is clear that due process requires that the defendant and defendant's counsel be afforded the opportunity to be present whenever the trial court communicates with the jury... Secondly: *Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.*

730 So. 2d 669, emphasis added. Justice Pariente recognized that while it is not inevitable that prejudice occurs in such instances, the *potential* for prejudice was "so great as to warrant the imposition of a prophylactic per se reversible error rule." 730 So. 2d 669. She cited a case where this Court declined to apply harmless-error analysis to such communications, then clarified that a "bailiff, rather than the judge, communicat[ing] with the jury does not lessen the potential for prejudice." 730 So. 2d 669.⁴

Thus in this case, the fact that a bailiff violated Rule 3.410 - not Judge Shames himself - did not lessen either the

⁴ Including Footnote 5.

potential for prejudicial error or the requirement that such error be "per se reversible." Thus, as Justice Pariente concluded:

[The majority's] approval of the procedure the trial court followed in this case of eliciting input after the fact erodes the prophylactic purpose of the rule we have previously enunciated. This rule could not be clearer -- there shall be *no ex parte* communications between judge and jury or *bailiff and jury* before the State and defendant have an opportunity to participate in the discussion... Allowing a trial court or *bailiff* to communicate *ex parte* with the jury is fraught with the dangers of unauthorized, unrecorded, substantive communications that we should not endorse. Providing defense counsel an opportunity to place an objection on the record after the fact (and just before the jury returned) did not erase the *per se* reversible error that occurred in this case.

730 So. 2d 669-70, Pariente, J. dissenting, emphasis added.

Thus as noted, Thomas was decided by the slimmest of margins, and the only reason the majority *didn't* apply the "per se" rule was because the defense attorney affirmatively waived any possible objection. But again, even with that affirmative waiver three of this Court's seven justices would still remand for new trial.

In this case, Mr. Merricks' attorney both objected and moved for mistrial immediately after the error was discovered, and also renewed that objection in a timely motion for new trial. Thus he gave Judge Shames a second chance to correct the error, and so this error is clearly and adequately preserved for appeal. In turn, this Court should rule that jurisdiction was improvidently granted and affirm the majority opinion in Merricks. This Court

has already both answered the certified question in the negative, and rejected the the Attorney General's claims of error.

Again, in his initial brief the Attorney General claimed in essence that "only" a bailiff - not a judge - violated Rule 3.410, and further that the bailiff neither gave the jury information outside the evidence, nor gave it inaccurate information, nor gave them any "procedural information" that Judge Shames himself would not have given. See, Petitioner brief, pages 10-11. But again, the majority in Thomas has already rejected such a claim.

A violation of Rule 3.410 is per se reversible both because of the "lost opportunity for counsel to argue⁵" and because "it is impossible to tell how the judge would have reacted to counsel's suggestions had they been made *before* the question was answered." See, 730 So. 2d 667, emphasis added. Further, and as Justice Pariente noted in dissent,⁶ a practice of "eliciting input after the fact erodes the prophylactic purpose of the rule

⁵ And especially where as here the jury returned its verdict just as counsel was being advised and so effectively *before* any meaningful remedy could be applied.

⁶ See again, 730 So. 2d 667, at footnote 5, Pariente, J. dissenting: "The fact that the bailiff, rather than the judge, does not lessen the potential for prejudice." It should also be noted Justice Pariente cited McKinney (supra), as support for her dissent, since the offending bailiff violated not one but two rules of court procedure, including §918.07. Thus even if a violation of that section is subject to harmless error analysis, a violation of Rule 3.410 clearly is not. Further, Justices Pariente, Kogan and Anstead all seemed to believe that McKinney is in accord with Thomas, contrary to the Attorney General's claims. See Petitioner's brief, pp. 11-12.

we have previously enunciated," even where the defense attorney affirmatively waives any objection to such a violation.

To repeat, there is no sound reason to change the rule announced in Thomas and many sound reasons *not* to do so. As noted, a bailiff is an agent of the state - an officer of the court - who operates day after day in close proximity to both judges and lawyers. At a minimum, it should not be too much to expect such an officer of the court to understand a rule phrased as simply as Rule 3.410. In contrast, it would be too difficult and too time-consuming for the appellate courts of this state to begin "splitting hairs" in such cases. In sum, the question certified has already been answered, in part by Justice Pariente:

Allowing a trial court *or bailiff*⁷ to communicate *ex parte* with the jury is fraught with the dangers of unauthorized, unrecorded, substantive communications that we should not endorse. Providing defense counsel an opportunity to place an objection on the record *after the fact*⁸ ... did not erase the *per se* reversible error that occurred in this case.

730 So. 2d 667. The mandate of Rule 3.410 could not be simpler. Carving out the requested "exception" would result in needless expenditure of scarce judicial resources, all in the name of some quixotic "evanescent search." It would also make "ignorance of the law" an excuse for possibly the first time in the history of this country, if not in the history of the Common Law as well.

⁷ Emphasis added by Respondent.

⁸ Emphasis supplied by Justice Pariente.

Further, even if such harmless-error analysis was required, and even if the lower courts were specifically instructed *not* to consider the cost of retrial as factor, that factor would in all likelihood be in the minds of all concerned, whether of "trial counsel, trial judges and appellate courts." See, Justice England's concurrence in Ivory, supra. But here too and even though considering such a factor might be improper, the "cost" to the state retrying Mr. Merricks would be minimal, compared with the benefit of applying Rule 3.410 in an impartial manner.

In this case only four witnesses testified, two of them "professional:" the complaining witness, her mother, the medical examiner and a police officer. Further, the entire trial was conducted in a single day, including voir dire and jury selection, opening statements, the taking of evidence, closing arguments, the jury's instruction, deliberation and rendition of verdict, sentencing, and a hearing on the violation of Rule 3.410.

Given the amount of prison time faced by Mr. Merricks, it would indeed be "cheap" to correct this error even under harmless-error analysis like that proposed by the Attorney General. On the other hand, justice can never adequately be weighed against inconvenience or expense, and if such analysis were to be considered - even tangentially - such consideration would inevitably "cheapen" the judicial system as a whole.

Again, there is no sound reason for this Court to accept the Attorney General's invitation to complicate an utterly simple and

understandable rule of law, and many sound reasons for this Court to summarily *reject* that invitation. Then too, there is no sound reason to make ignorance of the law an excuse for the first time in our legal history, but which excuse would only apply to bailiffs.

In this case and according to Petitioner himself, a bailiff told court and counsel "[o]ne minute later" - one minute after counsel was summoned and told of the violation - that the jury had reached its verdicts. See Petitioner brief, at page 2. Thus by that time the damage had already been done. The jury had already reached its decision, and so any attempt to correct any potential prejudice would have been an evanescent attempt to "unring a bell."

Next, while the Attorney General claimed the "per se" aspect of Rule 3.410 applies only to judges, not to bailiffs,⁹ Justice Pariente summarily rejected that claim in Thomas.

The Attorney General claimed his position was supported by McKinney v. State, 579 So. 2d 80 (Fla. 1991),¹⁰ but that claim too was summarily rejected by Justice Pariente in Thomas. See, 730 So. 2d 667, Pariente, J. dissenting, Footnote 5:

The fact that the bailiff, rather than the judge, communicated with the jury does not lessen the potential for prejudice... See also, e.g., McKinney v. State, 579 So. 2d 80 (Fla. 1991)...

⁹ Petitioner brief, pp. 8, 10-11.

¹⁰ Petitioner brief, pp. 11-13.

As Justice Pariente indicated, far from supporting a "bailiff exception," McKinney is wholly in accord with the majority opinion in Thomas. In McKinney the trial defense attorney failed to object or move for mistrial, but that was not the case here. Mr. Merricks' attorney objected both when the error occurred and through timely motion for new trial.

Then too, the Attorney General's reliance on federal law is wholly misplaced. See Petitioner brief, pp. 13-14.

As this Court noted in Traylor v. State, 596 So. 2d 957 (Fla. 1992), while state courts may not provide *less* protection of individual rights than federal courts, they are free to provide *more* protection. Put another way, "state courts and constitutions have traditionally served as the *prime* protectors of their citizens' basic freedoms." 596 So. 2d 961-2, emphasis added.

The same is true of the Attorney General's reliance on cases from other states. Petitioner brief, page 14. To paraphrase Traylor, any tendency to deny the rights of citizens accused of crime in federal courts or the courts of other states is one this Court should contest vigorously, not join blindly.

The Attorney General took issue with the adequacy of the defense attorney's objection, saying he "reject[ed] other adequate methods to correct the error in the trial court." Petitioner brief, page 15. But as this Court indicated in Ivory, and as Justice Pariente indicated in dissent in Thomas, and indeed as the Attorney General tacitly conceded in his statement of the

facts, there were no other "adequate methods to correct the error."

According to the Attorney General himself, the bailiff advised Judge Shames "one minute" after counsel was summoned that the jury had reached its verdicts. See Petitioner brief, at page 2. Thus again, by that time the damage had been done and it was legally impossible to "unring the bell." The defense attorney could hardly be faulted for failing to pursuing a fruitless course.

The Attorney General cited Coley v. State, 431 So. 2d 194 (Fla. 2d DCA 1983) in apparent support of his cause, but Coley too is more in accord with this Court's holdings that such error is per se reversible. In the Attorney General's own words, in Coley the bailiff told the judge the jury had a question, but the judge told the bailiff to tell the jury to "rely on their own recollection." Petitioner brief, page 16. In other words, the judge in Coley did precisely what Judge Shames *said* he would have done had the bailiff come to him first. But Coley indicated that in a case like that below, the error would still have been reversible.

In this case, had the bailiff come to Judge Shames first, and Judge Shames had consulted counsel and *then* told the jury to rely on its own recollection, there might not have been error. But the significant difference is that if such procedure had been used, the jury would not have reached its verdict *before* the

error could be corrected or even addressed. In such a case it would have been unnecessary to try an "unring the bell."

In this case, and relying as it did on the presumed validity of instruction from an "officer of the court," the jury reached its verdicts *before* Judge Shames could do anything to correct the error or even address it fully and adequately. Thus in this case, had the improper communication been made both outside the presence of counsel and *before* counsel had any adequate opportunity to address that request, the case would still have been reversed for new trial based on Coley. Thus Coley, like McKinney, is in complete accord with this Court's past holdings that such error is per se reversible where it is preserved by objection.

The Attorney General said, "In this case, counsel was given notice and an opportunity to place objections on the record." See Petitioner brief, page 17. The problem was that this "opportunity" came only *after* the jury had already reached its verdict. Again and as the Attorney General said himself, the bailiff advised Judge Shames "one minute" after counsel was summoned that the jury had already reached its verdicts. See Petitioner brief, at page 2.

And to paraphrase the Attorney General's final claim, the Respondent would agree that it is patently *not* the job of appellate courts to "police the out-of-court and off-the-record comment of bailiffs to juries." See Petitioner brief, page 18.

It *is* however the job of trial judges themselves to "police" their own bailiffs.

The bailiff below was not an officer of either this Court or the Second District Court. He was an officer of Judge Shames' court, and as an officer of that court he was charged with knowing the law pertaining to his "job description."

In essence, the Attorney General is asking this Court to make "ignorance of the law" an excuse for bailiffs, even though that excuse would not justify the misconduct of either a trial judge or a private citizen. Beyond that, it is precisely *because* such improper conduct may occur "out-of-court and off-the-record"¹¹ that makes it both so presumptively prejudicial and so difficult to address by and through "harmless error analysis." In all likelihood it would be literally impossible to try and "reconstruct" a sufficient record to review such a claim on appeal.

Finally, granting the Attorney General's requested special-exception for bailiffs would allow them for the first time in our legal history to claim ignorance of the law as an excuse. Rather than being held strictly accountable for knowing the rules of law that directly apply to them, bailiffs would be excused for violating Rule 3.410 if it could be shown that "no harm was intended."

Again, this would violate that basic legal tenet, *ignorantia legis neminem excusat*, "Ignorance of law excuses no one." See,

¹¹ Petitioner brief, page 18

Black's Law Dictionary, Fifth Edition, page 673. Variations on this theme include *Ignorantia legis est lata culpa* - "To be ignorant of the law is gross neglect" - and further *Ignorantia facti excusat, ignorantia juris non excusat*, indicating that while an ignorance of fact may excuse, ignorance of law does not:

Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance may not be carried.

Id, at 672-3. If this Court were to grant the requested special exception for bailiffs, there would be no sound reason not to extend that excuse for any and all public officials, and any and all private citizens. Moreover, this legal tenet is not one recognized only in "evanescent" legal dictionaries. It has been part of this state's legal history as well.

For example, in North Miami v. Seaway Corp., 9 So. 2d 705 (Fla. 1942), a case involving a dispute between a corporation and a municipality, this Court held, "Every man is supposed to know the law[;] he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies."

Likewise, in Buscher v. Mangan, 59 So. 2d 745 (Fla. 1952), this Court repeated, "Ignorance of the law is not a valid defense, because everyone is charged with knowledge of the law."

More recently in Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001), the Court said again, "This Court should not excuse such a violation on what is basically an 'ignorance of the law' defense."

The district courts of appeal have made similar holdings in cases involving an election dispute about the residence of a candidate, see Perez v. Marti, 770 So. 2d 284 (Fla. 3d DCA 2000), and also cases involving landlord-tenant dispute. See, Grant v. Thornton, 749 So. 2d 529 (Fla. 2d DCA 1999). And as the Fourth District held in D.F. v. State, 682 So. 2d 149 (Fla. 4th DCA 1996):

Ignorance of the law does not excuse a private citizen; it certainly does not excuse a law enforcement officer from violating a statute designed to regulate police conduct.

Both Fla. R. Crim. Pro. 3.410 and Florida Statute 918.07 were expressly designed to regulate the conduct of bailiffs as officers of the court. The fact that this bailiff may have violated two separate regulations is simply irrelevant. If anything, if the ignorance of one law or regulation is no excuse, neither should the ignorance of two laws be an excuse. In light of the foregoing, there is no good reason for this Court to accept the Attorney General's invitation to make ignorance of the law an excuse for bailiffs. This Court should summarily affirm.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Respondent respectfully requests that this Honorable Court affirm the ruling of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John M. Klawikofsky, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, on this _____ day of October, 2002.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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