IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-966

AUNDRA JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 305.545.1928

ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS..... 1-5

SUMMARY OF ARGUMENT 5-6

ARGUMENT

THE TRIAL JUDGE COMMITTED PER SE REVERSIBLE ERROR WHEN HE INSTRUCTED THE JURY OVER THE OBJECTION OF DEFENSE COUNSEL THAT IT COULD NOT ASK DURING DELIBERATIONS TO HAVE THE TESTIMONY OF ANY WITNESSES READ BACK AND THAT, IT COULD NOT ASK ANY QUESTIONS REGARDING THE LAW. 7-26

CONCLUSION 27

CERTIFICATES 28

APPENDIX

TABLE OF AUTHORITIES

CASES

Avila v. State,
781 So. 2d 413 (Fla. 4th DCA 2001) 7

Biscardi v. State,
511 So. 2d 575 (Fla. 4th DCA 1987) 10,11

Bradley v. State,
513 So. 2d 112 (Fla.1987) 15

Curtis v. State,
480 So. 2d 1277 (Fla.1985) 15

Davis v. State,
760 So. 2d 977 (Fla. 3d DCA 2000) 7

Gilliam v. State,
514 So. 2d 1098, *id.* at 1099 19

Hatin v. Mitjans,
578 So. 2d 289 (Fla. 3d DCA 1991) 25

Huhn v. State,
511 So. 2d 583 (Fla. 4th DCA 1987) 11,12,13

Ivory v. State,
351 So. 2d 26 (Fla.1977) 14,15,16,17,18

Kidd v. State,
486 So. 2d 41 (Fla. 2d DCA 1986) 19

Mendoza v. State,
700 So. 2d 670 (Fla.1997) 20,21,23

Mills v. State,
620 So. 2d 1006 (Fla.1993) 15

Peacher v. Cohn,
786 So. 2d 1282 (Fla. 5th DCA 2001) 19

Rhodes v. State,
547 So. 2d 1201 (Fla. 1989) 20,22,23

Rigdon v. State,
621 So. 2d 475 (Fla. 4th DCA 1993) 7,11,12

Sears Roebuck and Co. v. Polchinski,
636 So. 2d 1369 (Fla. 4th DCA 1994) 24,25

Shelby v. State,
541 So. 2d 1219 (Fla. 2d DCA 1989) 19

Slinsky v. State,
232 So. 2d 451 (Fla. 4th DCA 1970) 16,17

State v. Diguilio,
491 So. 2d 1129 (Fla. 1986), ...13,14

State v. Franklin,
618 So. 2d 171 (Fla.1993) 15

State v. Merrick,
831 So. 2d 156 (Fla. 2002) 15,16,17

Thomas v. State,
748 So. 2d 970 (Fla.1999) 25

Walden v. State,
319 So. 2d 51 (Fla. 1st DCA 1975), **cert. denied**, 330 So. 2d 21 (Fla.1976) 19

Williams v. State,
488 So. 2d 62 (Fla.1986) 15,20,21

OTHER AUTHORITY

Florida Rule of Criminal Procedure
Rule 3.410 8,9,12,14,17,18,20,2122

INTRODUCTION

Petitioner, Aundra Johnson, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal and prosecution in the Circuit Court. The symbols "R." and "T." refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State of Florida filed an information charging Aundra Johnson with burglary and fleeing a police officer. (R. 9-17).[1] A jury trial was conducted before the Honorable Julio Jiminez. The jury found Johnson not guilty of the burglary and guilty of fleeing a police officer. The only issue this Court must resolve is whether the Third District Court of Appeal misapplied the harmless error doctrine to the trial judge's improper instruction to the jury, over the objection of counsel, which prohibited them from asking any questions concerning the law and from asking to have any testimony re-read during their deliberations.

FACTS CONCERNING THE FLEEING A POLICE OFFICER CHARGE

Juan Nadal, a City of Miami patrol officer, was on routine patrol when he heard that the police were involved in a chase of a van that was involved in a burglary. (T. 414).

[1]The information charged several other crimes which were abandoned by the state prior to trial. (R. 9-17).

Nadal saw a blue van run through a red light and decided to get involved in the chase. (T. 415). The officer turned on his siren and lights and started to chase the van. (T. 415). During the chase the officer noticed that the tires of the van had blown out and eventually, an individual who Nadal identified as Johnson, jumped out of the driver's side of the van. (T. 426). Nadal admitted he did not know how many people were in the van and he never saw Johnson actually drive the van. (T. 435-6). Nadal exited his patrol car and chased Johnson on foot. (T. 427). Eventually, Nadal stopped and arrested Johnson. (T. 431).

Jennifer Welkner, Johnson's girlfriend, testified she was with Johnson when they decided to burglarize a house. (T. 305). She claimed Johnson went into the house and she was assigned to be the look out. (T. 307). Eventually, she went into the house and as they were taking property from the house she saw a car, heard an alarm and then she told Johnson they should leave. (T. 312-3). Despite this testimony the jury found Johnson not guilty of the burglary. Ms. Welkner went on to testify that Johnson drove the van away and that during the chase both her and Johnson jumped out of the car. (T. 317). Ms. Welkner was able to escape without being caught by the police. (T. 317).

After finishing reading the set of standard jury instructions which had been compiled with the approval of the State and the defense, the judge decided to add the following instruction not previously mentioned during the charge conference:

Now let me caution you regarding the communication, if you

> want to ask a question regarding the facts, **let me caution you that we do not have a simultaneous transcript of these proceedings we don't have a transcript and any questions regarding the facts, I will tell you that you must rely upon your own recollection of the evidence. (T. 659).**

The court went on to instruct the jury that: "If you have a question regarding the law, you have all the law that pertains to this case in those instructions. There are no other laws." (T. 659).

Defense counsel's objection to these improper jury instruction was overruled. (T. 659). Prior to the jury retiring to deliberate the judge, once again, instructed the jury:

> Ladies and gentlemen and, again, if you have a question regarding the facts I cannot reopen the facts. I cannot explain the evidence to you. **The normal answer that I give you is that you must rely upon your own recollection of the evidence.** If you have differences of opinion you must hash them out amongst yourselves. (T. 661).

After deliberations the jury found Johnson not guilty of burglary and guilty of fleeing a police officer. (R. 185).

On direct appeal Johnson argued the improper jury instruction which discouraged the jury from asking any questions concerning the law or asking for any testimony to be re-read was reversible error. The state conceded the trial court's jury instruction, which was given over the objection of counsel, was error. However, the state argued that the error was harmless.

The Third District Court of Appeal recognized that the trial judge erred in telling

the jury on two separate occasions that they could not have testimony re-read nor, could they ask any questions concerning clarifications on the law as given in the jury instructions. The majority opinion however, concluded that since the evidence was overwhelming the trial judge's violation of rule 3.410 was harmless error. Judge Cope filed a dissenting opinion wherein he wrote that it was error to apply the harmless error doctrine to the type of error committed in this case and even if the harmless error doctrine was applicable it was impossible for the state to establish beyond a reasonable doubt that the improper jury instructions which could have tainted the jury deliberations did not contribute to the jury verdict.

A petition for rehearing was filed wherein, it was argued that the Third District's majority opinion conflicted with numerous opinions from the Fourth District Court of Appeal which have concluded that it is impossible to apply the harmless error doctrine to the improper jury instruction in this case since, there is no way to determine how the jury was prejudiced by the improper instruction. This petition was denied.

A notice to invoke jurisdiction was filed along with briefs wherein, Mr. Johnson argued that the Third District's majority opinion, which applied the harmless error doctrine to this case, was in direct conflict with the Fourth District Court of Appeal cases which have held that it is impossible to apply the harmless error doctrine to the improper jury instruction given in this case. Mr. Johnson further argued that even if the harmless error doctrine was applicable to the error in this case, the Third District's conclusion that

the error was harmless since the evidence was overwhelming, directly conflicted with numerous cases from this Court which required the state to prove beyond a reasonable doubt that the improper jury instructions which prohibited the jury from asking any questions during deliberations concerning the law or the testimony did not affect the jury deliberations.

SUMMARY OF ARGUMENT

The Third District Court of Appeal's majority decision recognized that the trial judge erred when he told the jury on two separate occasions, over the objection of counsel, that they could not ask to have any testimony re-read or ask any questions concerning the laws that applied in this case. The majority concluded that since in their opinion the evidence was overwhelming, the improper jury instructions were harmless error. In reaching the conclusion that the error was harmless the majority opinion failed to even attempt to evaluate how the improper jury instruction may have affected the jury's verdict, which is the proper test when applying harmless error in this state. If the court would have attempted to apply the proper harmless error test to the error in this case, the court would have come to the same conclusion as both the dissenting opinion and the cases from the Fourth District Court of Appeal, which is that since it is impossible to determine what prejudice the defendant suffered from the improper jury instruction, it is impossible for the state to ever establish beyond a reasonable doubt that the error did not contribute to the jury verdict. Therefore, since the improper jury instruction given in this

case can never be deemed harmless error, this Court should quash the opinion of the Third District and conclude that the error committed in this case was per se reversible error and order a new trial for Mr. Johnson.

ARGUMENT

THE TRIAL JUDGE COMMITTED PER SE REVERSIBLE ERROR WHEN HE INSTRUCTED THE JURY OVER THE OBJECTION OF DEFENSE COUNSEL THAT IT COULD NOT ASK DURING DELIBERATIONS TO HAVE THE TESTIMONY OF ANY WITNESSES READ BACK AND THAT, IT COULD NOT ASK ANY QUESTIONS REGARDING THE LAW.

Fla.R.Cr.P. 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Based on this rule, it is error for a trial judge to instruct the jury that they can not ask questions concerning the law or ask to have testimony re-read. ***Davis v. State***, 760 So.2d 977, 978 (Fla. 3d DCA 2000)("This preemptive instruction by the trial judge was obviously intended to deter any requests to have testimony read back. While it is understandable that no trial judge wishes to encourage read-back requests, given the mandate of Rule 3.410, it is error to discourage them."); ***Avila v. State***, 781 So.2d 413 (Fla. 4th DCA 2001)(trial court abused its discretion in informing jury that there were no transcripts and that the jury members should rely upon their collective recollection, without mentioning that a method of read back was available); ***Rigdon v. State***, 621 So.2d 475 (Fla. 4th DCA 1993)(conviction reversed based upon jury instruction which may

reasonably have conveyed to the jurors that to ask for rereading of testimony would be futile or was prohibited, even though instruction contained indications that there remained a possibility of having testimony read back).

The trial judge in this case clearly violated Rule 3.410 and the cases decided under that rule. After finishing his reading to the jury of the set of standard jury instructions the judge decided to add the following instruction not previously mentioned during the charge conference:

> Now let me caution you regarding the communication, if you want to ask a question regarding the facts, let me caution you that we do not have a simultaneous transcript of these proceedings we don't have a transcript and any questions regarding the facts, I will tell you that you must rely upon your own recollection of the evidence. (T. 659).

After telling the jury that no transcript existed to help answer any questions the jury might have about the facts of the case, the judge then foreclosed any potential questions from the jury about the legal principles it was required to apply to those facts when he gave the jury the following instruction:

> If you have a question regarding the law, you have all the law that pertains to this case in those instructions. There are no other laws. (T. 659).

Defense counsel's objection to this improper jury instruction was overruled. (T. 659). Prior to the jury retiring to deliberate, the judge once again instructed the jury:

> Ladies and gentlemen and, again, if you have a question regarding the facts I cannot reopen the facts. I cannot explain the evidence to you. The normal answer that I give you is that you must rely upon

> your own recollection of the evidence. If you have differences of opinion you must hash them out amongst yourselves. (T. 661). [2]

As in the above-cited cases, these instructions improperly conveyed to the jurors not only that to ask for re-reading of any testimony would be futile or was prohibited but also, told the jury that it would be futile to ask the court to explain any of the laws that apply to the case. Thus, through the combination of these two instructions the judge essentially told the jury that it could not ask any questions at all once the jurors retired to begin their deliberations. The judge told the jury that it had everything it needed to render a verdict, and essentially told the jury that nothing else could or would be provided to them in the way of additional instructions or having any testimony read to them. This instruction clearly contravened the express language of Rule 3.410.

The Third District Court of Appeal recognized that the trial judge erred in telling the jury on two separate occasions that they could not have testimony re-read nor could they ask any questions concerning clarifications on the law. The majority opinion however, concluded that since the evidence was overwhelming the trial judge's violation of Rule 3.410 was harmless error when the court stated the following:

> Although the State concedes that the trial court erred in instructing the jury, the State argues that the error was harmless. Given the facts of this case, we agree that this error was harmless. **The evidence presented at trial was overwhelming as to the charge for which Johnson was convicted-fleeing a police officer.**

[2]Before the jury began deliberations defense counsel renewed all previous made objections. (T. 661).

Judge Cope filed a dissenting opinion wherein, he argued that it was error to apply the harmless error doctrine to the type of error committed in this case and even if the harmless error doctrine was applicable, it was impossible for the state to establish beyond a reasonable doubt that the improper jury instructions which could have tainted the jury deliberations did not contribute to the jury verdict when he stated the following:

> We should order a new trial. Defense counsel timely and correctly objected to the trial court's instruction. Neither the State nor the majority opinion has cited any authority for the proposition that this type of error is subject to harmless error analysis. Assuming arguendo that such an analysis could be applied, it is inappropriate here, where the jury had enough reasonable doubt about the State's case to acquit the defendant on a number of charges.

The Fourth District Court of Appeal has consistently recognized that the harmless error doctrine can not be applied to an error wherein, the trial judge wrongfully tells a jury before deliberations that they can not ask any questions concerning the law, nor can they ask to have testimony re-read since it is impossible to establish beyond a reasonable doubt that this type of error would not affect a jury verdict. In ***Biscardi v. State***, 511 So.2d 575 (Fla. 4th DCA 1987), the trial judge over the objection of counsel told the jury that there was no provision for reinstruction and or to have testimony read back. The state, similar to the state in this case, argued that the improper jury instruction was harmless error. In refusing to apply a harmless error analysis to this type of error the court held the following:

> The state points out that rule 3.410, Florida Rule of Criminal Procedure, leaves reinstruction to the judge's discretion, and from this argues that the above comment to the jury was not error; or, if error, then harmless, because appellant is unable to show prejudice. **Obviously, without going into the jurors' heads or their communication with each other appellant cannot demonstrate prejudice.**

Biscardi, 511 So.2d at 581.

In ***Rigdon v. State***, 621 So.2d 475 (Fla. 4th DCA 1993), the defendant was convicted of aggravated assault with a firearm. On appeal defendant raised numerous issues including the fact that the trial judge made several erroneous evidentiary rulings and, that the trial judge erred in instructing the jury over the objection of counsel that the court was not permitted to read back testimony. As to the evidentiary issues, the court concluded that the trial judge had committed error but that the errors were harmless. However, as to the judge's improper instruction as to whether the jury can have testimony read back, the court refused to apply the harmless error doctrine and instead, concluded that since the instruction given to the jury may have lead the jury to believe they could not ask to have testimony read back, the error was harmful. This is evidenced by the following holdings:

> . . . this court in Biscardi v. State, 511 So.2d 575, 580-81 (Fla. 4th DCA 1987), and Huhn, 511 So.2d at 591, where defense counsel had voiced an objection, held that similar instructions which indicated to the jury that there was really no provision for reinstruction of the jury or review of testimony, particularly where the trial court had earlier refused to advise the jury it could take notes, was harmful error because the comments may reasonably have conveyed to the jurors that to ask for clarification of instructions or rereading of testimony would be futile or was prohibited.

The court went on to hold:

> In the present case defense counsel properly preserved the issue for appellate review by objecting to the subject instruction when moving for a mistrial. Employing the reasoning underlying the foregoing cases, while the instruction given contains indications that there remained a possibility of having testimony read back, it nevertheless resembles the instruction condemned in the above cases because the trial judge's comments may reasonably have conveyed to the jurors that to ask for rereading of testimony would be futile or was prohibited. This was reversible error.

Rigdon, 621 So.2d at 479-80.

In ***Huhn v. State***, 511 So.2d 583 (Fla. 4th DCA 1987), the trial judge gave the jury almost the exact same improper jury instruction prohibiting questions on the law and having testimony re-read when the court gave the following instruction:

> Also, there is really no provision for me to either reinstruct you after I instruct you or certainly to have any testimony read back or certainly to call any witnesses back. You are going to have to remember the testimony and the instructions on the law as best you can and probably the next time we hear from you will be when that buzzer in there rings and we all jump about a foot up in the air and then, you have a verdict.

Huhn, 511 So.2d at 591.

In ruling that the improper jury instruction was a violation of Rule 3.410 and harmful error the court recognized that it was impossible to articulate the prejudice caused by the improper instruction since there is no way of knowing whether the instruction prevented the jury from asking questions concerning the law or wanted to have testimony re-read when the court held the following:

> Furthermore, perhaps jurors would have asked questions pertaining to the instructions or sought to have certain testimony read to them if they had thought it possible. In our view, the error was harmful.

Huhn, 511 So.2d at 591.

The Fourth District Court of Appeal's decisions in the above cited cases and Judge Cope's dissenting opinion in this case which conclude that the error that occurred in this case was per se reversible error, are consistent with this Court's opinions which define and apply the per se reversible error doctrine. In ***State v. Diguilio***, 491 So.2d 1129 (Fla. 1986), this Court was asked to reconsider the issue of whether an improper comment on a defendant's right to remain silent was per se reversible error. In reaching the conclusion that an improper comment on silence should not be considered per se reversible error, the court set out the following test to determine whether an error is per se reversible error:

> Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23, 87 S.Ct. at 827-28. In other words, those errors which are always harmful. 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.

Diguilio, 491 at 1135.

Therefore, in order to determine whether the error committed in this case was per se reversible error, this Court must attempt to apply the harmless error doctrine to the error and if the result will always be that the error was harmful, then the error must be considered per se reversible error. A review of cases where this Court has concluded that the error was per se reversible error, along with cases where the court applied the harmless error doctrine to improper communications with the jury which did not violate Rule 3.410 will clearly establish that when applying the proper harmless error analysis to the error in this case, the result will always be that the error is harmful. Therefore, consistent with the holding in ***Diguilio***, this Court should conclude that the error in this case was per se reversible error.

VIOLATION OF RULE 3.410 THROUGH IMPROPER COMMUNICATIONS BETWEEN THE JUDGE AND JURY WITHOUT NOTICE TO COUNSEL ARE PER SE REVERSIBLE ERROR.

In ***Ivory v. State***, 351 So.2d 26 (Fla.1977), this Court held that a violation of the notice requirement of Rule 3.410, constitutes per se reversible error, stating:

> We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Ivory, 351 So.2d at 28.

In so holding, the Court explained, "Any communication with the jury outside the presence of the prosecutor, the defendant, and the defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless." This Court has reaffirmed this per se reversible error rule in numerous cases since ***Ivory***. *See, e.g.*, ***Mills v. State***, 620 So.2d 1006 (Fla.1993); ***Bradley v. State***, 513 So.2d 112 (Fla.1987); ***Williams v. State***, 488 So.2d 62 (Fla.1986); ***Curtis v. State***, 480 So.2d 1277 (Fla.1985). In so doing, this Court has reiterated that "the potential for prejudice and the danger of an incomplete record of the trial court's communication with the jury are so great as to warrant the imposition of a prophylactic per se reversible error rule." ***State v. Franklin***, 618 So.2d 171, 173 (Fla.1993).

In ***State v. Merrick***,831 So.2d 156 (Fla. 2002), this Court expanded the per se reversible error rule to include improper communications between the bailiff and the jury during deliberations. In ***Merrick***, one of the jurors asked the bailiff if they could have testimony re-read. The bailiff improperly told the jury they had to rely upon their own recollection of the evidence. This Court refused to apply the harmless error doctrine to this type of error since the improper communication with the jury and bailiff was potentially just as prejudicial as an improper communication between the judge and the juror. In ruling that it was impossible to determine the prejudice that occurred by the

bailiff's incorrect advice to the jury that they can not have testimony re-read without the judge and parties knowing what testimony the juror may have wanted to review, this Court held the following:

> The present case exemplifies the potential danger of off-the-record communications between a bailiff and jurors regarding the official criminal proceedings. **On the record before us, it is simply not possible to say with any certainty that the bailiff's answer to the jury's request had no affect whatsoever on the jury's verdict in this case. To the contrary, the bailiff's spontaneous statement that the jurors would have to rely on their memories appears to have affected the jury's deliberations, as demonstrated by the fact that the jury reached its verdict promptly thereafter. Even the prosecutor at trial suggested that the trial court would need to inquire as to the specific testimony the jury wanted read back in order for a harmless error determination to be made . . .**
>
> The court went on to hold:
>
> In sum, we agree with the Second District that the bailiff's improper communication in this case constituted per se reversible error under Ivory and its progeny. **To apply a harmless error analysis to such improper communications as the State proposes would "unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm', real or fancied."** Ivory v. State, 351 So.2d 26, 28 (Fla.1977) (England, J., concurring).

Merricks, 831 So.2d at 160.

Similarly, in ***Slinsky v. State***, 232 So.2d 451 (Fla. 4th DCA 1970), a case which was relied upon by this Court in ***Ivory***, the judge, without notice to the parties, summarily denied a jury request that the testimony be read back to it. The ***Slinsky*** court attempted to apply harmless error analysis in accordance with controlling case law but concluded that

the error was harmful because:

> The specifics of the request were not recorded and were not reflected in the record. **Thus, we can not determine the affect, if any, that this denial may have had in the guilt determination, as was done in Nelson v. State, 1941, 148 Fla. 338, 4 So.2d 375. On one hand the testimony sought might have been innocuous or simply cumulative, on the other hand it might have been that the jury erroneously recalled critical testimony which, had it been corrected, would have resulted in a not guilty verdict.**

Slinsky, 232 So.2d at 452.

Therefore, this Court has recognized that when a judge improperly communicates with the jury without giving notice to defense counsel in violation of Rule 3.410 it creates an incomplete record which makes it impossible to determine the actual prejudice suffered by defendant and, therefore, the harmless error doctrine does not apply since the error is allows harmful. Furthermore, this Court in ***Merrick*** and the Fourth District in ***Slinsky***, recognized that when a judge or a bailiff wrongfully tells a jury that they can not have testimony re-read without considering what testimony the jury may want re-read, the error is always harmful because without knowing what testimony the jury wants re-read it is impossible for the state to establish that the improper communication did not affect the jury deliberations. Therefore, as Justice England recognized in ***Ivory*** "t**o apply a harmless error analysis to such improper communications as the State proposes would "unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm', real or fancied."** ***Ivory v. State***, 351 So.2d 26, 28

(Fla.1977) (England, J., concurring).

Applying the harmless error doctrine to the error that was committed in this case requires even more speculation and conjecture than is required when a judge fails to notify the parties that he intends to answer a jury's questions concerning re-read testimony or clarification of the law. The trial judge told the jury they could not ask any questions concerning the law nor could they ask to have any testimony re-read. Based upon this improper jury instruction, no questions were asked by the jury. What will never be known in this case or, for that matter in any case where a judge wrongfully tells a jury they are not allowed to ask questions during deliberations is whether the jury had a question about the law or testimony but chose not to ask it because they were already told there would be no answer. Since it is impossible to determine the affect the improper jury instruction had on the jury's deliberations, it is impossible for the state to ever establish beyond a reasonable doubt that the error committed in this case was harmless. Therefore, this Court should adopt the rational of its prior decisions dealing with a violation of Rule 3.410 and hold that the error in this case was per se reversible error.

IMPROPER DENIAL OF PEREMPTORY CHALLENGE PER SE REVERSIBLE ERROR

This Court has also held that a denial of a peremptory challenge is per se reversible error. ***Gilliam v. State***, 514 So.2d 1098 (Fla.1987). *Id*. at 1099. *See also* ***Shelby v. State***, 541 So.2d 1219 (Fla. 2d DCA 1989); ***Kidd v. State***, 486 So.2d 41 (Fla. 2d DCA 1986); ***Walden v. State***, 319 So.2d 51 (Fla. 1st DCA 1975), **cert. denied**, 330

So.2d 21 (Fla.1976). The rational of why the denial of a peremptory challenge must be considered per se reversible error was explained in ***Peacher v. Cohn***, 786 So.2d 1282 (Fla. 5th DCA 2001), where the main issue in the case was whether the refusal of the trial judge to allow a peremptory challenge by way of a back strike prior to swearing the jury was reversible error per se. The defendant, while conceding it was error, argued it was harmless error because the plaintiff won on the issue of liability when the jury ruled in her favor. In ruling that the error had to be considered per se reversible error since it was impossible to apply the harmless error test, the court held:

> The harmless error analysis suggested by the defendant is impractical to apply; one can hardly determine whether a jury, minus the challenged juror and replaced by another, would have acted more in the plaintiff's favor. We conclude that the right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error and the cause remanded for a new trial. See Padovano, Judge Phillip J., Florida Civil Practice, § 17.4 (2000 ed.).

Peacher, 786 So. 2d 1282.

The same logic that leads to the conclusion that the denial of a peremptory challenge must be considered per se reversible error applies to the error in this case. In both cases there is no way of determining whether the verdict would have been different if the error did not occur. Just as there is no way of knowing if a different group of jurors would reach a different verdict, there is no way of knowing whether the jury decided not to ask any questions during deliberations because of the improper jury instruction.

Therefore, the Fourth District's conclusion that the error in this case must be considered per se reversible error, is supported by this Court's conclusion that a wrongful denial of a peremptory challenge is per se reversible error.

CASES THAT HAVE APPLIED HARMLESS ERROR DOCTRINE TO IMPROPER COMMUNICATIONS WITH JURORS THAT ARE NOT IN VIOLATION OF RULE 3.410 ALSO SUPPORTS THE CONCLUSION THAT THE ERROR IN THIS CASE WAS PER SE REVERSIBLE ERROR.

This Court has concluded that the harmless error doctrine can be applied to improper communications between a judge and a jury which are not in violation of the notice requirements of Rule 3.410. ***Mendoza v. State***, 700 So.2d 670, 674 (Fla.1997); ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989); *see also* ***Williams v. State***, 488 So.2d 62, 64 (Fla.1986). However, when the court applied the harmless error doctrine the court looked at the specific communication that created the error and if the court was able to conclude that the improper communication did not affect the jury deliberations, the court held the error harmless. In the alternative, if after looking at the error the court had to speculate as to how the error affected the jury deliberations the error was not considered harmless error. The one constant in these cases is that the harmless error analysis was not based on whether the court thought the evidence was overwhelming but instead, on what affect the improper communication had on the jury.

For instance in ***Mendoza v. State***, 700 So.2d 670 (Fla.1997), the trial judge had a brief conversation with some jurors during lunch wherein a juror asked why the jurors

could not ask questions. The trial judge told the juror if he had any questions during the trial he should write them down. The judge also indicated that one of the jurors asked the judge his opinion about an unrelated case. After lunch the trial judge told the lawyers about the communication. This court concluded that the judge's communication with the juror during lunch break was not a violation of Rule 3.410 and therefore, the per se reversible error rule did not apply. In concluding that the error was harmless, the court held:

> Finally, even if we considered the judge's comments to be error, communications outside the express notice requirements of rule 3.410 should be analyzed using harmless-error principles. *Williams v. State*, 488 So.2d 62, 64 (Fla.1986). We find harmless in this case any error in the judge's responding to jurors during a lunch break by courteously indicating a constraint upon engaging in conversation. The court correctly informed the parties in open court of the brief exchange with jurors and allowed the parties an opportunity to object on the record. Thus, any error in the judge's brief communication with jurors was harmless.

Mendoza, 700 So.2d at 674.

In determining that the trial judge's communication was harmless error the court was able to look at the specific communication that occurred between the judge and the jury and was not required to speculate as to how the improper communication may have affected the jury deliberations. Therefore, the court was able to convince itself beyond a reasonable doubt that the improper communication did not affect the jury verdict and conclude that the error was harmless.

In ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), the jury asked the bailiff whether

it would be polled following the penalty phase as it had been following the conclusion of the guilt phase of the trial. The bailiff, on order of the court, informed the jurors that polling was a possibility. This Court recognized that the communication with the jury outside the presence of counsel was error but, since the communication was not in response to a jury requesting additional instructions or to have testimony re-read, the communication was not a violation of Rule 3.410 and therefore, the harmless error applied. In concluding that the error was not harmless the court looked at the improper communication and held:

> Applying the harmless error analysis, we do not believe the state has shown beyond a reasonable doubt that the jury verdict was not affected by the communication between the trial judge and the jury. The question asked demonstrates the jurors were concerned about being polled. Their only experience with the polling process occurred after the guilt phase when each juror was asked whether the guilty verdict was his or her own. The close jury vote suggests a reasonable possibility exists that some of the jurors may have voted differently and affected the sentence recommendation if they thought they would not be required to reveal their vote in open court. We therefore find the communication in this case was not harmless error.

Rhodes, 547 So.2d at1206.

Therefore, in ***Mendoza*** and ***Rhodes***, it is clear that in order to conduct a proper harmless error analysis it is necessary that the appellate court examine the improper communication between the judge and the jury and the error can be deemed harmless only if the court is convinced beyond a reasonable doubt that the improper communication did

not affect the jury verdict. This conclusion is supported by this court's recent decision in ***Rigertink v. State***, 2 So.3d 221(Fla. 2009), wherein this Court only again recognized that an appellate court can not conclude that an error is harmless based solely on its conclusion that the evidence is overwhelming but instead, must evaluate how the error may have affected the jury verdict when the court stated the following:

> We are not nor do we consider ourselves a super-jury; rather, we are an appellate tribunal charged with the task of determining whether there is a reasonable possibility that the error affected the verdict. Id. at 1139 (emphasis supplied). If such a possibility exists, it is our duty to remand for a new trial, which shall be free from the offending error. **The test is not whether the jury reached what we believe to be the correct result but is, instead, whether a reasonable possibility exists that the constitutional violation contributed to the defendant's convictions.**

Rigertink, 2 So.3d at 257.

In this case a review of the Third District's majority opinion reveals that unlike this Court in ***Mendoza*** and ***Rhodes***, the Third District's majority opinion concluded that the improper jury instruction was harmless without looking at how the improper jury instruction may have affected the jury deliberations and instead, concluded that the error was harmless since the court felt the evidence was overwhelming. If the Third District had attempted to determine how the judge's improper jury instruction, which in essence prohibited the jury from asking any questions during deliberations, may have affected the jury deliberations, the court would have come to the same conclusion as the Fourth District and the Judge Cope's dissenting opinion. which is that the nature of the improper

communication between the judge and the jury which prohibited any questions during deliberations is such that it will always be impossible to establish that the error is harmless since there is no way of knowing whether the improper instruction prohibited the jury from asking legitimate questions during deliberations.

In ***Sears Roebuck and Co. v. Polchinski***, 636 So.2d 1369 (Fla. 4th DCA 1994), the Fourth District Court of Appeal in an opinion written by Justice Pariente recognized that some improper communications, based solely on the nature of the improper communication, make it impossible to apply the harmless error doctrine since the appellate court is forced to speculate how the error affected the jury verdict. In ***Sears Roebuck and Co. v. Polchinski***, *supra*, one of the jurors in a civil trial asked the bailiff if they could have the law re-read since the jury did not fully understand the jury instructions. After speaking to the trial judge the bailiff told the jury that they could not be re-instructed on the law which is exactly what the judge did in this case. In concluding that it was impossible to determine whether the error was harmless Justice Pariente wrote the following:

> A jury has a right to ask questions calculated to shed light on the controversy or which will assist the jury in arriving at a just result. Sutton v. State, 51 So.2d 725, 726 (Fla.1951). A jury's understanding of the applicable law is integral to a trial by jury. This is why Florida Rule of Civil Procedure 1.470(b), amended in 1989, encourages the trial judge to furnish written instructions to the jury. While a trial judge may have discretion in not sending written instructions to a jury, we cannot overlook the possibility that the jury's verdict was a product of confusion or misunderstanding of the law as evidenced by the nature of the

communication.

Justice Pariente went on to hold:

> When a question from a deliberating jury indicates its confusion about the law, a trial court abuses its discretion when its response fails to ameliorate the confusion. Morgan Int'l Realty, Inc. v. Dade Underwriters' Ins. Agency, Inc., 571 So.2d 52 (Fla. 3d DCA 1990). **We are forced to speculate about what would have occurred if the jury's question was answered by the trial court after receiving input from both parties. Based on the nature of communication, we cannot say the action was harmless.**

Sears Roebuck and Co. v. Polchinski, 636 So.2d at 1371. *See also,* ***Hatin v. Mitjans***, 578 So.2d 289, 290 (Fla. 3d DCA 1991)("Reversal is required where...owing to the nature of the ex parte communication the reviewing court is unable to determine whether the action was actually harmless.").

In ***Thomas v. State***, 748 So.2d 970 (Fla.1999), this Court recognized "jury deliberations in a criminal case are perhaps the most critical and sacred parts of a trial, and care should be taken to ensure that those deliberations are conducted in such a way that there is no question of their reliability." This Court in ***Sutton v. State***, 51 So.2d 725, 726 (Fla. 1951), recognized how important fair jury deliberations are to a fair trial and how important it is to answer jury's questions concerning the applicable law in the case. In ***Sutton***, after the jury deliberated two hours without reaching a verdict, it returned to the court room and requested the court to advise it as to what punishment would be imposed if the defendant was found guilty. The trial judge refused to answer the jurors

question and told them to go back to their deliberations. In concluding that the trial judge's failure to respond to the jurors question required a new trial, this Court held:

> . . . In our system of jurisprudence, the jury is of ancient and constitutional sanction, Sections 3 and 11, Declaration of Rights, Constitution of Florida, F. S. A. and by the same token it is accorded a function on the horizontal with that of the trial judge. It is in no sense a menial to be ordered hither and yon by the court, it performs an extremely important duty and neither its duty nor that performed by the court can be done properly in the absence of mutual aid and assistance. It resolves controversies of fact about which the judge cannot speak or apply the rule of law till the jury announces its judgment. The law applied by the court arises from the factual truth adduced by the jury. In reality the trial of a case like this is nothing more than a realistic search for the truth by court and jury. **The jury has a perfect right to return to the court room at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the court in developing the truth of the controversy. The question propounded by the jury in this case was well within the allowable ambit and we think it was entitled to a courteous, helpful answer. The law contemplates such questions. Sections 918.10 and 919.05, F. S. A. The writer of this opinion speaks from personal experience as a juror in holding that the court room behavior of the trial judge is the most potent factor in guiding the trial of any cause to a righteous verdict. To inspire public confidence in the method employed it is more important than all other factors combined.**

Sutton, 51 So.2d at 726.

In conclusion, the law in Florida clearly establishes that a jury in this state has the absolute right during deliberations to ask the court questions concerning the law and to have testimony re-read. An improper instruction from the judge prior to deliberations which tells the jury they can not ask any questions during deliberations is clearly error. Furthermore, since the nature of this improper communication between the judge and the

jury prevents an appellate court from ever knowing what affect this improper instruction had on the jury deliberations, this Court should adopt the conclusion of both the Fourth District Court of Appeal and the dissenting opinion in this case which is that the error in this case was per se reversible error. Therefore, this Court should quash the opinion of the Third District Court of Appeal and grant defendant a new trial.

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Johnson a new trial.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:_____
ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of October, 2009.

_____
ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
ROBERT KALTER
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:09-966

AUNDRA JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX

INDEX TO APPENDIX

PAGES

Decision of the District Court of Appeal..... 1-5

Certificate of Service.....6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of October, 2009.

_____

ROBERT KALTER
Assistant Public Defender