IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:09-966

AUNDRA JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

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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.

The issue this Court must resolve is whether a trial judge's improper instructions to the jury, over the objection of counsel, that the jury does not have the right to ask questions concerning the law and can not ask to have testimony re-read, should be considered per se reversible error. In the alternative, if this Court concludes that the harmless error doctrine applies to the error in this case, the court must then decide whether the Third District Court of Appeal's decision improperly applied the harmless error doctrine case since the court merely concluded that the error was harmless based upon their conclusion that the evidence was overwhelming, rather than attempt to evaluate how the improper jury instruction affected the jury deliberations.

In its brief the state seems to concede that the court used the wrong standard in applying the harmless error doctrine since the court merely concluded that the evidence was overwhelming. However, the state argues that since Petitioner's counsel failed to raise this issue in his motion for rehearing, Petitioner is barred from raising the issue in this Court. The state cites to not one case that requires a petitioner to raise an issue on rehearing in order to preserve the issue in this Court, but instead, cites to three cases

wherein this Court refused to address issues that were beyond the scope of the conflict issue. *See Williams v. State*, 863 So.2d 1189 (Fla. 2003); *Asbell v. State*, 715 So.2d 258 (Fla. 1998) and *Trushin v. State*, 425 So.2d 1126 (Fla. 1982). It is Petitioner's position that assuming the harmless error doctrine is applicable to the error in this case, that if the Third District had applied the proper harmless error analysis, the court would not have been convinced beyond a reasonable doubt that the error was harmless and therefore, a new trial would have been granted. More importantly, it is Petitioner's position that if the Third District would have attempted to apply the proper harmless error analysis to this case, the court would have come to the same conclusion that the Fourth District Court of Appeal reached which is that the harmless error doctrine can not be applied to the error that occurred in this case since, it is impossible to know whether the improper jury instruction prevented the jury from asking for clarifications on the law or the testimony at trial.

In support of this position Petitioner in his initial brief cited to numerous cases from both this Court and the Fourth District Court of Appeal that have held certain types of improper communications between a judge and a jury must be considered per se reversible error since, it is impossible to know how the improper communication affected the jury deliberations. In its brief the state ignores all of these cases and does not even attempt to distinguish them. Instead, the state relies upon several state and federal cases which all are distinguishable from the facts in this case.

Initially, the state relies upon two cases from the Third District Court of Appeal that held that a trial judge's improper instruction to the jury that read back testimony is not available is not fundamental error. *See Smith v. State*, 990 So.2d 1162 (Fla. 3d DCA 2008) and *Diaz v. State*, 567 So.2d 18 (Fla. 3d DCA 1990). The obvious distinction between those cases and the present case is that in this case the Petitioner objected to the improper instruction given by the trial judge and, therefore, the trial judge had the ability to correct the mistake. The Fourth District Court of Appeal in *Farrow v. State*, 573 So.2d 161 (Fla. 4th DCA 1990), concluded that an improper jury instruction wherein the jury was told that no read back testimony was available was not fundamental error since, an objection by counsel could have resulted in the court rectifying the error. This is evidenced by the following conclusion of the court:

> Under the standards of the foregoing cases the judge's instruction to the jury panel at the commencement of appellant's trial did not constitute fundamental error. While the instruction was error, as it was in contravention of Florida Rule of Criminal Procedure 3.440 which permits the readback of testimony, it does not go to the merits of the case and does not deprive the defendant of a fair trial. **Defense counsel could have brought it to the court's attention immediately and obtained a curative instruction. Rather than denying a defendant a fair trial, to declare this instruction, given before the trial starts, to be a fundamental error permits the defendant two trials. What defense counsel would object to such an instruction on voir dire? It would be far better for the defendant not to object, even though the error is easily curable, and await the outcome of the trial. If the defendant is convicted, then defense counsel can be assured of securing a reversal on appeal because of the "fundamental" error which the judge committed in voir dire. If specific and confusing substantive jury instructions can be held not to make a trial fundamentally unfair, see Smith v. State; Castor v. State, then a procedural instruction such as**

the one given here is also not a fundamental error, and we so hold.

The fact that a certain type of error may not be deemed fundamental error does not mean that the error is not per se reversible error. For example, whereas this Court has recognized that an *Ivory* violation is per se reversible error, the court has also recognized that an *Ivory* violation is not fundamental error. *See, Ivory v. State,* 351 So.2d (Fla. 1977) and *Thomas v. State*, 730 So.2d 667 (Fla. 1948). Therefore, the cases that hold that an improper instruction by a judge wherein he tells a jury that they can not ask to have testimony re-read is not fundamental error has no relevance to the issue in this case since, Petitioner objected to the improper instruction and gave the judge the opportunity to cure the error.

The state also relies upon federal cases that do not aid their position in this case since they are (a) not binding on this court; (b) factually distinguishable from this case; and (c) inconsistent with this Court's decisions and another Federal Circuit Court which have held that the harmless error doctrine can not be applied to the type of error that occurred in this case since it is impossible to determine how the error may have affected the jury verdict.

In *United States v. Anderson*, 23 F.3d 404 (4th Cir 1994) and *United States v. Lang*, 39 F.3d 1182 (6th Cir. 1994), defense counsel failed to object to the improper instruction telling the jury read back testimony is not available and the court held that the improper jury instruction was not fundamental error. Once again in this case, defense

counsel did in fact object to the improper instruction and Petitioner is not arguing that this court should conclude that the error was fundamental error.

In *United States v. White,* 23 F.3d 404 (4th Cir 1994), the trial judge told the jury that they could not ask to have testimony read back. However, unlike this case the trial judge never told the jury that they could not ask any questions concerning the law. Therefore, the facts in *White* are clearly distinguishable from the facts in this case since the court never dealt with the issue as to the affect of an improper jury instruction which tells the jury they can not ask any questions concerning the law. Furthermore, the rational in *White,* which allows an appellate court to speculate as to whether an improper jury instruction which prohibited the jury from asking to have testimony read back affected the jury deliberations, is completely inconsistent with Justice England's concurring opinion in *Ivory v. State,* 351 So.2d 26 (Fla. 1977), which was reaffirmed by the court in *State v. Merrick* 831 So.2d 156 (Fla. 2002), wherein Justice England concluded:

> 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.[1]

In *White,* the court speculated that since the trial was a short one day trial there **probably** would have been no reason for the jury to ask to have testimony re-read. In reaching this conclusion the Fourth Circuit's opinion directly conflicted with an opinion

[1]It should be noted again that the error in the *Merrick* case was almost identical to the error in this case. In *Merrick*, the bailiff told the jury they could not have testimony readback while in this case the judge gave the improper instruction. In both cases it is impossible to determine how the improper instruction may have affected the jury verdict.

from the Second Circuit Court of Appeal in *United States v. Criollo*, 962 F.2d 241 (2d Cir. 1992), wherein the Second Circuit concluded that an improper jury instruction prohibiting the jury to ask to have testimony to be read back is per se reversible error no matter how short the trial was.

In *Criollo*, supra, the trial judge, similar to the trial judge in this case, told the jury before deliberations that they could not ask to have testimony read back. The government, similar to the state in this case, tried to convince the court to apply the harmless doctrine to the improper instruction since (1) the trial was relatively short, with a limited number of witnesses and (2) the jury never actually requested a readback, which would have required the court to put its restrictive policy into effect. In rejecting the government's argument the court held:

> **We have no way of determining whether the jury wanted to request a readback, but was chilled from doing so by the court's prohibition against readbacks stated in the midst of defense counsel's summation.** Since this case was so short and involved only a few witnesses, we might well conjecture that any request for a readback would not be the result of a confused jury attempting to sort through reams of evidence, but rather such a request could indicate that the jury had a genuine inability to resolve serious questions of fact. E.g., United States v. Rabb, 453 F.2d 1012, 1014 (3 Cir.1971) (jury's request for readback following short trial with three witnesses could have reflected jury's doubt or disagreement over evidence). We all know that juries not infrequently get into sharp disputes-whether the trial be long or short-as to the testimony of one or more witnesses. It strikes us as far better to try to have such disputes resolved by readbacks, rather than to end up with a hung jury, a mistrial and another trial.

Consistent with the holdings of this Court and the Fourth District Court of

Appeal, the Second Circuit properly recognized that since the court could only speculate as to whether the improper instruction affected the jury's deliberations, the harmless error doctrine could not be applied. The court reached this conclusion despite the fact that the trial was short and there was nothing in the record indicating the jury may have wanted to have testimony re-read.

A review of the state's arguments, which are identical to the arguments that were made by the government in *Criollo*, as to why they believe the error in this case should be deemed harmless error will best illustrate why it is impossible to apply the harmless error doctrine in this case. The state initially argues that since there is nothing in the record to indicate that the jury may have wanted testimony re-read, it is clear that the error was harmless. What the state fails to recognize is that maybe the reason why there is nothing in the record indicating that the jury may have wanted testimony re-read was because right before deliberations, the jury was told they could not ask to have testimony re-read.

The state next argues that since in their opinion the evidence was overwhelming, there would have been no reason for the jury to want to have testimony read back. In making this argument the state ignores the fact that the same witnesses who claimed Petitioner was fleeing the police officer, also claimed that he committed a burglary. If the evidence was so overwhelming and there was no confusion, then the jury would have not acquitted defendant of the burglary and convicted him of the fleeing a police officer. Recognizing this problem, the state engages in the ultimate speculation by arguing that

the jury's verdicts established that if the jurors were confused about the testimony, they obviously resolved those doubts in favor of Petitioner and, therefore, the error was harmless. Once again there is nothing in this record which would remotely suggest that if the jury was confused about the testimony of the law, they resolved the confusion in favor of Petitioner.

Furthermore, the state in its response does not even attempt to speculate how the trial judge's improper instruction to the jury that they can not ask questions concerning the law could be considered harmless. There is no way of knowing whether the jury was confused about how to apply the law in this case and whether the trial judge's improper instruction prevented the jury from asking for a clarification of the law.

To apply the harmless error doctrine to the improper jury instructions which prohibited questions from the jury concerning both the facts and law as the State proposes, would "unnecessarily embroil trial counsel, trial judges, and appellate courts in a search for evanescent harm, real or fancied" which this Court has already recognized it is not willing to do. See *Ivory v. State*, 351 So.2d 26 (Fla. 1977)(England, J., concurring) and *State v. Merrick*, 831 So.2d 156 (Fla. 2002).

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,

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BY:_____
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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 January, 2010.

_____
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.

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ROBERT KALTER
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