

**IN THE
SUPREME COURT OF FLORIDA**

CASE NO.: SC10-1275

RONALD WAYNE HENDRICKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**On Review from the District Court of Appeal,
First District of Florida**

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Ronald Wayne Hendricks was charged with four counts of sexual battery on a child less than 12 years of age. He was convicted at trial of two counts as charged and one count of a lesser-included offense of simple battery, and was acquitted of the fourth count. He was sentenced to two consecutive terms of life imprisonment, plus one year. The alleged victim and sole prosecution witness was the daughter of his former girlfriend, with whom he had lived for several years. She made allegations after achieving adulthood of conduct having occurred years earlier. App. 2. In his defense, Hendricks testified, denying that he committed any of the charged offenses, and he also presented testimony from multiple witnesses of his good reputation in the community for truth and veracity. Two proffered character witnesses would also have testified that he had a good reputation for sexual morality, but the trial court precluded that testimony. App. 2-3.

On appeal, Hendricks challenged the trial court's exclusion of evidence of his reputation for sexual morality; the manner in which the court permitted one or more questions from the jury to Hendricks and the court's own cross-examination of Hendricks; an improper closing argument by the prosecutor; and the trial court's failure to follow the procedure required by Fla.R.Crim.P. 3.410 in responding to a question from the jury during deliberations and failing to inform the jury of the

availability of a read-back of testimony. The First District followed dicta from the Third and Fifth Districts in affirming the exclusion of the proffered character evidence, but recognized that the majority of cases from multiple other jurisdictions allows such evidence. App. 6-14. The court noted that no Florida court had previously decided whether “a person accused of child molestation may or may not introduce evidence of his reputation for sexual morality for the purpose of showing he does not have the character trait necessary for committing acts of child molestation.” App. at 6.

The district court also found no reversible error in the manner in which the trial court failed to allow Hendricks an opportunity to participate in a determination of what action to be taken in response to a jury’s request to view a portion of the trial transcript, its negative response to the request, and its failure to inform jurors that a read-back of the requested testimony was possible. App. 14-28.

The court denied Hendricks’ motion for rehearing and for certification of the character evidence issue as one of great public importance. *See* App. 1. However, the court below withdrew its previous opinion and issued a substitute opinion further expounding on the character evidence issue, App. 12-13 n.1, and expressly noted its conflict with the Second District’s holding that an erroneous and

misleading refusal to allow a read-back constitutes fundamental error, stating, “We disagree with *LaMonte* [*v. State*, 145 So.2d 889, 893 (Fla. 2d DCA 1962)]” App. 26-27. Hendricks filed a timely notice to invoke the discretionary jurisdiction of this Court on June 24, 2010, and this jurisdictional brief follows.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of either the supreme court or another district court of appeal on the same point of law. *See* Art V., Sec. 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

The decision of the First District below expressly and directly conflicts with the Second District’s decision in *LaMonte*. The opinion below also conflicts with this Court’s decisions in *Ivory v. State*, 351 So.2d 26 (Fla. 1977) and *Bradley v. State*, 513 So.2d 112 (Fla. 1987), in which defense counsel were deprived of an opportunity to make objections and argument on how to respond to a jury request during deliberations, which the record reflects was the case in Hendricks’ trial.

The trial court in this case also affirmatively misled the jury into believing that a read-back was impermissible. As a result, the decision below expressly and directly conflicts with a decision of another district court of appeal on an important question arising routinely and widely throughout the state during criminal jury trials. Accordingly, the Court should accept jurisdiction and grant review in this case, and in doing so should further address the important character evidence issue on which the First District expressly rejected the views of the majority of jurisdictions to have addressed the issue.

ARGUMENT

I.

THE COURT SHOULD GRANT REVIEW TO RESOLVE THE FIRST DISTRICT'S EXPRESS AND DIRECT CONFLICT WITH THE SECOND DISTRICT ON AN IMPORTANT AND RECURRING ISSUE IN FLORIDA CRIMINAL TRIALS.

The Court should grant review on the basis of the First District's express and direct conflict in this case with the law of the Second District as to whether a violation of Fla.R.Crim.P. 3.410 constitutes reversible error where the trial court did not permit trial counsel an opportunity to be heard on a jury request to review a portion of trial testimony. A number of decisions, including recently, have addressed the importance and standard of review applicable to a Rule 3.410 error

during trial deliberations when jurors request additional instructions or reading of testimony. The pertinent decisions further address circumstances, such as occurred in this case, where the lay jury requested to see a portion of the “transcript,” not understanding that trial testimony rarely has been transcribed by the time the jury deliberates and trial court’s response failing to apprise the jury that testimony may be read back under Rule 3.410. The First District’s opinion in this case, that these errors can never constitute fundamental error, despite going to the heart of the jury’s deliberative process, expressly and directly conflicts with the decision of the Second District in *LaMonte v. State*, 145 So.2d 889, 893 (Fla. 2d DCA 1962). App. 27 (“We disagree with *LaMonte*.”)

Further, the decision below also conflicts with this Court’s decisions that hold that the mere fact that counsel for the defendant was present when the trial court considered the jury request is not sufficient to excuse the error and prevent *per se* reversal. See *Bradley v. State*, 513 So.2d 112, 114 (Fla. 1987) (more than the mere presence of counsel is required), citing, *Ivory v. State*, 351 So.2d 26, 28 (Fla. 1977); *Curtis v. State*, 480 So.2d 1277, 1278, n.2 (Fla. 1985). A “participation process” is necessary at the stage of a jury question during deliberations “to determine whether prejudice has occurred during one of the most sensitive stages of the trial.” *Culvert v. State*, 569 So.2d 433, 435 (Fla. 1990).

This Court has held that a Rule 3.410 violation constitutes *per se* reversible error. *Bradley*, 513 So.2d at 112-13. *See also, White v. State*, 31 So.3d 816, 818 (Fla. 2d DCA 2010) (finding ineffective assistance of appellate counsel for failing to raise a Rule 3.410 violation on direct appeal).

The Second District concluded that the trial court's refusal to have testimony read to the jury on its request during deliberations constitutes fundamental error in a case where the evidence was not overwhelming and the requested testimony was material to the verdict. *LaMonte*, 145 So.2d at 893. Where the testimony sought to be reviewed by the jury is material to the outcome of its deliberations, such an error necessarily injuriously affects the substantial rights of the defendant. *Id.* This is particularly so where the evidence cannot at all be described as overwhelming, but rather constitutes the uncorroborated testimony of a single prosecution witness, as in this case.

In *Farrow v. State*, 573 So.2d 161 (Fla. 4th DCA 1990) (*en banc*), the court held that an instruction during *voir dire* that no testimony would be read back after being given did not constitute fundamental error. *Id.* at 163. However, that instruction was given before trial, with ample opportunity for an objection and subsequent cure. Furthermore, the erroneous instruction can “penetrate[] the sanctity of the jury room and intimidate[] the jury.” *Id.* at 164 (Garrett, J.,

dissenting). The instruction “prevents a complete airing of the merits of a case and strikes at the very foundation of a jury trial...the deliberation process.” *Id.* (Garrett, J., dissenting).

The court below further construed the conflicting decisions regarding the trial court instructions misleading juries as to the availability of a partial read-back of testimony in *Avila v. State*, 781 So.2d 413, 415-16 (Fla. 4th DCA 2001), in contrast with *Hazuri v. State*, 23 So.3d 857 (Fla. 3d DCA 2009), which was repudiated and certified as a conflicting decision by *Barrow v. State*, 27 So.3d 211, 216-18 (Fla. 4th DCA 2010). *Hazuri* held that the jury’s request for a “transcript” did not even implicate the possibility of a read-back. 23 So.3d at 859-60. With a jury of laypersons, such a distinction elevates form over substance and constitutes “niggling nitpicking.” *Id.* at 861 (Cope, J., dissenting). The *Barrow* court agreed with Judge Cope’s dissent in *Hazuri*. 27 So.3d at 218 n.2. App. 20-23. The First District found that because Hendricks’ trial counsel failed to object, the error was not preserved for appeal and did not constitute fundamental error. App. at 28.

The Court should grant review to resolve the conflicts in Florida decisional law presented herein with respect to an important issue that arises commonly in criminal trials during the crucial process of jury deliberations. The trial court reacted to the jury’s request without allowing trial counsel a meaningful

opportunity to address the request, and counsel did not affirmatively agree to the court's actions as did counsel in *Thomas v. State*, 730 So.2d 667, 668 (Fla. 1998), wherein counsel's agreement precluded a finding of reversible error. The trial court in this case further misled the lay jury by failing to advise it of the availability of a read-back. In a close swearing contest case with no corroborating evidence of the accusations, such as this one, the error pierced the integrity of the deliberative process. Accordingly, the Court should grant view on the basis of this important and recurring issue as to which express and direct conflict exists.

CONCLUSION

For all the foregoing reasons, the Court should exercise its discretionary jurisdiction to review the merits of the issues on appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Michael T. Kennett, Esquire**, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399, by United States Mail, this 2nd day of July, 2010.

ATTORNEY

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is 14-point Times Roman.

ATTORNEY

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