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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,187


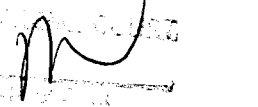
DENNIS WAYNE THOMPSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

  
 FEB 19 1993  
 CLERK OF SUPREME COURT  
 By: 

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ON APPLICATION FOR DISCRETIONARY  
REVIEW

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BRIEF OF RESPONDENT ON JURISDICTION

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## INTRODUCTION

The Respondent was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The Petitioner, was the defendant in the trial court and the appellant in the Third District Court of Appeal.

In this brief, the parties will be referred to as they appear before this court.

## STATEMENT OF THE CASE AND FACTS

Respondent would accept petitioner's Statement of the Case and of the Facts as an accurate account of relevant proceedings.

POINT INVOLVED ON APPEAL

WHETHER PETITIONER HAS FAILED TO ESTABLISH AN EXPRESS AND DIRECT CONFLICT WITH BOVA v. STATE, 410 So.2d 1343 (Fla. 1982) TO WARRANT THE INVOCATION OF THIS COURT'S DISCRETIONARY JURISDICTION.

### SUMMARY OF THE ARGUMENT

The Third District Court of Appeal's holding in this case does not expressly and directly conflict with Bova v. State, 410 So.2d 1343 (Fla. 1982). Bova, supra applies the harmless error doctrine to a trial court's restriction of counsel's contact with his client/defendant during a trial recess. The Third District applied the holding of Bova, supra to the facts of this petitioner's case.

## ARGUMENT

PETITIONER HAS FAILED TO ESTABLISH AN  
EXPRESS AND DIRECT CONFLICT WITH BOVA  
v. STATE, 410 So.2d 1343 (Fla. 1982)  
TO WARRANT THE INVOCATION OF THIS  
COURT'S DISCRETIONARY JURISDICTION

Petitioner urges this Honorable Court to accept jurisdiction of this case on the ground that the Third District Court of Appeal's holding in his direct appeal conflicts with Bova v. State, 410 So.2d 1343 (Fla. 1982). The case sub judice is not in direct and express conflict with Bova, supra, as is required by Fla.R.App.P 9.030(a)(2)(A)(iv), but rather correctly applied the Bova, supra holding.

The Third District Court of Appeal, in its revised opinion held, as did the Florida Supreme Court in Bova, supra that the harmless error doctrine was applicable to a trial court's restriction of counsel's contact with his client/defendant during a recess.

In Bova, supra this court, although finding error opined that the petitioner must show "actual prejudice." The Third District held that this petitioner failed to make that showing, pursuant to Bova, supra

Appellant's harm resulted not from  
being deprived of a right to confer

with counsel, but from having testified falsely to the question regarding other arrests. After the question had been asked "the door was opened" and the State had a right to bring before the jury the fact that defendant was then incarcerated awaiting trial for similar offenses. Prejudice sprang from a combination of false testimony and the invited evidence of a subsequent arrest for burglary and theft.

Thompson v. State  
So.2d \_\_\_\_\_ (Fla. 3d DCA  
1985) (Case No. 83-1375;  
Opinion filed December  
17, 1985)[11 F.L.W. 24].

Additionally, prejudice did not occur since even if consultation was permitted defense counsel could not have offered any advice which would soften the result of the anticipated impeachment.

The Third District when applying Bova, supra in Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982) on rehearing en banc, recognized the necessity of an objection. The Third District, however, failed to address the lack of an objection by this petitioner's attorney. A reading of the portion of transcript attached to petitioner's brief supports respondent's assertion that an objection was not placed.

Therefore, not only is this decision subject to the harmless error doctrine approved in Bova, supra, but is additionally unpreserved, as required by Bova, supra. In that petitioner

has failed to establish an express and direct conflict, this court should not accept jurisdiction of petitioner's cause.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests this Court deny discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to RICHARD J. PREIRA, ESQUIRE, 1801 West Avenue, Miami Beach, Florida 33139 on this 5<sup>th</sup> day of February, 1986.

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RKL/dm