

IN THE SUPREME COURT OF FLORIDA

TRAVIS JAMES,

CASE NO: SC03-1017

Petitioner,

L.T. NO.: 4D99-4114

vs.

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S JURISDICTIONAL BRIEF

**On Review from the District Court
of Appeal, Fourth District**

State of Florida

Law Offices of Jason T. Forman, P.A.

150 East Davie Boulevard

Suite 201

Fort Lauderdale, Florida 33316

(954) 527-5557

Law Firm of Gary S. Ostrow, P.A.

Intracoastal Building

Suite 301

3000 Northeast 30th Place

Fort Lauderdale, Florida 33306

(954) 566-4033

TABLE OF CONTENTS

	Page
Table of Citations	iii
Statement of the Case and Facts	1-2
Summary of Argument	2-3
Jurisdictional Statement	3
Argument	
The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the decision of the Third District Court of Appeal in <u>Eickmeyer v. Duncan Donuts of America, Inc.</u> 507 So.2d 1193 (Fla. 3 rd DCA 1987), the Fifth District Court of Appeal in <u>Bouey v. State</u> , 762 So.2d 537 (Fla. 5 th DCA 2000) and the First District Court of Appeal in <u>Fischer v. State</u> , 429 So.2d 1309, 1311 (Fla. 1 st DCA 1983).	3-5
Conclusion	5-6
Certificate of Service	6
Certificate of Compliance	7

TABLE OF CITATIONS

FLORIDA CASES	Page
<u>Bouey v. State</u> , 762 So.2d 537 (Fla. 5 th DCA 2000)	2-5
<u>Eickmeyer v. Duncan Donuts of America, Inc.</u> , 507 So.2d 1193 (Fla. 3 rd DCA 1987)	2-5
<u>Fischer v. State</u> , 429 So.2d 1309, 1311 (Fla. 1 st DCA 1983)	2-5
<u>James v. State</u> , 843 So.2d 933 (Fla. 4 th DCA 2003)	4

STATEMENT OF FACTS AND CASE

The Petitioner was convicted of first-degree murder after a jury trial was held before the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. During jury selection, Frederick Burtz, an unchosen juror, sat as the foreperson during the course of the jury trial. Juror Frederick Burtz was not selected as a juror, but due to a mistake, was seated instead of the chosen juror Robert Burns.

After the verdict was reached with the unchosen juror Frederick Burtz as its foreperson, the jury was subsequently polled. During the polling of the jury, juror Frederick Burtz affirmatively engaged in misconduct by responding on two separate occasions to the name Robert Burns.

A Motion for New Trial was filed and heard at the Circuit Court level. The trial court determined that there was no prejudice and that the mistake was not fundamental. An appeal was taken to the Fourth District Court of Appeal to review the trial court's order denying the Petitioner's Motion for New Trial. On March 26, 2003, the District Court of Appeal rendered an opinion affirming the decision of the trial court.

The District Court held that there was no evidence that Burtz's presence on the jury affected the verdict or prevented a fair trial. As such, the District Court found that the Petitioner failed to establish prejudice and rejected the contention that the mistake constituted fundamental error. The Petitioner filed a Motion for Rehearing, Motion for Certification and Motion for Rehearing En Banc, which were all denied on May 15, 2003. On June 2, 2003, a Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed.

SUMMARY OF ARGUMENT

In this case, the Fourth District Court of Appeal held that there was no prejudice to the Petitioner even though an unselected juror sat on the jury and acted as its foreperson during deliberations. The decision of the District Court cannot be reconciled with previous decisions of other district courts, such as Eickmeyer v. Duncan Donuts of America, Inc. 507 So.2d 1193 (Fla. 3rd DCA 1987), Bouey v. State, 762 So.2d 537 (Fla. 5th DCA 2000), and Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983), where those courts have consistently held that any person who is present during deliberations and who was not supposed to be present in the jury room constitutes fundamental error requiring a new trial.

The Petitioner contends that the decision of the Fourth District Courts of Appeal expressly and directly conflicts with the aforementioned decisions in the First, Third and Fifth District Courts of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(iv).

ARGUMENT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN EICKMEYER V. DUNCAN DONUTS OF AMERICA, INC. 507 So.2d 1193 (FLA. 3RD DCA 1987), THE FIFTH DISTRICT COURT OF APPEAL IN BOUEY V. STATE, 762 So.2d 537 (FLA. 5TH DCA 2000) AND THE FIRST DISTRICT COURT OF APPEAL IN FISCHER V. STATE, 429 So.2d 1309, 1311 (FLA. 1ST DCA 1983).

The Fourth District Court of Appeal made a determination that there was no prejudice established when an unchosen person was allowed to sit as the foreperson on a first-degree murder trial. As explained above, the Fourth District Court of Appeal conflicts with the decisions of several other courts holding that the presence of any stranger, whether an alternate juror or an interpreter, during deliberation constitutes fundamental error requiring a new trial. The Petitioner respectfully submits that this Honorable Court should grant discretionary review and resolve the conflict by quashing the decision of the Fourth

District Court of Appeal in James v. State, 843 So.2d 933 (Fla. 4th DCA 2003), rehearing denied. See Appendix A.

The district court rendered an opinion affirming the decision of the trial court denying the Petitioner's Motion for New Trial. The Fourth District Court of Appeal affirmed the decision of the trial court because:

In the instant case, there is no evidence that Burtz's presence on the jury affected the verdict or prevented a fair trial... We . . . reject that the mistake constitutes fundamental error. Id.

Thus, the Fourth District Court of Appeal has expressly held that the sitting of an unchosen juror (a stranger) is not fundamental error and results in no prejudice to the Petitioner. The decision of the Fourth District Court of Appeal is in direct conflict with the decision of several other jurisdictions, namely, Eickmeyer v. Dunkin Donuts of America, Inc., 507 So.2d 1193 (Fla. 3rd DCA 1987)(Alternate jurors presence in jury room during deliberations created fundamental, reversible error, requiring a new trial); Bouey v. State, 762 So.2d 537 (Fla. 5th DCA 2000)(A new trial is required if an alternate juror was present in the jury room during deliberations); Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983)(Allowing an alternate juror to deliberate with regular jurors was fundamental error

requiring a new trial, even without objection by defense counsel prior to verdict).

The Fourth District Court of Appeal conflicted with these decisions when it determined that Juror Frederick Burtz was not deemed a stranger to deliberations. Instead, the court ignored the ramifications of his unauthorized presence and placed the burden on the Petitioner to demonstrate prejudice. This is expressly and directly contrary to the aforementioned decisions of the other district courts of appeal.

Applying the Eickmeyer, Bouey and Fischer decisions to the situation at hand, it requires that this Honorable Court accept discretionary review and quash the contrary decision of the Fourth District Court of Appeal.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the Petitioner's arguments.

Respectfully submitted,

Law Offices of Jason T. Forman, P.A.
150 East Davie Boulevard
Suite 201
Fort Lauderdale, FL. 33316
(954) 527-5557

By: _____
Jason T. Forman, Esq.
Florida Bar No. 109850
Co-Counsel for Petitioner

By: _____
Gary S. Ostrow, Esq.
Florida Bar No. 354694
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished by U.S. Mail to the Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399 and to James Carney, Sr. Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 on this _____ day of _____, 2003.

Respectfully submitted,

Law Offices of Jason T. Forman, P.A.
150 East Davie Boulevard
Suite 201
Fort Lauderdale, FL. 33316
(954) 527-5557

By: _____
Jason T. Forman, Esq.
Florida Bar No. 109850
Co-Counsel for Petitioner

By: _____
Gary S. Ostrow, Esq.
Florida Bar No. 354694
Co-Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

Law Offices of Jason T. Forman, P.A.

150 East Davie Boulevard
Suite 201
Fort Lauderdale, FL. 33316
(954) 527-5557

By: _____
Jason T. Forman, Esq.
Florida Bar No. 109850
Co-Counsel for Petitioner

By: _____
Gary S. Ostrow, Esq.
Florida Bar No. 354694
Co-Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

TRAVIS JAMES,

Petitioner,

CASE NO: SC03-1017

L.T. NO.: 4D99-4114

vs.

STATE OF FLORIDA,

Respondent.

_____ /

APPENDIX TO

PETITIONER'S JURISDICTIONAL BRIEF

Law Offices of Jason T. Forman, P.A.

150 East Davie Boulevard

Suite 201

Fort Lauderdale, Florida 33316

(954) 527-5557

Law Firm of Gary S. Ostrow, P.A.

Intracoastal Building

Suite 301

3000 Northeast 30th Place

Fort Lauderdale, Florida 33306

(954) 566-4033

INDEX TO APPENDIX

James v. State, 843 So.2d 933(Fla. 4th DCA 2003)

A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished by U.S. Mail to the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399 and to James Carney, Sr. Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 on this _____ day of _____, 2003.

Respectfully submitted,

Law Offices of Jason T. Forman, P.A.
150 East Davie Boulevard
Suite 201
Fort Lauderdale, FL. 33316
(954) 527-5557

By: _____
Jason T. Forman, Esq.
Florida Bar No. 109850
Co-Counsel for Petitioner

By: _____
Gary S. Ostrow, Esq.
Florida Bar No. 354694
Co-Counsel for Petitioner