IN THE SUPREME COURT OF FLORIDA

CASE NOS. 67,772 & 67,773

EDWARD SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER

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INTRODUCTION

The petitioner, Edward Smith, was the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the petitioner will be referred to as defendant and the respondent as the state.

The following symbols will be utilized: the symbol "R" will designate the record on appeal, the symbol "Tr" the transcript of trial proceedings, the symbol "S.R." the supplemental record on appeal, and the symbol "A" the appendix to this brief (comprised

of the decision of the court below). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

An information charging defendant with burglary and grand theft was filed on February 2, 1983 (R. 1-2A). Defendant was arraigned on February 10, 1983, and stood mute; the trial court directed the entry of a not guilty plea (S.R. 1).

Trial commenced on July 27, 1983, and the jury returned guilty verdicts on the following day (R. 4, 13, 14-15). The trial court entered judgment on that date (R. 16-17). A timely motion for new trial was denied on August 9, 1983 (R. 21-26; S.R. 2), and the court on that date imposed a seven-year term of imprisonment on the burglary conviction, suspending the entry of sentence on the grand theft count (R. 18-19).

Notice of appeal was filed on September 8, 1983 (R. 27). The District Court of Appeal of Florida, Third District, issued its decision, reversing the judgment of the trial court and remanding for a new trial, on October 8, 1983 (A. 1-2). Both parties timely invoked the discretionary-review jurisdiction of this Court.[1]

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[1] The basis for the invocation of this Court's jurisdiction was a certification by the District Court of Appeal that its decision passed upon a question of great public importance. See Art. V, § 3(b)(4), Fla.Const.

QUESTIONS PRESENTED

I

WHETHER THE RULE THAT THE FAILURE OF A TRIAL COURT TO CONDUCT AN INQUIRY INTO A VIOLATION OF THE PROVISIONS OF RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE IS PER SE REVERSIBLE ERROR APPLIES IN THIS CASE, REQUIRING THAT DEFENDANT BE AFFORDED A NEW TRIAL WHERE THE STATE FAILED TO DISCLOSE A STATEMENT ATTRIBUTED TO DEFENDANT, IN VIOLATION OF RULE 3.220(a)(1)(iii) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE, AND THE TRIAL COURT PERMITTED THE STATEMENT TO BE INTRODUCED INTO EVIDENCE WITHOUT CONDUCTING AN INQUIRY INTO THE CIRCUMSTANCES OF THE VIOLATION, POTENTIAL PREJUDICE TO DEFENDANT, AND WHETHER SANCTIONS SHOULD BE IMPOSED AS A CONSEQUENCE OF THE DISCOVERY VIOLATION.

II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO BE PRESENT DURING THE EXERCISE OF PEREMPTORY CHALLENGES AT SIDEBAR, IN VIOLATION OF DEFENDANT'S RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND RULE 3.180 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

STATEMENT OF THE FACTS

Trial Proceedings:

Jury selection in this case occurred on July 27, 1983 (Tr. 3-77). After the court and counsel completed questioning the prospective jurors, counsel approached the bench (Tr. 69), and the following transpired:

> Mr. Landau [counsel for defendant]: Excuse me, are we going to allow my client?
> The Court: No. Do you want to confer with him?
> Let the record reflect that counsel has

> objected to holding this in the hallway.
>
> Mr. Landau: I'm objecting to doing this outside my client's presence. If the Court is denying my request we can go into the hallway. I just want my client to be present.
>
> The Court: I want the record to reflect that the Court rules that the client cannot come side-bar and stand with the lawyers and the clerk to decide on the jury selection.
>
> Now, that being the ruling, I will keep it right here . . . .

(Tr. 69-70).

The parties then proceeded to exercise peremptory challenges, and the court twice permitted counsel to confer with defendant, once after a tentative panel had been selected with counsel having exercised two peremptory challenges, and once after counsel had exhausted defendant's challenges and prior to the selection of the alternate (Tr. 71-75). At the conclusion of the sidebar conference, counsel renewed his objection to having proceeded in defendant's absence, and moved to strike the panel (Tr. 75). The motion was denied (Tr. 75).[2]

2

This issue was relitigated in counsel's motion for new trial (R. 24-25). In denying the motion on that ground, the court explicated the basis for its ruling as follows:

> [H]e was at all times in the courtroom with the jury panel, one looking at the other, and that's the reason at the time that we went side bar and I indicated to you that you had the privilege at any time, every time if you still wished to walk back and forth to your client to discuss a particular juror with him, but I did rule and I will continue to rule . . . that a defendant has [no] right to go side bar and put his head in that.
>
> * * *
>
> . . . [Y]ou are not allowed to go sidebar with your client. Therefore, an extension of that

(Cont.)

Alfreda Gordon testified that she is responsible for renting and caring for a residence owned by her daughter, which is located at 1871 Northwest 65th Street (Tr. 95-96). Ms. Gordon had been in the process of cleaning the house after her tenants had moved out in December of 1982 (Tr. 95-98). Upon arriving at the house on the morning of December 22, 1982, Ms. Gordon found that an air conditioning unit had been removed from a front window, and she called the police (Tr. 96-97, 98-99). She thereafter entered the house with a police officer, and found that other items of property (dishes and plumbing equipment) had also been taken (Tr. 99).

Ms. Gordon further testified that there had been a philodendron plant in the rear of the house which had grown across the back door, and that the plant had been broken when she observed it on December 22nd (Tr. 104). A jalousie window was also found missing from the back door, and the door was unlocked (Tr. 101). Ms. Gordon testified that she did not know defendant, and had not given him permission to enter the house (Tr. 100).

Officer Nicholas Del Guidice of the Metro-Dade Police Department testified that he had been dispatched to the residence on December 22nd, and that he had recovered a jalousie window from the rear of the house (Tr. 108). The officer gave the

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> is if we step through a door into a hallway about 10 feet away and can then speak up, then so long as the Public Defender has the absolute right to go back and forth as many times as he desires to the Defendant who is sitting before the jury, I see nothing wrong with that. . . .

(Tr. 253-54).

window to Detective Rene Heinzen, the lead investigator in the case, who lifted a latent fingerprint from the window and submitted it for comparison (Tr. 112, 114). Detective Heinzen also testified that she had gone to the house and examined the rear door; she found that the panes had a rough surface on the exterior and a smooth surface on the interior side (Tr. 113). She testified that the latent fingerprint had been lifted from the interior (smooth) surface of the jalousie (Tr. 113).

Detective Heinzen further testified that she had questioned defendant regarding the burglary on January 3, 1983 (Tr. 114-15). She testified to the contents of their conversation as follows:

> Q. What did you tell Mr. Smith?
> A. I advised him that I was looking into this case, and that I had a couple of questions to ask him, that he didn't need to speak with me if he didn't care to.
>
> * * *
>
> Q. What, specifically, did you ask the Defendant in this case?
> A. I asked him if he had been around that house recently, the last month or so, and he indicated that he had not.

(Tr. 115).

The prosecutor then stated that he had "nothing further" to ask the witness (Tr. 115). Counsel for defendant then advised the court that he had an objection to present, and requested a sidebar conference, which the court permitted (Tr. 115-16). Counsel objected to the introduction of the statement related by the detective on two grounds: first, that the statement had been obtained in violation of the privilege against self-incrimina-

tion, and second, that the statement had not been supplied on discovery (Tr. 116).[3] The court then excused the jury for argument on the objections (Tr. 117).

The prosecutor asserted that the statement was admissible without defendant having been advised of his privilege against self-incrimination since defendant had not been in custody at the time of the interrogation and further asserted that counsel's objection was "late" (Tr. 118). Counsel for defendant responded that he had never been advised of the statement in discovery, and that Detective Heinzen had not revealed the statement during her deposition, but had testified only that defendant had denied committing the offense (Tr. 116, 118). The prosecutor then referred to the state's discovery response (Tr. 119), which states in pertinent part: "All [s]tatements or summaries of statements made by the defendant are available for copying by contacting the undersigned Assistant State Attorney." (S.R. 4). The discovery response also indicates that counsel for defendant was provided with a police report (S.R. 6). Counsel for defendant advised the court that the only statement of defendant contained within the police report was that which he had previously related, i.e., defendant's denial of involvement in the offense (Tr. 121).[4]

3

Counsel for defendant had orally invoked the reciprocal provisions of Rule 3.220 of the Florida Rules of Criminal Procedure at the time of arraignment (S.R. 1).

4

At the hearing on defendant's motion for new trial, in which the discovery claim was relitigated (R. 25-26), the prosecutor (Cont.)

The court initially accepted the prosecutor's argument that the objection was untimely (Tr. 124-25). Counsel for defendant then argued that he had known of one statement, and that he had objected when the witness related a statement of which he had never been advised (Tr. 125-26). Counsel also read portions of the detective's deposition to the court, in which she repeatedly stated that defendant had denied involvement in the offense or had made no statement at all in response to her questioning (Tr. 127-30).

The court then ruled that there had been "insufficient Miranda warnings at the time of that telephone conversation", and stated that it would instruct the jury to disregard the statement (Tr. 131). Counsel for defendant then requested a ruling on the admissibility of the statement as possible rebuttal of defendant's testimony, explaining that the curative instruction did not obviate the discovery-violation claim (Tr. 132). The prosecutor asserted that the statement would be admissible as rebuttal (Tr. 133).

The court then stated: "Tell the jury to come in and tell them to disregard that last question and answer." (Tr. 133). Counsel then asked, "You are not going to deal with my Richardson issue at this juncture?", and the court responded, "No", and denied counsel's motion for mistrial (Tr. 133). The jury was then returned to the courtroom, the court instructed it to

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stated, in response to counsel's argument on the issue, "I didn't have any statements in my possession", and argued that counsel had simply failed to question the detective fully on the matter of defendant's statements during the deposition (Tr. 257).

"disregard the last question and answer from the Detective", and directed the court reporter to read the question and answer to the jury (Tr. 133-34). On cross-examination, the detective testified that defendant lives across the street and one house down from the burglarized residence (Tr. 134).

Jack Longworth, a fingerprint technician with the Metro-Dade Police Department, testified that he had compared defendant's standard fingerprints with the latent fingerprint lifted by the detective, and that the fingerprints had matched (Tr. 142-43). On cross-examination, Mr. Longworth described the fingerprint as "fresh", meaning that it could have been placed on the window within weeks or "[p]ossibly" a month prior to its discovery (Tr. 143).

The state then rested its case (Tr. 145), and counsel for defendant requested the court to conduct a hearing on the discovery violation prior to defendant being called to the stand (Tr. 150-51). The request was denied (Tr. 151).

Defendant then testified that he lives across the street from the residence, and that he frequently had visited two young women who had been renting it from Ms. Gordon (Tr. 152-53). He testified that he had known Ms. Gordon since he was a child, although she probably did not know him by name (Tr. 154). Defendant testified that he had last been at the residence "a couple of days" before the incident, when he took a friend, who was interested in buying a boat which was being stored behind the house, into the backyard (Tr. 155). Defendant denied any involvement in the burglary (Tr. 153).

Defendant rested after presenting his testimony, and the prosecutor then announced that the state would call Detective Heinzen (Tr. 156). Counsel for defendant requested and was granted a sidebar conference, at which he renewed his discovery-violation objection and requested a hearing, stating that he would be moving for a mistrial if the detective testified to defendant's statement (Tr. 156). The court stated that "[t]he Richardson ruling is still the same", and denied the motion for mistrial (Tr. 157).

Detective Heinzen then testified that she had had a conversation with defendant on Janaury 3, 1983, and that defendant had stated that he had not been at the house or in the backyard "in the last month or so." (Tr. 158). On cross-examination, she testified that defendant had denied involvement in the burglary (Tr. 159). She further testified that she had prepared a police report, which included only defendant's denial of involvement and not the statement which she had related on direct examination, but that she was able to recall the unrecorded conversation (Tr. 160-61).

Appellate Proceedings:

Defendant asserted on appeal that the trial court had erred in refusing to permit him to be present at the sidebar conference during which peremptory challenges were exercised by the parties, and in failing to conduct an inquiry into the state's discovery violation (A. 1-2). The court below held that the first claim

did not constitute grounds for reversal:

> We are not persuaded that the security measure of excluding a defendant from the bench conference where peremptory challenges are exercised outside the jury's hearing, after he and counsel have had an opportunity to confer as to how each challenge will be exercised, deprives the defendant of participation at a critical stage of the trial proceedings. Cf. Francis v. State, 413 So.2d 1175 (Fla. 1982)(exercise of challenges was conducted in a different room, therefore, defendant was unable to consult with his attorney during selection process).

(A. 1).

The court further held that the trial court's failure to conduct an inquiry into the discovery violation was per se reversible error:

> The second question, as presented by the record in this case, is whether failure of the trial court to require the State to show at a hearing that the defendant has not been prejudiced where the state failed to comply with the discovery rules, Richardson v. State, 246 So.2d 771 (Fla. 1971), is per se reversible even though the error would have otherwise been harmless.
>
> The question must be answered in the affirmative in light of Cumbie v. State, 345 So.2d 1061 (Fla. 1977), and several cases which have applied the Richardson rule. . . .

(A. 2). The court certified the following question to this Court as one of great public importance: "Is a new trial required when the trial court's failure to conduct a Richardson inquiry is, in the opinion of the reviewing court, harmless error?" (A. 2).

SUMMARY OF ARGUMENT

1. The prosecution failed to disclose, in response to defendant's demand for discovery under Rule 3.220 of the Florida Rules of Criminal Procedure, the substance of an unrecorded oral statement attributed to defendant by an investigating police officer. Upon counsel's objection, the court struck the statement as substantively inadmissible and instructed the jury to disregard it, but thereafter permitted the prosecutor to introduce the statement to rebut defendant's trial testimony, refusing counsel's repeated requests for an inquiry into the circumstances of the discovery violation. The governing rule, which had its origin in Richardson v. State, 246 So.2d 771 (Fla. 1971), and to which this Court and the district courts of appeal have adhered without exception, provides that the failure of a trial court to inquire into the circumstances of a discovery violation is reversible error as a matter of law. There have been no changes of circumstance since the promulgation of that rule which warrant departure therefrom, nor is there any evidence that the relatively simple commands thereof have worked substantial injustice during its years of operation as the law of this state. In the absence of such considerations, the rule of stare decisis commands adherence to this Court's prior precedent and reversal of the conviction in this case pursuant to that precedent.

2. The trial court expressly refused to allow defendant to be present at a sidebar conference during which all peremptory challenges were exercised and the jury was selected, ruling that

permitting counsel occasionally to confer with defendant was sufficient. The exercise of peremptory challenges is a critical stage of the trial proceedings, and an accused has the right, guaranteed by the Florida and federal constitutions, to be personally present at this critical stage, unless that right validly is waived. Defendant was not personally present, did not waive the right to be present, and did not ratify or accept the jury which was selected in his absence. Controlling precedent from this Court mandates reversal of the ensuing conviction.

ARGUMENT

I

THE RULE THAT THE FAILURE OF A TRIAL COURT TO CONDUCT AN INQUIRY INTO A VIOLATION OF THE PROVISIONS OF RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE IS PER SE REVERSIBLE ERROR APPLIES IN THIS CASE, REQUIRING THAT DEFENDANT BE AFFORDED A NEW TRIAL WHERE THE STATE FAILED TO DISCLOSE A STATEMENT ATTRIBUTED TO DEFENDANT, IN VIOLATION OF RULE 3.220(a)(1)(iii) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE, AND THE TRIAL COURT PERMITTED THE STATEMENT TO BE INTRODUCED INTO EVIDENCE WITHOUT CONDUCTING AN INQUIRY INTO THE CIRCUMSTANCES OF THE VIOLATION, POTENTIAL PREJUDICE TO DEFENDANT, AND WHETHER SANCTIONS SHOULD BE IMPOSED AS A CONSEQUENCE OF THE DISCOVERY VIOLATION.

The District Court of Appeal has certified the following question to this Court: "Is a new trial required when the trial court's failure to conduct a Richardson inquiry is, in the opinion of the reviewing court, harmless error?" (A. 2). Thus, the primary issue presented herein is whether this Court should recede from the rule of Richardson v. State, 246 So.2d 771 (Fla. 1971), and subsequent cases, that the failure of a trial court to

conduct an inquiry into a violation of Rule 3.220 of the Florida Rules of Criminal Procedure is per se reversible error. Sound principles of decisional uniformity and logic compel adherence to the Richardson rule, and a negative answer to the certified question.[5]

This Court promulgated the predecessor of the present discovery rule, Rule 1.220 of the Florida Rules of Criminal Procedure (1967) as part of the first full compilation of criminal procedure rules, In re Florida Rules of Criminal Procedure, 196 So.2d 124 (Fla. 1967), codifying therein both pre-existing statutes authorizing discovery by defendants in criminal cases and new provisions for full reciprocal discovery. Id. at 151-55. The basic structure of the rule has remained the same through its current codification in Rule 3.220.[6]

5

The same question has been certified to this Court by the Third District in R.R. v. State, 10 F.L.W. 1834 (Fla. 3d DCA July 30, 1985), pending before this Court in Case No. 67,459, and by the Fourth District in Hall v. State, 10 F.L.W. 1651 (Fla. 4th DCA July 3, 1985), pending before this Court in Case No. 67,319.

6

Fla.R.Crim.P. 1.220(f)(1967), governing depositions in criminal cases, was amended in 1968, In re Florida Rules of Criminal Procedure, 211 So.2d 203, 205 (Fla. 1968), and the entire rule was renumbered as Rule 3.220 in 1971, when the prefix for the criminal rule numbers was changed. In re Florida Rules of Criminal Procedure, 253 So.2d 421 (Fla. 1971). The substantive discovery rights of the parties were expanded by the 1972 amendments to the rule. In re Florida Rules of Criminal Procedure, 272 So.2d 65, 105-10 (Fla. 1972). The only modification of the rule since that time has been a minor amendment of Fla.R.Crim.P. 3.220(a)(1)(ii), with respect to discovery by an accused of statements in police reports. The Florida Bar in re Rules of Criminal Procedure, 389 So.2d 610, 628 (Fla. 1980).

As originally promulgated, Rule 1.220(g) of the Florida Rules of Criminal Procedure (1967) stated, in pertinent part:

> If, at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection or materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.[7]

The early decisions of the district courts of appeal took widely divergent positions on the ramifications of a trial court's failure to take any action upon being advised of a discovery violation. E.g., Howard v. State, 239 So.2d 83, 84 (Fla. 1st DCA 1970)(harmless-error statute, § 924.33, Fla.Stat. (1983) applicable to discovery violations by prosecution); Buttler v. State, 238 So.2d 313, 314 (Fla. 3d DCA 1970)(discovery violation does not warrant reversal "where it can be affirmatively determined that no prejudice resulted")(citations omitted); Powers v. State, 224 So.2d 411, 412 (Fla. 3d DCA 1969)("abuse of discretion" standard of review applicable to trial court's exclusion of defense witnesses for failure to comply with discovery rule).

In Ramirez v. State, 241 So.2d 744 (Fla. 4th DCA 1970), the court took a different approach. In that case, the prosecution

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[7] This provision was transferred to Fla.R.Crim.P. 3.220(j)(1) in the 1972 amendments to the rule. See n.6, supra.

failed to supply a witness list as required by the then-applicable provisions of Rule 1.220(e) of the Florida Rules of Criminal Procedure, and, upon being advised of this violation of the rule, the trial court determined by inquiry of the prosecutor that the violation had been an "oversight", compelled the prosecutor to announce the names of the state's witnesses, and then permitted the state to present these witnesses, over the objection of counsel for the accused. Id. at 745-46. On appeal, the court first rejected the proposition that "the state's noncompliance with the rule entitles defendant, as a matter of right, to have the non-listed witness excluded from testifying", id. at 746, and then proceeded to state the following rule to govern such situations:

> [I]f, during the course of the proceedings, it is brought to the attention of the trial court that the state has failed to comply with [the rule], the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.
>
> Once the court has considered all of the circumstances, it has authority to enter such order as it deems just. However, in those cases where the court determines that the state's noncompliance with the rule has not prejudiced the ability of the defendant to properly prepare for trial, we deem it essential that the circumstances establishing non-prejudice affirmatively appear in the record. . . .

Id. at 747-48 (citation omitted; original emphasis).

This Court adopted the Ramirez formulation in Richardson v. State, its first decision addressing the consequences of a violation of Rule 1.220. This Court first held that "the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant", and refused to hold that a violation of an applicable discovery rule is an absolute bar to presentation of undisclosed evidence or witnesses. 246 So.2d at 774. This Court then endorsed the Ramirez requirement of an inquiry into discovery violations, id. at 775, ultimately ruling as follows:

> The trial court has discretion to determine whether the non-compliance would result in harm or prejudice to the defendant, but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the circumstances. . . .
>
> * * *
>
> [W]hen it is brought to the attention of the trial court during the course of the proceedings that the State has failed to comply with the Rule the Court has a discretion to determine if such failure has prejudiced the defendant on trial. But . . . the trial court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. . . .

Id. at 775-76. Finding that the trial court in that case had failed to conduct an inquiry into the asserted discovery violation (the failure of the state to list a witness who could have provided relevant information), this Court held that the court had committed reversible error. Id. at 776-77.

Thereafter, this Court followed Richardson in Bradford v. State, 278 So.2d 624 (Fla. 1973), holding that a trial court's failure to inquire into the circumstances of a defendant's nondisclosure of defense witnesses before excluding such witnesses was reversible error, id. at 625-26, and in Smith v. State, 319 So.2d 15 (Fla. 1975), holding that the trial court's failure to inquire into the state's nondisclosure of an alibi-rebuttal witness under Rule 3.200 of the Florida Rules of Criminal Procedure was reversible error. Id. at 17. Pursuant to Richardson and these subsequent decisions, the district courts of appeal uniformly held that the failure of a trial court to conduct an inquiry prior to ruling on the implications of a discovery violation constituted per se reversible error. E.g., Hardison v. State, 341 So.2d 270 (Fla. 2d DCA 1977); Frazier v. State, 336 So.2d 435 (Fla. 1st DCA 1976); Carnivale v. State, 271 So.2d 793, 796 (Fla. 3d DCA 1973); Garcia v. State, 268 So.2d 575 (Fla. 3d DCA 1972); Williams v. State, 264 So.2d 106, 108 (Fla. 4th DCA 1972); Salamone v. State, 247 So.2d 780 (Fla. 3d DCA 1971).

The first breath of disharmony on this proposition occurred with the decision in Cumbie v. State, 327 So.2d 67 (Fla. 1st DCA 1976), quashed, 345 So.2d 1061 (Fla. 1977), in which the district court of appeal determined that the alleged discovery violation had been harmless and affirmed the conviction, despite the trial court's failure to abide by the Richardson dictates:

> Violation of a criminal rule of procedure does not require the reversal of a conviction unless the record discloses that noncompliance with the rule resulted in prejudice or harm to

> the defendant. In response to defendant's Rule 3.220(a)(1)(iii) demand that it furnish him with the substance of any oral statements made by him, together with the names and addresses of the witnesses to the statements, the state replied that no statements were made. At trial the state produced two witnesses who testified, over defendant's objections and motions for mistrial, to oral statements made by the defendant. Although the state failed to comply with Rule 3.220(a)(1)(iii) or Rule 3.220(f), the trial court permitted the witnesses to testify because it determined that the state had furnished the defendant with the names and addresses of the witnesses, and defendant had taken their depositions prior to trial. The record reflects the testimony given by these witnesses was corroborative of the testimony subsequently given by the defendant. Although the state violated two discovery rules, and the trial court did not make the inquiry into the surrounding circumstances, as suggested by the Richardson case, nevertheless, the error was harmless. The defendant received a fair trial.

Id. at 68 (citation omitted).

This Court unanimously quashed the district court of appeal's decision, holding in no uncertain terms that its harmless-error inquiry had been improper and that the failure of the trial court to conduct an inquiry was per se reversible error:

> In Richardson we held that a violation of the Rules of Criminal Procedure by the state would require an appellate court to reverse a conviction unless the trial court made an inquiry into all the circumstances surrounding the breach, with the state having the burden of showing to the trial court that there was no prejudice to the defendant. In affirming the petitioner's convictions, the district court reviewed the record anew and found that "although the state violated two discovery rules, and the trial court did not make the inquiry into the surrounding circumstances as suggested by the Richardson case, nevertheless, the error was harmless."

> It is clear that the trial court's investigation of the question of prejudice was not the full inquiry Richardson requires. No appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules, as Richardson indicates. Especially is this so in cases such as this, where a false response is given to a request for discovery. The mere fact that alleged statements are attributed to the petitioner can not relieve the state of its duty to disclose; that is precisely the situation contemplated by Rule 3.220(a)(1)(iii).
>
> The trial court erred in admitting into evidence the testimony concerning the alleged statement of the petitioner without conducting an inquiry into the question of prejudice, and this error is reversible as a matter of law.
> . . . .

Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977)(footnote omitted). This Court consistently and uniformly followed the Cumbie holding in its subsequent decisions on this question, holding without exception that the failure of a trial court to conduct a full inquiry into a discovery violation prior to ruling thereon is reversible error as a matter of law. Cooper v. State, 377 So.2d 1153, 1155 (Fla. 1979); Kilpatrick v. State, 376 So.2d 386, 389 (Fla. 1979); Smith v. State, 372 So.2d 86, 88 (Fla. 1979); Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1979).[8]

8

The district courts of appeal have, of course, adhered to this precedent without exception. E.g., Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985); Borges v. State, 459 So.2d 459 (Fla. 3d DCA 1984); Balboa v. State, 446 So.2d 1135 (Fla. 3d DCA 1984); McCollough v. State, 443 So.2d 147 (Fla. 1st DCA 1983); Poe v. State, 431 So.2d 266 (Fla. 5th DCA 1983); Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983); Johnson v. State, 416 So.2d 1237 (Fla. 4th DCA 1982); Carroll v. State, 414 So.2d 247 (Fla. 4th DCA 1982); Moore v. State, 411 So.2d 335 (Fla. 5th DCA 1982); Clair v. State, 406 So.2d 109 (Fla. 5th DCA 1981); McDonnough v. (Cont.)

Thus, given the opportunity to adopt a "harmless-error" rule in 1971 in Richardson, and again in 1977 in Cumbie, this Court declined to do so. The per se rule of Richardson thus has been an integral component of Florida law under Rule 3.220 for almost 15 years. Now, once more, that rule has been questioned by a district court of appeal, and the long-standing preeminence of the rule requires adherence to its strictures.

The rule of stare decisis, that is, "[t]o abide by, or adhere to, decided cases", Black's Law Dictionary 1577 (rev. 4th ed. 1968), "is a fundamental principle of Florida law." State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). While "its application is not obligatory in any particular case, it is considered appropriate in most instances in order to produce consistency in the application of legal principles unless for some compelling reason it becomes appropriate to recede therefrom." Forman v. Florida Land Holding Corporation, 102 So.2d 596, 598 (Fla. 1958). Thus, as the United States Supreme Court has cautioned:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious

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State, 402 So.2d 1233 (Fla. 5th DCA 1981); Potts v. State, 399 So.2d 505 (Fla. 4th DCA 1981); Easterling v. State, 397 So.2d 999 (Fla. 1st DCA 1981), review denied, 407 So.2d 1105 (Fla. 1981). Meadows v. State, 389 So.2d 694 (Fla. 2d DCA 1980); Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980); Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980); Dorsey v. State, 375 So.2d 60 (Fla. 2d DCA 1979); Henderson v. State, 372 So.2d 217 (Fla. 1st DCA 1979); Grant v. State, 354 So.2d 80 (Fla. 4th DCA 1977); Flynn v. State, 351 So.2d 377 (Fla. 4th DCA 1977); Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977).

> adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

The district court of appeal in the present case has suggested no compelling reasons for departing from the rule of Richardson and Cumbie, except perhaps for its finding that the error was harmless -- a finding which this Court's decisions hold should not have been made in the first instance. E.g., Cumbie v. State, 345 So.2d at 1062. Two other decisions, which have certified the same question to this Court, offer no other reasons for abandoning the rule, and the sense of these decisions is simply that violation of a discovery rule by the state should not require a new trial when a reviewing court, despite the failure of a trial court to make the inquiry, can determine that the error did not affect or could not have affected the outcome of the trial. R.R. v. State, 10 F.L.W. 1834 (Fla. 3d DCA July 30, 1985); Hall v. State, 10 F.L.W. 1651 (Fla. 4th DCA July 3, 1985).

None of these proffered reasons for abandoning Richardson and Cumbie offer any new, much less compelling, reasons for such a result. The concern that a nonprejudicial violation of a discovery rule should not be a windfall to a convicted defendant was expressly noted in Richardson itself:

> The Rule was designed to furnish a defendant with information which would bona fide assist him in the defense of the charge against him. It was never intended to furnish a defendant with a procedural device to escape justice. . . .

Richardson v. State, 246 So.2d at 774. Yet this concern led only to this Court's refusal to adopt a flat rule which would prohibit the state from presenting undisclosed witnesses or evidence under any circumstances, id. at 774, and did not affect the ultimate holding of the case. No reason is advanced in the cited cases as to why it now should.

With regard to the harmless-error finding of the court below and the decisions in R.R. and Hall, these courts have misconceived the nature of the prejudice against which the rule of Richardson protects. In Wilcox v. State, which addressed a failure by a trial court to conduct an inquiry into the prosecution's failure to disclose a post-arrest statement attributed to the defendant, the state sought to resist reversal by asserting that "no prejudice resulted because the trial court instructed the jury to disregard the statement." Wilcox v. State, 367 So.2d at 1022. In rejecting this argument, this Court made it clear that the question of "prejudice" in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the factfinder, but rather upon its impact on the defendant's ability to prepare for trial:

> Respondent misapprehends the nature of the prejudice Cumbie and Richardson seek to remedy. The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive, prejudice. In deciding whether this type of prejudice exists in a given case, a trial judge must be cognizant of two separate but interrelated aspects. First, the judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. In this case, had petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the

> very least, advance knowledge would have given petitioner time to gather rebuttal evidence. On the other hand, close scrutiny might have revealed that the statement had no bearing on petitioner's defense. Without a Richardson inquiry, the trial court was in no position to make an accurate judgment as to these possibilities.

Id. at 1023; see also Smith v. State, 372 So.2d at 88 (rejecting argument that post-trial inquiry would suffice because "a Richardson inquiry after remand from the appellate court is reduced to a mere guessing game").

And, as this Court expressly held in Cumbie, "[a] review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules". Cumbie v. State, 345 So.2d at 1062.[9] Thus, the suggestion that Richardson be modified by adopting a harmless-error gloss is, at heart, a request that it be utterly abandoned, and that the concern for procedural prejudice which is very underpinning of the doctrine -- and of Rule 3.220 itself -- be scrapped and replaced with the harmless-error analysis which this Court consistently has refused to adopt in ths context. It suffices to say that none of the decisions which have requested reconsideration of the rule by this Court have advanced any

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The holding in Cumbie is not the anomaly that the Third District has labeled it, see R.R. v. State, 10 F.L.W. at 1835 n. 7 & 9; to the contrary, reversal of a criminal conviction based upon a presumptively-prejudicial error which cannot confidently be declared harmless is authorized in many different contexts. E.g., Curtis v. State, 10 F.L.W. 533 (Fla. Sept. 26, 1985) (responding to jury question in absence of defendant and counsel); Francis v. State, 413 So.2d 1175 (Fla. 1982)(absence of defendant from critical stage of trial proceedings).

justification for doing away with it in its entirety.

The command of Rule 3.220 is simple and direct: disclose that which the rule requires to be disclosed. The command of Richardson and its progeny to trial judges is equally so: inquire into the circumstances of any discovery violation before admitting or excluding nondisclosed evidence, and impose appropriate sanctions if prejudice is found. There is no empirical evidence that these clear dictates have imposed any significant hardship upon the bench or bar, or that they have worked substantial injustice. Absent such evidence, or some change of circumstances since 1971 which would mandate a wholesale revision of Florida's criminal discovery law, there is no case for revisiting the governing rule, or for departing from almost 15 years of prior precedent.

Application of the controlling rule to the present case demonstrates that the District Court of Appeal did correctly determine that reversal of defendant's conviction was mandated. Defendant invoked the reciprocal-discovery provisions of Rule 3.220 in the present case (S.R. 1), obliging the state to disclose "[a]ny written or recorded statements and the substance of any oral statements made by the accused . . . together with the name and address of each witness to the statements." Fla.R.Crim.P. 3.220(a)(1)(iii). In his discovery response, the prosecutor checked a box next to the following statement: "All [s]tatements or summaries of statements made by the defendant are available for copying by contacting the undersigned Assistant State Attorney." (S.R. 4). Appended to the discovery response

was a police report, which reflected that the only statements made to the investigating officer by defendant were denials of any involvement in the offenses (Tr. 121, 160-61). On deposition, the officer, Detective Heinzen, testified only that defendant had made the statements set forth in the police report (Tr. 127-30).

When the detective related another statement, which she attributed to defendant, at trial (Tr. 115), the prosecutor's primary response to defendant's objection was that the discovery pleading had provided sufficient constructive notice of the statement (Tr. 119).[10] The trial court struck the statement as substantively-inadmissible (due to the officer's failure to advise defendant pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), before questioning him), and instructed the jury to disregard it, but refused counsel's repeated requests for a Richardson hearing on the asserted discovery violation (Tr. 131-34). The court thereafter twice refused to grant a hearing, and permitted the prosecutor to introduce the statement as rebuttal of defendant's testimony (Tr. 150-51, 156-58).[11]

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There is no merit to the prosecutor's alternative argument that counsel's objection was untimely (Tr. 118, 124-25). The record reflects that counsel objected immediately after the statement was elicited (Tr. 115). In Wilcox v. State, a discovery objection raised immediately after an undisclosed statement was elicited by the state was held sufficiently timely to preserve the issue for review. 367 So.2d at 1021-22 & n.1.

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The state's case against defendant was based upon the discovery of his fingerprint on the inside surface of a jalousie window which had been removed from the rear door of the burglarized residence (Tr. 108, 112-14, 142-43). The disclosed (Cont.)

That there was a violation of Rule 3.220(a)(1)(iii) is manifest. The "checkbox" form used by the state does not constitute "disclosure" of the substance of oral statements under the rule. Donahue v. State, 464 So.2d 609, 610-11 (Fla. 4th DCA 1985); Clair v. State, 406 So.2d 109, 111 (Fla. 5th DCA 1981). Counsel was, however, provided with a police report prepared by the only officer to question defendant, and the report reflected only exculpatory statements by defendant (Tr. 121, 160-61), as did the officer's testimony on deposition (Tr. 127-30). While the prosecutor never advised the court of how he had become aware of the undisclosed oral statement -- and, indeed, never sought to justify the nondisclosure -- his statement at the hearing on the motion for new trial that he "didn't have any statements in [his] possession" (Tr. 257), strongly suggests that there were no other written memoranda of statements other than the disclosed police

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statements of defendant were denials of any involvement in the burglary (Tr. 114-15, 127-30). Defendant testified that he lives across the street from the residence, that he frequently had visited the prior tenants of the house, and that he had been in the backyard of the residence "a couple of days" before the incident (Tr. 152-55). The undisclosed statement, as related by the detective on rebuttal, was that defendant had said that he had not been at the house or in the backyard "in the last month or so." (Tr. 158).

Even if the per se rule previously discussed in the text did not apply, the prejudice to defendant from the nondisclosure is patent. The case proceeded to trial on the assumption that the prosecutor and detective had disclosed all of defendant's pretrial statements, in which he had denied involvement in the offense, and defendant was then "bushwhacked" at trial by the inconsistent statement. In light of the circumstantial nature of the prosecution case and defendant's denial of responsibility at trial, the admission of the undisclosed statement was prejudicial under any harmless-error standard. The district court's reasons, if any, for concluding to the contrary do not appear on the face of its decision (A. 2).

report.[12] Thus, the state's discovery response at best indicated to counsel that the only statements subject to disclosure were reflected in the written report, see Potts v. State, 399 So.2d 505, 506 (Fla. 4th DCA 1981), and such clearly was not the case.

The trial court's instruction to the jury to disregard the undisclosed statement was insufficient to obviate the requirement of a full inquiry into the violation. Wilcox v. State, 367 So.2d at 1023. And, in any event, the trial court's admission of the statement as rebuttal evidence runs directly afoul of the governing rule; there is neither a "rebuttal" nor an "impeachment" exception to the Richardson rule. E.g., Hicks v. State, 400 So.2d 955 (Fla. 1981); Kilpatrick v. State, 376 So.2d at 388; Donahue v. State, 464 So.2d at 612. The failure of the trial court to conduct the required inquiry is therefore reversible error. Wilcox v. State, 367 So.2d at 1023-24; Cumbie v. State, 345 So.2d at 1062.

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The trial testimony of the officer also supports this conclusion; she testified that she had not made any written notes of the undisclosed statement, but rather simply had kept it in her memory until the time of trial (Tr. 160-61).

II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO BE PRESENT DURING THE EXERCISE OF PEREMPTORY CHALLENGES AT SIDEBAR, IN VIOLATION OF DEFENDANT'S RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND RULE 3.180 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.[13]

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Florida Constitution guarantee the right to be present at critical stages of criminal trial proceedings. E.g., Illinois v. Allen, 397 U.S. 337 (1970); Snyder v. Massachusetts, 291 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982); Shaw v. State, 422 So.2d 20 (Fla. 2d DCA 1982); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976). Jury-selection proceedings, including the exercise of peremptory challenges and ultimate determination of which prospective jurors will serve on the jury panel, are such a critical stage. Francis v. State, 413 So.2d at 1177-78; accord, Lane v. State, 459 So.2d 1145 (Fla. 3d DCA 1984); Walker v. State, 438 So.2d 959 (Fla. 2d DCA 1983); Shaw v. State, 422 So.2d at 21; Fla.R.Crim.P. 3.180(a)(4).

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This issue was presented to and ruled upon by the District Court of Appeal, but was not the subject of the certified question (A. 1-2). This Court's jurisdiction having been invoked by the certified question, however, the issue is properly raised in this proceeding. E.g., Tillman v. State, 471 So.2d 32, 34 (Fla. 1985); Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012, 1014 (Fla. 1977); Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596 (Fla. 1961).

In Francis, the defendant was present during the examination of the prospective jurors, but was excused from the courtroom to use the bathroom facilities just prior to the hearing at which peremptory challenges were to be exercised. 413 So.2d at 1176. Counsel for the defendant then "waived" Francis' right to be present at the jury selection, after which the trial judge and counsel for the parties "retired to the jury room to continue the selection process". Id. at 1176-77. The defendant had been returned to the courtroom prior to this, "but was left sitting in the courtroom when the judge and counsel went into the jury room." Id. at 1177. At the hearing on his motion for new trial, Francis testified "that he had wanted to be present during the jury selection process but that he was told by his counsel that he would not be permitted to accompany the judge, counsel, and court reporter into the jury room." Ibid.

This Court held that this procedure denied Francis his right to be present at a critical stage of the trial proceeding, and that his presence could not be deemed the result of a voluntary waiver:

> Francis was absent during a crucial stage of his trial and his absence was not voluntary. He had been excused by the court momentarily to go to the restroom. After he had returned to the courtroom, his counsel, the prosecutor, the judge, and the court reporter retired to the jury room to exercise Francis' and the State's peremptory challenges. His counsel had told him he could not go with them into the jury room. His counsel had not obtained his express consent to challenge peremptorily the jury in his absence.
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> * * *
>
> Francis was not questioned as to his

> understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present.

Francis v. State, 413 So.2d at 1178 (citations omitted). This Court further held that the deprivation entitled the defendant to a new trial, without a showing of specific prejudice:

> Since we find that the court erred in proceeding with the jury selection process in Francis' absence, we also consider whether this error is harmless. We are not satisfied beyond a reasonable doubt that this error in the particular factual context of this case is harmless. The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. . . . In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

Id. at 1178-79 (citations omitted).

In the present case, the trial court ruled that Francis was inapplicable, and the right to be present sufficiently protected, if defendant was excluded from the sidebar proceedings during which peremptory challenges were exercised but counsel was afforded an opportunity to periodically confer with defendant

(Tr. 69-70).[14] This clearly is not so. Walker v. State, 438 So.2d at 970 (peremptory challenges exercised in another room; court denied request for defendant's presence "after ascertaining from defense counsel that defendant had been consulted concerning the subject of peremptory challenges", and exclusion of defendant ruled reversible error under Francis); see also Shaw v. State, 422 So.2d at 21-22 (jury selected in defendant's absence, with court ruling that it would "entertain any specific objections to any jury", and defendant thereafter appeared and stated that jury was satisfactory; proceeding in defendant's absence held

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The trial court candidly stated that the basis for the ruling was its opinion that a defendant "cannot come sidebar and stand with the lawyers and the clerk to decide on the jury selection" (Tr. 70). On appeal, the District Court of Appeal found no error in "the security measure of excluding a defendant from the bench conference" if defendant and counsel "have had an opportuntiy to confer as to how each challenge will be exercised" (A. 1).

There is absolutely no basis in the record for any finding that defendant's exclusion from the conference was a "security measure". It certainly is true that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Illinois v. Allen, 397 U.S. at 343. Nothing of the sort occurred here, and there is no record support for the notion that the security of the court would have been compromised if defendant had been permitted to be present at this critical stage of his trial.

Furthermore, the court permitted counsel to confer with defendant but twice: one after a tentative panel had been selected with counsel having exercised two peremptory challenges, and again after counsel had exhausted defendant's challenges and prior to the selection of the alternate (Tr. 71-75). The record is bereft of any support for the finding of the court below that defendant and counsel "had an opportunity to confer as to how each challenge [would] be exercised" (A. 1).

reversible error).[15] Accordingly, Francis mandates a reversal of the conviction in this case.

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Absent a true "security" situation, see n.12, supra, proceeding in a defendant's absence and without a voluntary waiver is permissible only if a ratification from the defendant is thereafter obtained. In State v. Melendez, 244 So.2d 137 (Fla. 1971), the trial court selected the jury in the defendant's absence, and the defendant, upon re-appearing, "after careful questioning by the trial judge as to his willingness and understanding, ratified the selection of the jury". Id. at 138. The record in the present case reflects no such ratification, and, as this Court held in Francis, the imputation of "constructive knowledge" approved in Melendez appleis "only to those cases in whch, upon defendant's reappearance at his trial, he acquiesces or ratifies the action taken by his counsel during his absence." Francis v. State, 413 So.2d at 1178 (original emphasis).

CONCLUSION

Based upon the foregoing, defendant requests this Court to answer the question certified by the District Court of Appeal in the negative and to approve that portion of its decision reversing his conviction and remanding for a new trial, and/or to quash that portion of the decision holding that proceeding with a critical stage of the trial in defendant's absence was not error, and to remand with directions to order that he be afforded a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to RICHARD L. POLIN, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128 this 8th day of November, 1985.

_____
ELLIOT H. SCHERKER
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