IN THE SUPREME COURT OF FLORIDA

CASE NOS. 67,772 and 67,773

EDWARD SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

* *

ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED QUESTION

* *

REPLY BRIEF OF RESPONDENT

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ARGUMENT

I.

A NEW TRIAL SHOULD NOT BE REQUIRED WHEN THE TRIAL COURT'S FAILURE TO CONDUCT A RICHARDSON INQUIRY IS, IN THE OPINION OF THE REVIEWING COURT HARMLESS ERROR.

The State relies on its prior brief concerning the first point on appeal.

II.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO ALLOW THE DEFENDANT TO BE PRESENT AT A SIDEBAR CONFERENCE DURING THE EXERCISE OF PEREMPTORY CHALLENGES, WHEN THE DEFENDANT WAS PRESENT IN THE COURTROOM AT ALL TIMES, HAD HEARD THE ENTIRE VOIR DIRE QUESTIONING OF PROSPECTIVE JURORS, AND DEFENSE COUNSEL WAS ABLE TO CONSULT WITH THE DEFENDANT BOTH PRIOR TO AND DURING THE EXERCISE OF THE PEREMPTORY CHALLENGES.

Petitioner has argued that the State's characterization of the trial court's ruling at the peremptory challenge conference is misleading. (Petitioner's Reply Brief, p.12, note 7). If Petitioner is going to resort to such vituperative accusations, one would at least hope that Petitioner would get the facts straight. The State has previously argued that "the judge made it clear that defense counsel could walk back and forth between the judge's bench and the defendant's table to consult with his client." (Brief of Respondent on Merits, p.29). The record supports this contention. Petitioner has attempted to minimize this assertion by arguing that the trial judge only afforded defense counsel two such opportunities. (Reply Brief of Petitioner, p.12, note 7). Petitoner's factual statement is inaccurate. The record reflects three separate and distinct

inquiries from the trial judge. The judge first asked if defense counsel wanted to confer with his client after denying the request that the defendant be present at the bench. (T. 69). This occurred before any prospective jurors were accepted or stricken. After defense counsel had utilized either one or two of his six peremptories, the trial judge again specifically asked whether defense counsel wished to confer with his client. (T. 72). Prior to selection of the alternate, the judge inquired for a third time. (T. 74). Notwithstanding the new math, it remains axiomatic that 1 + 1 + 1 = 3, not 2. The State has carefully outlined the three distinct inquiries in its brief in the Third District Court of Appeal, as well as in its initial brief in this Court. Notwithstanding this constant reiteration, citing chapter and verse, Petitioner has still chosen to ignore the facts. Even more importantly, the judge never intimated that counsel's consultations with his client were limited to those three occasions. It is obvious from the trial judge's meticulous concern and repeated inquiries, that he was prepared to permit counsel to consult with his client as often as counsel desired. Thus, the State fully stands by its initial assertions on this matter.

The State relies on its prior Brief in all other respects.

CONCLUSION

Based upon the points and the authorities contained herein, the State respectfully requests that this Court answer the certified question in the negative, quash the decision of the Third District as to the Richardson issue, approve the portion of the decision concerning the presence of the Defendant during the exercise of peremptory challenges, and reinstate the trial courts judgement and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33128 on this 30th day of December, 1985.

RICHARD L. POLIN
Assistant Attorney General