IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,845

THE STATE OF FLORIDA,

Petitioner,

vs.

KENNETH WARD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

* *

BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

MARK J. BERKOWITZ
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Petitioner, the State of Florida, was the Appellee in the District Court and the prosecution in the trial court. The Respondent, Kenneth Ward, was the Appellant in the District Court and the defendant below. The parties will be referred to as they stand before this Court. The symbol "A" will be used to designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Respondent, Kenneth Ward, was charged in a three (3) count indictment with first degree murder, armed robbery, and conspiracy to commit first degree murder and armed robbery. (R. 1-2A, T. 26). In June of 1982, Larry Hogue tried to engage in a cocaine deal with Kenneth Ward. (T. 289).

Jimmy Mays and Larry Hogue[1] were to sell cocaine to the Respondent and to Gary Patterson, the victim. (T. 289). However, due to the high price of cocaine, the planned narcotics transaction could not take place. (T. 290). Instead, the Respondent stated that the victim's money should be taken and that he would be subsequently killed. (T. 295).

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[1]Hogue plead guilty to second degree murder and received a life sentence. (T. 325). He testified at the trial. (T. 325).

Jimmy Mays contacted his relative, Clifford Darden to kill Gary Patterson. (T. 298). Hogue told Ward that Clifford Darden was going to kill Gary Patterson. (T. 303).

At the home of Jimmy Mays, Hogue, Ward and Mays were sitting at a table while the victim sampled a small amount of cocaine. (T. 300). Darden, hiding in the bedroom, then came out and began hitting the victim with a ball peen hammer. (T. 306). The Respondent gave Hogue $1,000 in order to pay Darden for his role in the killing. (T. 309).

The victim only possessed $10,000 which he was carrying on this person. (T. 318). After paying $1,000 to Darden, the Respondent gave $3,000 each to Hogue and Mays. (T. 318). Ward kept the remaining $3,000. (T. 318).

On rebuttal, the State called a witness who was not named on the witness list. (T. 579). The witness, Gail Beard[2] testified that the day the victim's body was found the Respondent was in Gary Patterson's car. (T. 582-584).

Steven Parr, the lead detective in this case, gave a deposition almost two years prior to the trial where he reviewed Gail Beard's testimony. (T. 580). After considering that both sides had prior notice of Gail Beard's testimony,

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[2]This witness lived in the victim's neighborhood.

the trial court overruled the objection based on a discovery violation and denied the request for a Richardson hearing. (T. 581).

The jury returned guilty verdicts on the First Degree Murder and Armed Robbery charges and not guilty on the conspiracy charge. (R. 133-135). The trial court imposed a life sentence for the first degree murder conviction and a twenty-five (25) year consecutive sentence for the armed robbery conviction. (R. 199-200).

On appeal to the Third District, Respondent claimed a right to a new trial solely because a Richardson inquiry was not held. The Petitioner argued that the trial court's inquiry was sufficient under the principles outlined in the Richardson case as well as harmless error.

The Third District, after finding that the Richardson error was harmless on State standards, relunctantly reversed the Respondent's convictions. The Third District felt bound to hold that the failure to conduct a Richardson inquiry into the possible prejudice resulting from failure to list a witness per se reversible error. The Court felt bound to follow Richardson and granted a new trial regardless of the utter lack of effect it had upon the judgment. (A. 1-2).

The Third District then certified the following question:

> 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?

The Third District stated that if it was at liberty to do so, it would affirm. Petitioner's Motion To Stay The Mandate was granted. (A. 3). A notice to invoke the discretionary review of this Court was filed and accepted.

SUMMARY OF THE ARGUMENT

The Respondent, in the face of overwhelming evidence, claimed he was entitled to a new trial based on the trial court's failure to hold a Richardson inquiry. The Third District relunctantly agreed, but certified the following question:

> 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?

The foregoing certified questions should be answered in the negative, based on this Court's decision in State v. Murray, 433 So.2d 955 (Fla. 1984), which held that prosecutorial misconduct or indifference is not valid ground to grant a new trial where the evidence is overwhelming. In the instant case the prosecutor failed to include the name of a rebuttal witness on the witness list. This failure, in the face of overwhelming evidence, should not require a new trial. Further, this Court has recently evidenced a trend away from automatic reversals and it should be continued and Richardson should be receded from.

ARGUMENT

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?

This Court in State v. Murray, 443 So.2d 955 (Fla. 1984), agreed with the analysis of the doctrine in United States v. Hastings, 401 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1903):

> The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of the appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.
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> 443 So.2d at 956.

The adoption of the foregoing doctrine reflected the concern that when courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality, United States v. Hastings, 461 U.S. at p. 509, 103 S.Ct. at p.1980.

This Court then applied the harmless error doctrine to Murray. This Court then found that evidence against the defendant was overwhelming and therefore held that prosecutorial error during closing argument was harmless and did not warrant reversal.

Other recent treatments of the harmless error doctrine of Murray, in different contexts reveals a trend toward abolishing per se reversible error rules in favor of the harmless beyond a reasonable doubt standard. Therefore, the State submits, that after a review of the different contexts in which harmless error has supplanted automatic reversal, it will be clear that it is time to recede from the automatic reversal rule of Richardson and establish a harmless error standard of review [3].

In Bova v. State, 410 So.2d 1343 (Fla. 1982) pre Murray decision, was the first decision indicating this Court's dissatisfaction with per se reversible error rules. The issue in Bova was whether a violation of the constitutional right on attorney/client consultation during the course of a criminal trial was subject to the harmless error doctrine. Although error was found with the trial court's

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[3]Although the Third District certified the question as harmless error, it found the instant error to be harmless beyond a reasonable doubt. Since the latter encompasses a higher standard, this brief will address that higher standard.

restriction of consultation, this Court, citing to Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1971) and Knight v. State, 394 So.2d 797 (Fla. 1981), found the violation subject to the harmless beyond a reasonable doubt standard of review. In so ruling, this Court rejected the principle that the constitutional right to have reasonably effective attorney representation is absolute and held that the access to counsel rule is neither fundamental in the sense that it does not require preservation below, nor prophylactic in that reversal will necessarily follow its violation without reference to ordinary considerations of harmlessness. This Court then found the evidence of defendant's guilt was overwhelming and no actual prejudice was shown. Therefore, this Court held that beyond any reasonable doubt the brief restraint on defense consultation did not contribute to the jury's finding of guilt.

In Tucker v. State, 459 So.2d 306 (Fla. 1984), this Court receded from the State v. Black, 385 So.2d 1372 (Fla. 1980), which held that venue was an essential element of the crime charged, thus an indictment which failed to allege venue was so fundamentally defective as to be capable of supporting a conviction. Instead, this Court held that the failure to allege venue in an indictment or information is an error of form, not of substance and such a defect will not

render the charging instrument void absent a showing of prejudice to the defendant. By so holding, this Court rejected the automatic reversal rule and required the defendant to show prejudice by establishing that venue was laid in the wrong county or that it caused misunderstanding of the nature and cause of the accusation against him.

In Davis v. State, 461 So.2d 67 (Fla. 1984), over objection, the prosecutor's closing argument violated the "golden rule" and as such mandated automatic reversal. This Court, for the first time, explicitly relied on its holding in State v. Murray, supra.

> . . ."prosecutorial error alone does not warrant automatic reversal. . . unless the errors involved are so basic to a fair trial that they can never be treated as harmless." We went on to hold that the error must be so prejudicial as to taint the entire trial as judged by the harmless error rule from Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> (Footnote omitted). 461 So.2d at 71.

In applying the foregoing doctrine, this Court rejected the contention that the prosecutor's argument to the jury during the penalty phase rendered those proceedings fundamentally unfair. The comments were found to have support in the record and has no significant impact on the jury's

recommendation or the sentence imposed. Since the error did not go to the foundation of the conviction or sentence, it was harmless beyond a reasonable doubt.

In State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) this Court held that an entire state attorney's office is not automatically disqualified from prosecuting a defendant, where the defendant related confidential information to his attorney who later became a member of the state attorney's office. The only way the entire office would be disqualified is if defendant could show prejudice by either establishing that the confidential information was provided to the office by the attorney or if the attorney actually assisted, in any capacity, in the prosecution of the charge. This Court then reviewed the record and found based thereon that the disqualified attorney had neither provided prejudicial information relating to the charge nor personally assisted in the prosecution thereof. Since no prejudice was established, defendant was not entitled to relief. See also, Clausell v. State, 455 So.2d 1050 (Fla 3d DCA 1984) review pending Case No. 65,945 (where the panel opinion held, pursuant to State v. Murray, that in order to disqualify an entire state attorney's office, where a non prosecuting assistant is going to testify at trial, the defendant must point to some prejudice to him which results from the office's participation in his prosecution).[4]

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[4]However, in Curtis v. State, 10 F.L.W. 533 (Fla. September 27, 1985), this Court reaffirmed Ivory v. State, 351 So.2d (Fla. 1977) which held that any communication with the jury outside the presence of the prosecutor, the defendant and defendant's counsel is so fraught with potential prejudice

In Frances v. State, 413 So.2d 1175 (Fla. 1982), this Court held that harmless error standard was applicable in a situation where a portion of voir dire was conducted outside defendant's presence. In Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied 461 U.S. 902, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), the trial court without notice and after the jury retired to deliberate, gave an additional jury instruction. This Court found that the instruction was appropriate and held the procedural error of failing to notify was harmless. In Hitchcock v. State, 413 So.2d 741 (Fla. 1982), this Court held the trial court's written response to a jury question, without notification, was harmless error.

This trend away from court rules the violation of which mandate automatic reversal is further supported by the Amendment to Rules 3.191 and 3.390 of the Florida Rules of Criminal Procedure. The Florida Bar re: Amendment to Rules--Criminal Procedure, 462 So.2d 386 (Fla. 1984).

Rule 3.191 (a) (1), the speedy trial rule, repealed the remedy of automatic discharge from the crime for violation of

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that it cannot be considered harmless. "The trial court, faced with [a request to have testimony read], should have advised counsel of it and reconvened court with defendant in attendance. . . This would afford counsel an opportunity to perform their respective functions. They would advise the court, object, request the giving of additional instructions or the reading of additional testimony, and otherwise fully participate in their facet of the proceeding." Curtis, supra, at 533.

the speedy trial rule. Instead, said rule now provides a 15-day grace period for the state to bring the defendant to trial, and only if he is not tried, without excusable reasons, at the expiration of the 15-day period is defendant entitled to discharge.

Rule 3.390, as amended, deleted the requirement that the trial court instruct the jury as to the maximum and minimum penalities. In so doing, this Court abolished the per se reversible error rule which accompanied the trial court's failure to so instruct of Tascano v. State, 393 So.2d 540 (Fla. 1981).

This trend of not placing a mere procedural deficiency into a protected status not occupied by errors which concern the most serious constitutional rights, is also evident in Richardson violations which are not occasioned by the State during trial.

In Cuciak v. State, 410 So.2d 916 (Fla. 1982), this Court held that a defendant in a probation revocation hearing is entitled discovery. This Court also held that a violation of discovery in a probation revocation proceeding requires a Richardson hearing. However, the Richardson holding was modified so that in revocation hearings the failure to hold an inquiry after notification does not require automatic reversal when the appellate court finds to its satisfaction

that the error was harmless. Although Richardson was modified, this Court held that the burden will remain on the state to prove to the appellate court that the failure to conduct an inquiry was non prejudicial. The apparent reason for this modification is the fact of the informality of probation revocation hearings and the lesser burden of proof of satisfying the conscience of the court.

The Cruciak modification of Richardson has been extended to pre-trial motions to suppress. In Taylor v. State, 386 So.2d 825 (Fla. 3d DCA 1980), the Court held the failure to conduct a Richardson inquiry was subject to the harmless error rule. The court reasoned that such a modification was proper since permitting the State to call unlisted witnesses could not have adversely affected the defendant's ability to prepare for trial since the instant proceeding occurred well before trial. Further, the error was found harmless, since the record disclosed that the two witnesses' testimony was cumulative and corroborative. See also, Cauley v. State, 444 So.2d 964 (Fla. 1st DCA 1983). (Failure to hold a Richardson inquiry on motion to suppress subject to harmless error rule and record on appeal insufficient to support holding of non-prejudice).

The Richardson rule has also been applied to defense discovery violations. Bradford v. State, 278 So.2d 624 (Fla. 1973). In Bradford a judgement of conviction was

reversed after the trial court refused to allow the testimony of two defense witnesses whose identities had not been properly disclosed to the State prior to trial. This Court found that in defense discovery violations a Richardson inquiry was mandated not only to determine the substantive prejudice that might be suffered by the defendant by exclusion of the witness and his right to present a defense. See also, Patterson v. State, 419 So.2d 1020 (Fla. 4th DCA 1982). (After Richardon inquiry, trial court exclusion of defense witnesses was reversed since likelihood of substantive prejudice to defendant outweighed procedural prejudice to State).

The fact that a Richardson violation is not fundamental lends further support for recession from the automatic reversal rule. Fundamental error which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause action. Clark v. State, 363 So.2d 331 (Fla. 1978). Failure to conduct a Richardson hearing is not fundamental error and therefore requires a timely objection. Failure to object acts as a waiver since a discovery violation does not require automatic reversal. Lucas v. State, 376 So.2d 1149 (Fla. 1979). Since failure to hold a Richardson inquiry, requires preservation below, it is not fundamental error and therefore it is incongruent to hold the error is not fundamental yet still subject to automatic reversal for a

violation thereof. Reconciliation of the two concepts should be made by receding from the automatic reversal rule.

The foregoing analysis clearly establishes that automatic reversal rules are no longer in vogue. The concern is now on substance and not form. Procedural irregularities, whether they concern constitutional rights or rule violations, are now scrutinized on appeal to determine if the error was harmless beyond a reasonable doubt. There is no logical reason why a Richardson rule violation should not be subject to the harmless beyond a reasonable doubt standard[5]. Futhermore, the only other error still not subject to the harmless error rule involves the constitutional right to have a pretrial ruling on voluntariness of a confession. Land v. State, 293 So.2d 724 (Fla. 1973). But the constitutional right to remain silent is now subject to the harmless error rule.

> "Any comment on, or which is fairly susceptible of being interpreted as referring to a defendant's failure to testify is error and is strongly discouraged. Such a comment, however, should be evaluated according to the harmless error rule, with the state

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[5]The United States Supreme Court has recently held that the government's failure to disclose Brady impeachment material after demand does not require automatic reversal. United States v. Bagley, 53 USLW 5004 (July 2, 1985).

> having the burden of showing the comment to have been harmless beyond a reasonable doubt." State v. Marshall, 10 F.L.W. 445 (September 6, 1985). See also, State v. Kinchen, 10 F.L.W. 446 (September 6, 1985), State v. Diguilio, 10 F.L.W. 433 (August 30, 1985).

In accordance with the foregoing analysis and in conjunction with the Third District in the instant case and the Fourth District in Hall v. State, 10 F.L.W. 1651 (Fla. 4th DCA July 3, 1985), the State also takes the liberty of urging this Court to "change the per se rule which it errected," Hall, 10 F.L.W. at 1652, by answering the question in the negative.

CONCLUSION

Based upon the points and authorities contained herein, the State respectfully requests that this Court answer the certified question in the negative, quash the decision of the Third District and reinstate the Respondents' convictions.

Respectfully submitted,

JIM SMITH
Attorney General

MARK J. BERKOWITZ
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to N. JOSEPH DURANT, ESQ., GELBER, GLASS, AND DURANT, P.A., Suites 202-205, Miami, FL 33125, on this 2nd day day of December, 1985.

MARK J. BERKOWITZ
Assistant Attorney General

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