2-23

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,124

LARRY SMALL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

This is a petition for discretionary review on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A", followed by the page numbers. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Larry Small was charged with robbery (A. 1). At the jury trial on that charge, the trial court refused to permit Mr. Small's alibi witness to testify without giving Small the opportunity to show good cause why he failed to comply with Florida Rule of Criminal Procedure 3.200 (A. 1-2). Mr. Small was found guilty of the robbery and an adjudication of guilt and sentence were entered pursuant to the jury's finding of guilt (A. 1).

On appeal to the Third District Court of Appeal, the court found that the exclusion of Small's alibi witness without first inquiring into the circumstances surrounding his failure to comply with Rule 3.200 was an abuse of discretion (A. 2). However, the district court of appeal did not reverse the judgment of conviction and sentence and remand for a new trial based on the trial court's failure to conduct an inquiry into the circumstances surrounding Small's failure to comply with Rule 3.200. Rather, the appellate court fashioned the following remedy:

> Accordingly, we temporarily remand the case to the trial court with directions that a hearing be held to determine whether or not good cause existed to waive the requirements of rule 3.200. If the trial court determines that good cause has been shown, defendant's conviction and sentence should be vacated and a new trial ordered. Such order will be immediately transmitted to this court so this appeal may be closed. If, however, the trial court determines that no good cause is shown, the court will transmit back to this court the entire record, including a transcript of the hearing on the surrounding circumstances regarding the defendant's failure to comply with the rule, and a copy of the court's order.

(A. 2-3).

A motion for rehearing was filed by appellant Small on August 13, 1992 (A. 4-7). The State of Florida filed a response to the motion for rehearing on September 3, 1992 (A. 8-14). On December 22, 1992, the motion for rehearing was denied (A. 15). Judges Nesbitt and Baskin concurred in the denial of the motion, and Judge Ferguson indicated that he would grant the motion (A. 15).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed January 21, 1993.

SUMMARY OF ARGUMENT

In the present case, the Third District Court of Appeal found that the trial court had erred in excluding the defendant's alibi witness without conducting an inquiry into the circumstances surrounding the defendant's failure to comply with the rule requiring timely disclosure of the name and address of alibi witnesses to the state. However, the district court refused to reverse and remand for a new trial based on the trial court's error. Rather, the district court temporarily remanded the case to the trial court for a post-trial hearing on the circumstances surrounding the defendant's failure to comply with the rule.

This ruling by the district court expressly and directly conflicts with the decisions of this Court in *Smith v. State*, 372 So. 2d 86 (Fla. 1979) and *Smith v. State*, 319 So. 2d 14 (Fla. 1975), as well as the decision of the Second District Court of Appeal in *Pelham v. State*, 567 So. 2d 537 (Fla. 2d DCA 1990). These decisions establish that reversal and remand for a new trial is required when an appellate court finds error in the trial court's exclusion of the defendant's alibi witness without conducting an inquiry into the circumstances surrounding the defendant's failure to comply with the rule requiring timely disclosure of the name and address of alibi witnesses to the state. The express and direct conflict between these decisions and the decision in the present case warrants this Court's exercise of its discretionary jurisdiction.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *SMITH v. STATE*, 372 So. 2d 86 (Fla. 1979) AND *SMITH v. STATE*, 319 So. 2d 14 (Fla. 1975), AS WELL AS THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *PELHAM v. STATE*, 567 So. 2d 537 (Fla. 2d DCA 1990).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. *Neilsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). In the present case, the Third District Court of Appeal applied a rule of law to produce a different result in a case which involves substantially the same facts as the decisions of this Court in *Smith v. State*, 372 So. 2d 86 (Fla. 1979) and *Smith v. State*, 319 So. 2d 14 (Fla. 1975), and also the decision of the Second District Court of Appeal in *Pelham v. State*, 567 So. 2d 537 (Fla. 2d DCA 1990).

A.

THE FAILURE TO CONDUCT A *RICHARDSON* HEARING NECESSITATES REVERSAL AND REMAND FOR A NEW TRIAL, AND THE ERROR CANNOT BE REMEDIED BY A POST-TRIAL *RICHARDSON* HEARING.

In *Smith v. State*, 353 So. 2d 205, 207 (Fla. 2d DCA 1977), the court fashioned the following remedy based on its holding that the trial court abused its discretion in excluding the testimony of a

defense witness without first inquiring into all the circumstances surrounding the defendant's failure to disclose the witness to the prosecution:

> [W]e temporarily relinquish jurisdiction of the cause to the trial court for a period of 45 days from the date of issuance of our mandate. The trial court shall hold a hearing inquiring into the circumstances surrounding defense counsel's failure to comply with Fla.R.Crim.P. 3.220. The court shall enter an order stating its findings and ruling on whether the state's objection at trial was well taken. Thereafter, within the said 45-day period, the court shall transmit to this court a transcript of the hearing, and a certified copy of its findings and ruling on the state's objection. We will thereafter give further consideration to the question raised by this appeal.

On petition for writ of certiorari, this Court quashed the decision of the district court, and held that the failure to conduct an inquiry at the time of trial concerning a defendant's failure to supply the name of a defense witness to the state cannot be remedied by a post-trial hearing:

> We are convinced that a post-trial hearing of the sort conducted in this case is inadequate to satisfy the objectives of a *Richardson* inquiry. The deficiencies in this procedure are apparent. In the illusive search for past prejudice, the trial court is charged with the task of resurrecting the events and circumstances of a trial which may have taken place long ago. The reliability of the findings of such a hearing must be suspect, for they are necessarily based on hearsay, conflicting recollections and summarized and paraphrased information. Instead of a vigorous investigation into the circumstances surrounding a discovery violation, a *Richardson* inquiry after remand from the appellate court is reduced to a mere guessing game.

> A post-trial *Richardson* inquiry is not only likely to be unreliable, it fosters piecemeal litigation as well. Where hearings come after trial, the possibility exists that judges, already concerned with congested court dockets, might become less sensitive to due process considerations. . . . Moreover, as we recognized in *Land [v. State*, 293 So. 2d 704 (Fla. 1974)] and *Wilcox [v. State*, 367 So. 2d 1020 (Fla. 1979)], it would be difficult at best for a trial judge to determine the thorny question of prejudice in an isolated *Richardson* hearing without the possibility of being subconsciously affected by a jury's prior judgment of guilt.

Smith v. State, 372 So. 2d 86, 88 (Fla. 1979)(*Smith I*)(footnotes and citations omitted).

In the present case, the district court fashioned a remedy virtually identical to the remedy expressly disapproved by this Court in *Smith I:*

> Accordingly, we temporarily remand the case to the trial court with directions that a hearing be held to determine whether or not good cause existed to waive the requirements of rule 3.200. If the trial court determines that good cause has been shown, defendant's conviction and sentence should be vacated and a new trial ordered. Such order will be immediately transmitted to this court so this appeal may be closed. If, however, the trial court determines that no good cause is shown, the court will transmit back to this court the entire record, including a transcript of the hearing on the surrounding circumstances regarding the defendant's failure to comply with the rule, and a copy of the court's order.

(A. 2-3). Thus, unless the rationale of *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), does not apply to Fla. R. Crim. P. 3.200, the decision of the district court of appeal in this case cannot be squared with the decision of this Court in *Smith I*.

B.

THE RATIONALE OF *RICHARDSON* IS FULLY APPLICABLE TO FLA. R. CRIM. P. 3.200.

In *Smith v. State*, 319 So. 2d 14 (Fla. 1975)(*Smith II*), this Court made it clear that the rationale of *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) fully applies to the reciprocal discovery provisions of Fla. R. Crim. P. 3.200. In *Smith II*, when the state sought to call a witness to rebut the defendant's alibi defense, the defendant sought to exclude the witness based on the state's failure to previously disclose the witness to the defense as required by Rule 3.200. Without conducting any inquiry into the circumstances surrounding the state's nondisclosure, the trial court overruled the defense objection and allowed the witness to testify in rebuttal. On appeal, the Third District Court of Appeal affirmed the trial court's ruling.

On petition for writ of certiorari, this Court quashed the decision of the district court of appeal. After quoting extensively from *Richardson*, this Court held that it was reversible error to allow the state to call the alibi rebuttal witness without conducting a full inquiry into the circumstances surrounding the violation of Rule 3.200 because that rule is a part of the reciprocal discovery rules incorporated into the rules of criminal procedure. This Court further held that pursuant to *Richardson*, the trial court's failure to conduct an inquiry into the circumstances surrounding the violation of Rule 3.200 could not be remedied by a determination of prejudice at the appellate level:

> Under the rationale of *Richardson, supra*, it is not the function of this Court to determine whether prejudice had resulted to Petitioner by the State's failure to advise him that Norma Campbell would be a witness against him; however, it was incumbent upon the trial judge to do so. The trial judge having failed to make proper inquiry, this cause must be reversed.

319 So. 2d at 17-18. This Court reversed and remanded for a new trial, rather than remanding the case for a post-trial hearing into the circumstances surrounding the Rule 3.200 violation.

A similar conclusion was reached by the district court of appeal in *Pelham v. State*, 567 So. 2d 537 (Fla. 2d DCA 1990). In that case, the court held that the trial judge had reversibly erred in excluding the defendant's alibi witness from testifying based on the defendant's failure to comply with Rule 3.200. Finding that the Fla. R. Crim. P. 3.200 notice of alibi rule is analogous to a failure to furnish witnesses under Fla. R. Crim. P. 3.220, the court ruled that a Rule 3.200 violation should be treated as a Rule 3.220 violation in the manner prescribed by *Richardson*, and the court reversed and remanded for a new trial based on the trial judge's failure to conduct a *Richardson* inquiry before excluding the alibi witness.

Smith I, Smith II, and *Pelham,* all stand for the proposition that a trial judge's exclusion of a defense alibi witness based on a violation of Rule 3.200 without an inquiry into the circumstances surrounding the violation requires reversal and remand for a new trial, and the error cannot be remedied by a post-trial inquiry into those surrounding circumstances. Thus, the decision of the

district court of appeal in the present case, which remands for a post-trial hearing into the circumstances surrounding the violation of Rule 3.200, expressly and directly conflicts with the decisions in *Smith I*, *Smith II*, and *Pelham*. Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Attorney General's Office, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 29th day of January, 1993.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

LARRY SMALL, **

Appellant, **

vs. ** CASE NO. 91-1311

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed August 11, 1992.

An Appeal from the Circuit Court for Dade County, Ellen J. Morphonios, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Marc E. Brandes, Assistant Attorney General, for appellee.

Before NESBITT, BASKIN, and FERGUSON, JJ.

PER CURIAM.

The defendant appeals an adjudication of robbery entered upon a jury verdict. We agree with defendant's argument that the trial court erred in refusing to permit his alibi witness to testify without first giving the defendant an opportunity to show good

cause why defendant failed to comply with Florida Rule of Criminal Procedure 3.200. That rule requires a defendant offering an alibi witness to furnish to the prosecuting attorney, at least ten days before trial, notice of his intent to call such witness, as well as the witness' name and address, so that the state may depose the witness prior to trial. Rule 3.200 was specifically designed to timely afford the state an opportunity to learn the nature of the alibi and to proceed with discovery if needed. However, the rule specifically provides, "[f]or good cause shown the court may waive the requirements of this rule."

We find the instant case to be much like Barnes v. State, 294 So.2d 679 (Fla. 2d DCA 1974), where the court held that exclusion of testimony of defendant's alibi witness without first inquiring into circumstances surrounding his failure to comply with rule 3.200 was an abuse of discretion. See also Pelham v. State, 567 So.2d 537 (Fla. 2d DCA 1990); Bell v. State, 287 So.2d 717 (Fla. 2d DCA 1974).

Accordingly, we temporarily remand the case to the trial court with directions that a hearing be held to determine whether or not good cause existed to waive the requirements of rule 3.200. If the trial court determines that good cause has been shown, defendant's conviction and sentence should be vacated and a new trial ordered. Such order will be immediately transmitted to this court so this appeal may be closed. If, however, the trial court determines that no good cause is shown, the court will transmit back to this court the entire record, including a transcript of the hearing on the surrounding circumstances regarding the

defendant's failure to comply with the rule, and a copy of the court's order.

Remanded with directions.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 91-1311

LARRY SMALL,

Appellant,

vs

THE STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, Larry Small, pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves for rehearing in the above-styled cause, and in support of the motion states the following:

1. On August 11, 1992, this Court rendered its decision holding that the trial court had erred in refusing to permit an alibi witness to testify without first giving the defendant an opportunity to show good cause why he failed to give the required notice of alibi to the prosecutor at least ten days before trial, as required by Florida Rule of Criminal Procedure 3.200 (A. 1-3).[1]

2. Based on this holding, this Court did not reverse and remand for a new trial, but instead fashioned the following remedy:

> Accordingly, we temporarily remand the case to the trial court with directions that a hearing be held to determine whether or not good cause existed to waive the requirements of rule 3.200. If the trial court determines that good cause has been shown, defendant's conviction and sentence should be vacated and a new trial ordered. Such order will be immediately transmitted to this court so this appeal may be closed. If, however, the trial court determines that no good cause is shown, the court will transmit back to this court the entire record, including a transcript of the hearing on the

[1]In this motion, the symbol "A" will be used to designate this Court's decision which is attached to this motion.

> surrounding circumstances regarding the defendant's failure to comply with the rule, and a copy of the court's order.

(A. 2-3). As support for such a remedy, this Court relied on *Barnes v. State*, 294 So.2d 679 (Fla. 2d DCA 1974).

3. In *Smith v. State*, 353 So.2d 205, 207 (Fla. 2d DCA 1977), the court fashioned a similar remedy based on its holding that the trial court abused its discretion in excluding the testimony of a defense witness without first inquiring into all the circumstances surrounding the defendant's failure to disclose the witness to the prosecution:

> The failure of the trial judge to make such inquiry, however, does not require vacation of the judgment and sentence at this time. *Barnes v. State*, 294 So.2d 679 (Fla. 2d DCA 1974).
>
> Accordingly, we temporarily relinquish jurisdiction of the cause to the trial court for a period of 45 days from the date of issuance of our mandate. The trial court shall hold a hearing inquiring into the circumstances surrounding defense counsel's failure to comply with Fla.R.Crim.P. 3.220. The court shall enter an order stating its findings and ruling on whether the state's objection at trial was well taken. Thereafter, within the said 45-day period, the court shall transmit to this court a transcript of the hearing, and a certified copy of its findings and ruling on the state's objection. We will thereafter give further consideration to the question raised by this appeal.

4. On petition for writ of certiorari, the Florida Supreme Court quashed the decision of the district court, and held that the failure to conduct an inquiry at the time of trial concerning a defendant's failure to supply the name of a defense witness to the state cannot be remedied by a post-trial hearing:

> We are convinced that a post-trial hearing of the sort conducted in this case is inadequate to satisfy the objectives of a *Richardson* inquiry. The deficiencies in this procedure are apparent. In the illusive search for past prejudice, the trial court is charged with the task of resurrecting the events and circumstances of a trial which may have taken place long ago. The reliability of the findings of such a hearing must be suspect, for they are necessarily based on hearsay, conflicting recollections and summarized and paraphrased information. Instead of a vigorous investigation into the circumstances surrounding a discovery violation, a *Richardson* inquiry after remand from the appellate court is reduced to a mere guessing game.

> A post-trial *Richardson* inquiry is not only likely to be unreliable, it fosters piecemeal litigation as well. Where hearings come after trial, the possibility exists that judges, already concerned with congested court dockets, might become less sensitive to due process considerations. . . . Moreover, as we recognized in *Land [v. State*, 293 So.2d 704 (Fla. 1974)] and *Wilcox [v. State*, 367 So.2d 1020 (Fla. 1979)], it would be difficult at best for a trial judge to determine the thorny question of prejudice in an isolated *Richardson* hearing without the possibility of being subconsciously affected by a jury's prior judgment of guilt.

Smith v. State, 372 So.2d 86, 88 (Fla. 1979)(footnotes and citations omitted).

5. The same concerns which led the Supreme Court in *Smith* to condemn post-trial hearings into the circumstances surrounding a defendant's failure to disclose a defense witness militate against post-trial hearings to determine whether "good cause" existed for the defendant's failure to give the required notice of his intent to call an alibi witness at trial. Indeed, in *Smith v. State*, 319 So.2d 14 (Fla. 1975), the Supreme Court made it clear that the rationale of *Richardson v. State*, 246 So.2d 771 (Fla. 1971) fully applies to the reciprocal discovery provisions of Rule 3.200. In *Smith*, the Court reversed and remanded for a new trial based on the trial judge's failure to make a proper inquiry into the circumstances surrounding the state's failure to disclose a rebuttal witness to the defendant's alibi witness pursuant to Rule 3.200. *See also Briseno v. State*, 449 So.2d 312 (Fla. 5th DCA 1984)(reversal and remand for new trial based on trial court's error in precluding defendant from calling alibi witness on ground that State had not been notified under Rule 3.200 without conducting full inquiry into circumstances surrounding violation of the rule); *Slaughter v. State*, 330 So.2d 156 (Fla. 4th DCA 1976)(reversal and remand for a new trial based on trial judge's exclusion of defendant's claim of alibi and witness list in support thereof without first inquiring into the surrounding circumstances).

6. Thus, it is clear that 1) *Barnes v. State, supra*, cited by this Court in support of the remedy of a post-trial hearing, has been implicitly overruled by *Smith v. State*, 372 So.2d 86 (Fla. 1979); and 2) a post-trial hearing to conduct an inquiry into the circumstances surrounding

a violation of either Rule 3.220 or Rule 3.200 is prohibited by *Smith*.

WHEREFORE, the appellant respectfully requests this Court to grant rehearing, withdraw that portion of the decision remanding for a post-trial hearing into the circumstances surrounding defense counsel's failure to comply with Rule 3.200, and reverse the defendant's judgment of conviction and sentence and remand for a new trial.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Marc E. Brandes, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 13th day of August, 1992.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender
Florida Bar No. 264385

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 91-1311

LARRY SMALL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO APPELLANT'S MOTION FOR REHEARING

The Appellee, the State of Florida, by and through undersigned counsel, moves this court to deny rehearing in the above-styled cause pursuant to Rule 9.330, Fla.R.App.P., and states the following:

1. Subsequent to this Court's August 11, 1992 opinion of the above-styled cause, Appellant filed a motion for rehearing.

2. Appellant's reliance on Smith v. State, 372 So.2d 86 (Fla. 1979) is misplaced. Smith is distinguishable from Barnes v. State, 294 So.2d 679 (Fla. 2d DCA 1974) by the fact that Smith involved a violation of the discovery rules pursuant to Rule 3.222 Fla.R.Crim.P. Barnes involved a violation of Rule 3.200, Fla.R.Crim.P., which involves alibi witnesses.

3. The inherent differences between the two rules, which is explained in depth in the State's brief, requires different remedies for violation of the rules. Thus, Smith is distinguishible.

4. The Appellant also relies upon Smith v. State, 319 So.2d 14 (Fla. 1975) to further his cause. In Smith, the defendant complied with Rule 3.200 Fla.R.Crim.P. However, over objection, the State did not supply their rebuttal witness name to the defendant, thus violating Rule 3.200 Fla.R.Crim.P. The prosecution had knowledge of the existence of the rebuttal before defendant's alibi witness took the stand and intentionally with held disclosure of its rebuttal evidence. The court held:

> It is our view that, where the trial court fails to make full inquiry into circumstances relating to the State's calling a witness whose name was not supplied to the defendant and where that witness testified as to a material issue, refusal by the trial court to exclude the testimony by the surprise witness is reversible error.
>
> 319 So.2d at 17.

5. In Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977), cert. den., 354 So.2d 981, the State learned of potential rebuttal evidence only after the alibi witness began testifying. This court found that Holman was distinguishable with Smith and Watson v. State, 291 So.2d 661 (Fla. 4th DCa 1971). In both Smith and Watson, the State knew of its rebuttal witness long

before the alibi witness took the stand and intentionally withheld this from the defendant. The court held that the court may waive requirements of rule in its discretion under circumstances of each case and affirmed the lower court's exclusion of alibi witness based upon the lack of surprise of defendant regarding the State's rebuttal witness.

6. Shifting to the case at bar, defendant had at the very least five (5) weeks notice of its albi witness and never gave notice to the State. (The day of the last trial until the second trial commenced). When the second trial commenced and the court learned of the violation of Rule 3.200 Fla.R.Crim.P., the Court excluded the witness. Defendant never objected, nor made any mention again throughout the trial.

7. The Court's reliance on Barnes is well taken. That case as literally on all fours with the case at bar except in Barnes, the defendant testified and sub judice the defendant chose not to present any case.

8. The State submits that after a careful comparison of all the cases, it seems when a state violation takes place of Rule 3.200 and it is a gross violation, the courts seem to require a Richardson inquiry and any lack thereof results in reversal. See Smith v. State, 319 So.2d 14 (Fla. 1975).

9. However, when the state violation does not seem to be as gross as compared to Smith, the Court does not look to Richardson, but rather to Rule 3.200 itself, to see if there was good cause shown for the state's failure to comply. See Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977).

10. Lastly, when the violation is caused by defendant as in the case sub judice and defendant presents no case, the court seems to require the trial court to have a hearing is determine if the trial court wished to waive the requirements of the rule. In other words, the trial court has discretion under the circumstances of each of these types of cases. See Barnes v. State, 294 So.2d 679 (Fla. 2d DCA 1974).

11. Defendant also relies upon Briseno v. State, 449 So.2d 312 (Fla. 5th DCA 1984) and Slaughter v. State, 330 So.2d 156 (Fla. 4th DCA 1976). Both cases are distinguishable from the case at bar.

12. In Briseno, an alibi witness was excluded from testifying because defendant failed to abide by Rule 3.200 and notify the State. However, the state was placed on notice and knew of the existence of this witness pursuant to Rule 3.220. The court should have determined whether the violation surprised the State in preparing for trial, and if so, whether reasonable means could have been employed to overcome such disadvantage

without resorting to the drastic measure of excluding evidence. 449 So.2d at 312, 313.

13. The facts at bar show that the State was or could have been surprised because they had no idea who the alibi witness was not what he or she would say. The defendant knew for at least five (5) weeks the existence of the alibi witness and chose not to give this information to the State.

14. In Slaughter v. State, 330 So.2d 156 (Fla. 4th DCA 1976) the Court held that it was reversible error for the trial court to exclude an alibi witness and witness list in support thereof because of the defendant's failure to comply with Rule 3.200, without inquiring into the surrounding circumstances. At bar, the defendant's noncompliance was obviously willfull. He knew for at least five (5) weeks of the existence of the alibi witness. It was also certainly substantial because the State has a right to know about any potential alibi witnesses pursuant to Rule 3.200. Further, it was prejudicial, as in every defense violation of Rule 3.200, the State is prejudiced because it does not know who the alibi witness is, what he or she will say.

15. There is little doubt that the case law on this subject is hardly uniform. Defendant relies upon his cases to suggest a Richardson inquiry is necessary for a violation of Rule 3.200 and in its absence, the Court must reverse the lower court.

16. However other cases such as Barnes v. State, 294 So.2d 679 (Fla. 2d DCA 1974), Chester v. State, 276 So.2d 76 (Fla. 2d DCA 1973) and Lail v. State, 314 So.2d 234 (Fla 4th DCA 1975) allow the trial court to exclude alibi witnesses when defendant did not comply with Rule 3.200 Fla.R.Crim.P. and the court found no good cause was shown for a violation. None of these cases made mention of Richardson.

17. The evolution of Richardson has developed into an automatic weapon of per se reversibility where the defendant does not comply with Rule 3.220 and the State fails to ask the court or the court fails to conduct a Richardson hearing. Armed with cases in this motion for rehearing, defendant is attempting to continue to use the Richardson weapon for its own violations of Rule 3.220 and argues that the absence of a Richardson inquiry should result in a reversal. The State submits that this Court correctly decided this issue. Despite the fact the only case pertaining to this issue is from this district and follows the Courts rational, see Holmes v. State, 347 So.2d 832 (Fla. 3d DCA 1977) the facts sub judice suggest a gross violation of the rule in question. By allowing defendant to violate Rule 3.200 and then allow him to complain that the lack of a Richardson inquiry necessitates reversal, seems patently unfair. This court should deny the defendant's motion.

WHEREFORE, the Appellee respectfully requests this Court to deny Appellant's motion for rehearing and affirm its decision in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE TO APPELLANT'S MOTION FOR REHEARING** was furnished by mail to **HOWARD K. BLUMBERG**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, 1351 N. W. 12th Street, Miami, Florida 33125 on this 3rd day of September, 1992.

MARC E. BRANDES
Assistant Attorney General

/ml

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

DECEMBER 22, 1992

LARRY SMALL, **

Appellant, **

vs. ** CASE NO. 91-1311

THE STATE OF FLORIDA, **

Appellee. **

Upon consideration, appellant's motion for rehearing is hereby denied. Nesbitt and Baskin, JJ., concur. Ferguson, J., would grant the motion. Appellee's motion to accept response as timely filed is granted.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Marc Brandes Howard Blumberg

/nbc

A.15