IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,124

LARRY SMALL

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, **LARRY SMALL**, was the Defendant in the trial court and the Appellant in the District Court of Appeal. 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 parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts as a substantial and accurate account of the proceedings below.

QUESTION PRESENTED

WHETHER 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).

SUMMARY OF THE ARGUMENT

None of the cases cited by Petitioner are directly on point with the case at bar. The facts of the relied upon cases are dissimilar with the case at bar. The State submits that these differences require this Court to deny review of the decision of the District Court.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION 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).

Article V, Section 3(b)(3) of the Florida Constitution provides that the Supreme Court may exercise discretionary jurisdiction of a decision of a District Court of Appeal that, inter alia, expressly and directly conflicts with a decision of another District Court of Appeal of the Supreme Court. Reaves v. State, 485 So. 2d 829 (Fla. 1986). Petitioner contends in the present case, that 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. 1978)(Smith I) and Smith v. State, 319 So. 2d 14 (Fla. 1975)(Smith II) and also the decision of the Second District Court of Appeal in Pelham v. State, 567 So. 2d 537 (Fla. 2d DCA 1990). The Respondent submits that the three cases relied on by the Petitioner do not expressly or directly conflict with the decision of the Third District Court of Appeal below.

Petitioner first relies upon Smith v. State, 372 So. 2d 86 (Fla. 1979)(Smith I) to show conflict. Smith I was before this Court on a petition for writ of certiorari to renew the decisions of the Second District Court of Appeal. A jury had found the petitioner guilty of aggravated assault. During his trial the defense called a witness. This witness's name had not been included on the witness list provided to the State pursuant to Rule 3.220 Fla.R.Crim.P. The State objected to the discovery violation. Without more inquiry the witness was excused by the trial court. On appeal, the Second District Court of Appeal held that the trial court abused its discretion in failing to conduct a hearing pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971) and temporarily relinquished jurisdiction for that purpose. This Court granted the Writ of Certiorari, quashed the District Court of Appeal decision holding that post trial hearing of this court conducted in this case is inadequate to satisfy the objection of a Richardson inquiry.

> Equally fundamental to our decision today is the fact that the policies underlying rule 3.220 cannot be fully effectuated if the *Richardson inquiry* is held after trial. Subsections, ranging from an order to comply to exclusion of evidence, to even a mistrial. Prejudice is often averted at trial through the simple expedient of a recess to permit the questioning or deposition of witnesses. Obviously, the rule is designed to afford a trial judge wide latitude in tailoring a sanction to the peculiar circumstances of a given case. But when the inquiry is held for the first time after remand from the appellate court, the range of options available under subsection (j) is narrowed to

> a determination of the propriety of the sanction imposed at trial, a sanction which, of course, was involved without the aid of a contemporaneous *Richardson* inquiry. Hence, the procedure employed in the case before us would eviscerate the flexibility contemplated under subsection (j).

Smith v. State, 372 So. 2d at 89.

The Smith I case was a violation of Rule 3.220, Fla.R.Crim.P. The facts surrounding that case are different from the facts sub judice at bar. The Petition violated Rule 3.200 Fla.R.Crim.P. Inherent in that rule is its last sentence which states "[f]or good cause shown the court may waive the requirements of this rule." The remedy fashioned by the Third District Court of appeal below was well within the parameters of Rule 3.200 Fla.R.Crim.P. This Court's holding in Smith I pertained to a violation of Rule 3.220, Fla.R.Crim.P. The Respondent submits that because of the differences in the rules, namely Rule 3.220 does not have a "for good cause" section, that no conflict exists between Smith v. State, 372 So. 2d 86 (Fla. 1972)(Smith I) and the district court of appeal decision below.

Petitioner also contends that the case Smith v. State, 319 So. 2d 14 (Fla. 1975)(Smith II) is in direct and express conflict with the decision below of the Third District Court of Appeal. In Smith II the defendant complied with Rule 3.200 Fla.R.Crim.P. However, over objection, the State did not supply their rebuttal witness's 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 withheld disclosure of its rebuttal evidence. This 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.

Sub judice the Petitioner violated Rule 3.200 Fla.R.Crim.P. and the witness did not testify. The fact that it was a defense violation as opposed to a State violation differentiates the two cases. Therefore there is no conflict between Smith II and the case below.

Lastly, Petitioner relies upon Pelham v. State, 567 So. 2d 537 (Fla. 1990), to show conflict. In Pelham the State filed its demand for notice of intention to claim alibi. In response, defendant listed an alibi witness. However, the listed alibi witness's name was spelled incorrectly. On the morning of the third day of trial, the State asserted that it just found out the alibi witness's name was different than originally given to them. Thus, there was no way the prosecution could have been able to locate the alibi witness with an improper name. The trial judge

excluded the witness because his name was misspelled. The second district reversed the trial court's decision reasoning that the trial court used no finding as the whether the State was actually prejudiced by the misspelling of the witness's name. The trial judge also failed to consider alternatives to rectify any prejudice short of excluding the testimony of the alibi witness.

The Respondent would submit that Pelham does not conflict with the case sub judice. There was no violation of Rule 3.200, Fla.R.Crim.P. in Pelham. The defendant gave the State the name of its alibi witness that was going to testify at trial. At bar, the defendant failed to list said alibi witness. The difference between listing a witness and failure to list a witness pursuant to Rule 3.200 Fla.R.Crim.P. is a difference in facts that would fail to show an express or direct conflict with the case at bar.

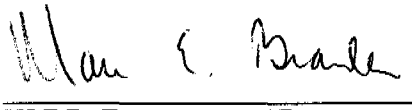
Accordingly, because there is nothing within the four corners of the District Court of Appeal's opinion that conflicts with a decision of another district court of appeal or of this Court, jurisdiction should be denied.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent would respectfully request that this court deny review of the decision of the district court.

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 **BRIEF OF RESPONDENT** was furnished by mail to **HOWARD BLUMBERG**, Assistant Public Defender, PUBLIC DEFENDER'S OFFICE, 1351 Northwest 12th Street, Miami, Florida 33125, on this 15 day of February, 1993.

MARC E. BRANDES
Assistant Attorney General

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