IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,124

LARRY SMALL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Larry Small, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Larry Small was charged with committing a robbery on December 26, 1990 (R. 1-2). The first jury trial on this charge commenced at 9:00 A.M. on March 13, 1991 (R. 47). Shortly before the start of jury selection, Mr. Small advised defense counsel for the first time that an alibi witness was available to testify on his behalf (R. 110). Defense counsel contacted the witness, Audrey Lyons, and she indicated that she might be a potential alibi witness (R. 118).

Defense counsel immediately advised the court and the prosecutor of these facts, and asked for leave to put on an alibi defense notwithstanding his failure to give the 10-day notice required by Florida Rule of Criminal Procedure 3.200 (R. 111). The prosecutor objected to the alibi witness being allowed to testify based on defense counsel's failure to comply with the notice requirements of rule 3.200 (R. 111-112). The court told defense counsel to make the alibi witness available to the state for deposition, and reserved ruling on the defense motion to present the alibi defense (R. 111). Defense counsel then made arrangements for the alibi witness to be picked up and taken to the courthouse by 11:30 A.M. (R. 118).

When the trial proceedings resumed at 12:50 P.M. following a lunch recess, the alibi witness had not arrived at the courthouse (R. 118). Defense counsel advised the court and the prosecutor that the name of the alibi witness was Audrey Lyons, and that she was to have been picked up at 27018 S.W. 127 Avenue (R. 118). Defense counsel moved for a continuance so that he could have more

time to locate Ms. Lyons, and so that the state could have the amount of time specified by Florida Rule of Criminal Procedure 3.200 to prepare to rebut the alibi defense (R. 118). The motion for continuance was denied, and the trial commenced (R. 118).

After the first two state witnesses had completed their testimony, defense counsel informed the court that Audrey Lyons had arrived at the courthouse (R. 158). Pursuant to questioning by the court, Ms. Lyons gave both her present address where she had been residing for the past three months, and her previous address (R. 159). Defense counsel then proffered to the court that Ms. Lyons was prepared to testify that Larry Small was with her at her residence from the afternoon hours of December 26th until midnight or 1:00 A.M. (R. 159-60). They were together cleaning up the house from the Christmas celebration the day before (R. 160).

The prosecutor was given the opportunity to question Ms. Lyons, but she did not ask any questions (R. 160). The court ruled that Ms. Lyons would not be allowed to testify as an alibi witness (R. 158-59). After the state had rested its case, defense counsel renewed his request to call Audrey Lyons to the witness stand (R. 176). The motion was again denied (R. 176-77). The trial subsequently ended with the declaration of a mistrial based on a hung jury (R. 210-211).

A second trial commenced 40 days later, on April 22, 1991 (TR. 1). Before the start of jury selection, the prosecutor announced that she still had not deposed the alibi witness (TR. 3). Without conducting any further inquiry into the matter, the court ruled

that the alibi witness would be precluded from testifying at trial (TR. 3).

The jury at the second trial found Mr. Small guilty as charged (R. 32). The court entered an adjudication of guilt based on the jury's verdict, and sentenced him to a term of imprisonment (R. 33-39).

Notice of appeal to the District Court of Appeal, Third District, was filed on May 21, 1991 (R. 41-42). The district court rendered its decision on August 11, 1992 (R. 48-50). The district court ruled 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 (R. 49). However, the district court 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 district 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.

(R. 49-50).

Appellant Small's motion for rehearing was denied on December 22, 1992 (R. 51). Judges Nesbitt and Baskin concurred in the denial of the motion, and Judge Ferguson indicated that he would grant the motion (R. 51).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed January 21, 1993. On May 10, 1993, this Court entered its order accepting jurisdiction and dispensing with oral argument.

STATEMENT OF THE FACTS

On December 26, 1990, at approximately 10:00 P.M., a man ran up to Glenda Schmidt as she stood outside a convenience store and forcibly pulled her purse out of her arms (TR. 88-90). The only issue at trial was whether Larry Small was the man who had committed this crime.

Shortly after the robbery, Ms. Schmidt described the assailant to the police as very tall, with a slim face and close-cropped hair (TR. 93). According to Ms. Schmidt, the assailant was wearing a light-colored Polo shirt, very dark pants, and was not wearing a cap (TR. 93). At trial, Ms. Schmidt identified Larry Small as the man who had taken her purse (TR. 90-91).

Julio Guevara was working inside the convenience store on the night of the robbery, and he saw a man take Ms. Schmidt's purse (TR. 108-109). Mr. Guevara described the lighting conditions outside the convenience store as poor (TR. 112-113). The struggle over the purse lasted only a few seconds (TR. 119). Mr. Guevara told the police that the assailant was wearing a blue cap, a blue tank top shirt, and shorts (TR. 119-120).

Mr. Guevara had previously seen Larry Small inside the store buying items on many occasions (TR. 111). After the robbery, Mr. Guevara told the police that Larry Small was the man who had taken the purse (TR. 110-111). Mr. Guevara later identified Mr. Small in a photographic line-up, and he identified Mr. Small at trial (TR. 109, 113-116).

SUMMARY OF ARGUMENT

Decisions from this Court and each of the five district courts of appeal recognize that a violation of the notice of alibi rule is analogous to a failure to furnish witnesses under rule 3.220, and that the matter should be treated as a rule 3.220 violation in the manner prescribed in Richardson. One of the fundamental principles established by Richardson and its progeny is that the erroneous failure to conduct an inquiry into the circumstances surrounding a discovery violation cannot be remedied by a conducting such an inquiry post-trial; reversal and remand for a new trial is the only proper remedy. This principle applies with equal force to violations of rule 3.200. Accordingly, the decision of the district court of appeal in this case, which finds error in the exclusion of an alibi witness without a proper inquiry, but remands for a post-trial inquiry, must be quashed.

ARGUMENT

THE ERRONEOUS EXCLUSION OF A DEFENSE ALIBI WITNESS BASED ON A VIOLATION OF RULE 3.200, WITHOUT FIRST INQUIRING INTO THE CIRCUMSTANCES SURROUNDING THAT VIOLATION, REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL, AS THE ERROR CANNOT BE REMEDIED BY CONDUCTING SUCH AN INQUIRY POST-TRIAL.

The discretion of a trial court in attempting to remedy a discovery violation can be properly exercised only after the court has made an adequate inquiry into all of the circumstances to determine whether the violation is willful or inadvertent, trivial or substantial, and what effect, if any, it had upon the ability of the aggrieved party to prepare for trial. Richardson v. State, 246 So. 2d 771 (Fla. 1971); Smith v. State, 372 So. 2d 86 (Fla. 1979)(Smith I). A Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. Smith I, 372 So. 2d at 88; Duarte v. State, 598 So. 2d 270 (Fla. 3d DCA 1992). The exclusion of a defense witness based on a discovery violation without conducting a proper Richardson inquiry is per se reversible error. Smith v. State, 500 So. 2d 125 (Fla. 1986)(Smith II); Hernandez v. State, 572 So. 2d 969 (Fla. 3d DCA 1990); S.G. v. State, 518 So. 2d 964 (Fla. 3d DCA 1988). The erroneous exclusion of a defense witness based on a discovery violation without conducting a proper Richardson inquiry cannot be remedied by a remand to the trial court to conduct a post-trial Richardson inquiry. Smith I.

The issue to be decided in this case is whether the foregoing principles apply with equal force to violations of the notice

requirements of Florida Rule of Criminal Procedure 3.200. Rule 3.200 provides in part that "a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi." In the event such alibi notice is not served, "the court may exclude evidence offered by such defendant for the purpose of providing an alibi, except the testimony of the defendant himself." Exclusion is not mandatory, as the rule specifically provides that "[f]or good cause shown the court may waive the requirements of this rule."

It is readily apparent that rule 3.200 is very similar to rule 3.220, and the decisional law in this state, with the exception of the decision of the district court of appeal in the case at bar, recognizes that all of the principles developed under rule 3.220 apply with equal force to rule 3.200. In Smith v. State, 319 So. 2d 14 (Fla. 1975)(Smith III), this Court made it clear that the rationale of Richardson fully applies to the reciprocal discovery provisions of rule 3.200. In Smith III, 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 Second District Court of Appeal in Bell v. State, 287 So. 2d 717 (Fla. 2d DCA 1974). There, the court found that a violation by a defendant of the notice of alibi rule is analogous to a failure to furnish witnesses under rule 3.220, and that the matter should be treated as a rule 3.220 violation in the manner prescribed in Richardson. The court in Bell adopted the view that when there is a violation of the notice of alibi rule, the trial court should make a careful inquiry as to why the disclosure was not made, the extent of the prejudice to the other party and the feasibility of rectifying that prejudice by some intermediate procedure. The court approved the view that while the rule describes the possibility that the court may prohibit witnesses from testifying, this should be done only under the most compelling circumstances and where the omission cannot be otherwise remedied. Accordingly, the court held that the trial court had abused its discretion in excluding the defense alibi witness, notwithstanding the fact that the trial court had conducted a limited inquiry prior to excluding the witness.

The views expressed by the Second District in Bell were recently reaffirmed by that court in Pelham v. State, 567 So. 2d 537 (Fla. 2d DCA 1990). Relying heavily on the decision in Bell, the court reversed and remanded for a new trial based on the trial court's erroneous exclusion of a defense alibi witness based on a violation of rule 3.200, because the trial court had made no finding as to whether the violation had prejudiced the state, and because the trial court had considered no alternative for

rectifying that prejudice short of excluding the testimony of the alibi witness.

The First District Court of Appeal has also concluded that a violation by a defendant of the notice of alibi rule is analogous to a failure to furnish witnesses under rule 3.220, and that the matter should be treated as a rule 3.220 violation in the manner prescribed in Richardson. In Fedd v. State, 461 So. 2d 1384, 1385 (Fla. 1st DCA 1984), the court equated the "for good cause shown" standard in rule 3.200 to the standards established in Richardson:

> The rule was not intended for suppression of evidence. A trial is a quest for truth, and "[i]n a system in which the search for truth is the principal goal, the severe sanction of witness exclusion for failure to timely comply with the rules of procedure should be a last resort and reserved for extreme or aggravated circumstances." *Austin v. State*, 461 So.2d 1380 (Fla. 1st DCA 1984); *See also: Johnson v. State*, 461 So.2d 1385 (Fla. 1st DCA 1984). A trial judge must do more than simply ascertain that a discovery rule has been violated. The inquiry must involve a determination of whether the violation resulted in substantial prejudice to the opposing party. A failure to conduct such an inquiry constitutes error. *Bradford v. State*, 278 So.2d 624 (Fla.1973); *Richardson v. State*, 246 So.2d 771 (Fla.1971).

The court reversed and remanded for a new trial because the trial court had excluded the testimony of alibi witnesses based solely on the fact that rule 3.200 had been violated, and because the trial court had failed to inquire into possible prejudice to the state if the witnesses were permitted to testify and did not explore reasonable alternatives to the drastic remedy of exclusion.

In reaching this conclusion, the First District in Fedd adopted the reasoning of the Fifth District Court of Appeal in

Briseno v. State, 449 So. 2d 312 (Fla. 5th DCA 1984). In Briseno, the appellate court had also reversed and remanded for a new trial because the trial court had excluded the testimony of an alibi witness based solely on a violation of rule 3.200, and because the trial court had failed to conduct an inquiry to determine "whether the discovery violation surprised the state in preparing for trial, and if so, whether reasonable means could have been applied to overcome such disadvantage without resorting to the drastic measure of excluding evidence." Id. at 313.

The Fourth District Court of Appeal reached the same conclusion in Slaughter v. State, 330 So. 2d 156 (Fla. 4th DCA 1976), reversing and remanding for a new trial based on the trial court's erroneous exclusion of defense alibi witnesses without first inquiring into the surrounding circumstances. The court stated that "[a]ny inquiry into a party's failure to comply with Rule 3.200 FRCrP, should at least cover such questions whether the violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly what effect, if any, it had upon the ability of the other party to properly prepare for trial, i.e., prejudice or surprise." Id. at 157.

Finally, and most curiously, the Third District Court of Appeal itself has expressly recognized that the principles governing violations of rule 3.220 apply with equal force to violations of rule 3.200. In Holman v. State, 347 So. 2d 832 (Fla. 3d DCA 1977), cert. denied, 354 So. 2d 981 (Fla. 1978), the defendant contended that the trial court had erred in allowing a

state rebuttal witness to testify because the state had not complied with rule 3.200. The Third District addressed this contention in the following manner:

> While the terms of the rule [3.200] provide that the court may exclude such rebuttal testimony, the rule also provides that the court may waive the requirements of the rule. In other words, the trial court must exercise its discretion under the circumstances of each case.
>
> Fla.R.Cr.P. 3.200 and 3.220 are similar and much of what has been written regarding the latter is equally applicable to the former. It is noted that a discovery rule violation does not necessarily require exclusion of the witness or physical evidence.

Id. at 834.

All of the foregoing decisions, from this Court and each of the five district courts of appeal, recognize that a violation of the notice of alibi rule is analogous to a failure to furnish witnesses under rule 3.220, and that the matter should be treated as a rule 3.220 violation in the manner prescribed in Richardson. Moreover, in Bell, Pelham, Fedd, Briseno and Slaughter, the appellate court reversed and remanded for a new trial based on the exact same error committed by the trial judge in this case --- the exclusion of the testimony of a defense alibi witness based solely on the fact that rule 3.200 had been violated, without conducting a proper inquiry into possible prejudice to state if the witness was permitted to testify and reasonable alternatives to the drastic remedy of exclusion. In none of these cases did the appellate court simply remand the case to the trial court so that a post-trial inquiry could be conducted.

In Smith I, this Court gave the following reasons in support of its ruling that the erroneous exclusion of a defense witness based on a discovery violation without conducting a proper Richardson inquiry cannot be remedied by a remand to the trial court to conduct a post-trial Richardson inquiry:

> 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.

372 So. 2d at 88 (footnotes and citations omitted). See also State v. Johans, 613 So. 2d 1319, 1322 (Fla. 1993)(failure to conduct inquiry mandated by State v. Neil, 457 So. 2d 481 (Fla. 1984) cannot be remedied by post-trial hearing; proper remedy in all

cases where trial court errs in failing to hold a Neil inquiry is to reverse and remand for a new trial).

These reasons apply with equal force to the inquiry that must be conducted before an alibi witness can be excluded based on a violation of rule 3.200. Accordingly, there is no basis to conclude that the required inquiry into the circumstances surrounding a violation of rule 3.200 can be conducted post-trial, even though the required inquiry into the circumstances surrounding a violation of rule 3.220 cannot be conducted post-trial.

The only authority cited by the district court in support of its remand for a post-trial inquiry into the circumstances surrounding the violation of rule 3.200 in this case is Barnes v. State, 294 So. 2d 679 (Fla. 2d DCA 1974). In Barnes, the trial court had excluded defense alibi witnesses based on a violation of rule 3.200, without conducting any inquiry into the circumstances surrounding the failure to comply with the rule. On appeal, the court found that the rationale of Richardson applied equally to violations of rule 3.200, and held that the trial court abused its discretion in excluding the testimony of the alibi witnesses without first inquiring into the surrounding circumstances. However, the court further held that the trial court's error did not require reversal and remand for a new trial. Rather, the appellate court temporarily remanded the cause to the trial court to hold a post-trial inquiry into the circumstances surrounding the violation of rule 3.200.

In citing Barnes as authority for its remand for a post-trial hearing into the circumstances surrounding the violation of rule 3.200 in the present case, the district court of appeal failed to consider the fact that the decision in Barnes was rendered five years prior to decision of this Court in Smith I which held that the failure to conduct a Richardson hearing could not be remedied by conducting such an inquiry post-trial. Indeed, the district court of appeal decision which was quashed in Smith I had cited the decision in Barnes as authority for its remand to the trial court for a post-trial Richardson inquiry. Smith v. State, 353 So. 2d 205, 207 (Fla. 2d DCA 1977). Thus, the decision in Barnes can provide no support for the remand for a post-trial inquiry ordered by the district court in this case.

In the present case, the trial court erroneously excluded the testimony of a defense alibi witness based on a violation of rule 3.200, with no inquiry whatsoever into the circumstances surrounding that violation. The decisions from this Court and each of the five district courts of appeal cited in this brief establish beyond question that the only proper remedy for such error is to reverse and remand for a new trial. Accordingly, the decision of the district court of appeal in this case, which finds error in the exclusion of the alibi witness without a proper inquiry, but remands for a post-trial inquiry, must be quashed.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that court to reverse his judgment of conviction and sentence and remand the case to the trial court with directions that he be granted a new trial.

Respectfully submitted,

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BY: _____
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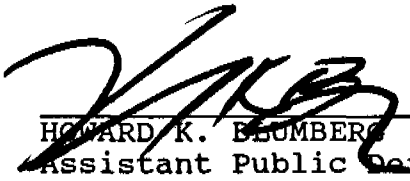
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 23rd day of June, 1993.



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