IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,124

LARRY SMALL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

REPLY 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

In this reply brief of petitioner on the merits, as in the initial brief of petitioner on the merits, all emphasis is supplied unless the contrary is indicated.

SUMMARY OF ARGUMENT

The state proposes an exception to the principles established by this Court in *Richardson* which would allow a trial judge to exclude a defense alibi witness based on a violation of Fla. R. Crim. P. 3.200 without any inquiry into the issues of prejudice and alternative sanctions to exclusion. The state's proposal should be rejected because: (1) no cases approve such an exception to the principles of *Richardson*; (2) numerous decisions from this Court and various district courts of appeal clearly establish that the principles of *Richardson* are fully applicable to rule 3.200; and (3) there is no reason why the principles of *Richardson* should apply to rule 3.220 but not to rule 3.200. As the principles of *Richardson* are fully applicable to rule 3.200, the trial court's exclusion of a defense alibi witness without conducting an adequate *Richardson* hearing requires reversal and remand for a new trial, and the error cannot be remedied by conducting a post-trial *Richardson* hearing.

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.

In the face of overwhelming authority contrary to its position, the state attempts to carve out a broad exception to the well-established principles set forth in the initial brief of petitioner on the merits. Under the state's proposed exception, a trial judge would not be required to conduct a *Richardson*[1] inquiry prior to excluding a defense alibi witness based on a violation of the notice requirements of Fla. R. Crim. P. 3.200. The state claims that a *Richardson* hearing would not be required based on such a violation of rule 3.200 because the state would always be prejudiced by a defense failure to provide notice of an alibi witness, and because that prejudice could never be remedied by any sanction other than exclusion. As a result, posits the state, the only inquiry required prior to exclusion of the alibi witness concerns the reason for the defense failure to provide notice of the alibi witness. If the defense can provide a good reason to explain its lack of compliance with the notice requirements of rule 3.200, the trial judge should allow the witness to testify. If the defense cannot supply an adequate explanation for its noncompliance, the witness should be excluded. And, because the nature of the inquiry is so limited, there is no reason why the inquiry cannot be conducted post-trial.

Not surprisingly, the state cites no cases which approve such a broad exception to the general rule which requires a trial judge to conduct an adequate *Richardson* inquiry prior to excluding a defense witness based on a discovery

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[1] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

violation. The state totally ignores this Court's decision in *Smith v. State*, 319 So. 2d 14 (Fla. 1975), which establishes that the requirements of *Richardson* are fully applicable to rule 3.200. The state also ignores a number of district court of appeal decisions which stand for the same proposition. Furthermore, the state's attempts to distinguish several district court of appeal decisions which apply the dictates of *Richardson* to rule 3.200 are unpersuasive.

In *Smith*, the defendant claimed that the trial court had erred in allowing the state to call a rebuttal witness whose name had not been disclosed to the defense as required by rule 3.200. The trial court had not conducted any inquiry prior to ruling that the witness would be allowed to testify. This Court reversed and remanded for a new trial based on *Richardson*:

> While the notice-of-alibi rule was never intended to provide a defendant with a procedural device to escape justice, this Court stated, *inter alia*, in *Richardson*:
>
> > ". . . [I]f it is evident from the record that the non-compliance with the Rule by the State resulted in harm or prejudice to a defendant through failure to furnish the names of witnesses, and such witnesses were permitted to testify in behalf of the State, or if it should affirmatively appear that the State failed to furnish to the defendant the name of a witness known to the State to have information relevant to the offense charged against the defendant, or to any defense of the defendant with respect thereto, and the latter situation resulted in harm or prejudice to the defendant, an appellate court reviewing his conviction must reverse. The trial court has discretion to determine whether the non-compliance would result in harm or prejudice to the defendant, *but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances . . . .*" (Emphasis supplied)
>
> 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. As was stated in [*Watson v. State*, 291 So. 2d 661 (Fla. 4th DCA 1974)]:
>
> > "Rule 3.200, RCrP is a part of the general discovery rules incorporated into the criminal procedure of this state. Like all discovery, it is reciprocal, affording the state and defendant alike an opportunity to eliminate surprise and lessens the opportunity for manufactured false alibis. Like all discovery procedures, fairness is the watchword . . . . The rule mandates that each party is under a continuing duty to disclose the names and addresses of additional witnesses. On this record we are convinced that the prosecutor had sufficient knowledge concerning the rebuttal evidence before appellant's alibi witnesses took the stand to require him to apprize appellant thereof. The letter and the spirit of the rule demand no less . . . ."
>
> 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.

Smith, *supra*, 319 So.2d at 17-18 (footnotes omitted). Unless the state is asking this Court to overrule *Smith*,[2] it is difficult to understand how, considering these clear pronouncements by this Court, the state can claim that the principles established by *Richardson* do not fully apply to rule 3.200.

The state's claim that a trial court need not inquire into the issue of prejudice before excluding a defense alibi witness not disclosed pursuant to rule 3.200 is also refuted by a substantial number of district court of appeal decisions. For example, in *Pelham v. State*, 567 So. 2d 537, 538 (Fla. 2d DCA 1990), the court stated the

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[2]By totally ignoring this Court's decision in *Smith v. State*, 319 So. 2d 14 (Fla. 1975), the state has provided this Court with no reason to depart from the principles of *stare decisis* and overrule that decision. *See Perez v. State*, 18 Fla. L. Weekly S361 (Fla. June 24, 1993).

following in reversing and remanding for a new trial based on the trial court's exclusion of a defense alibi witness:

> In [*Bell v. State*, 287 So. 2d 717 (Fla. 2d DCA 1974)], the court concluded that a violation of the notice of alibi rule is analogous to a failure to furnish witnesses under rule 3.220 and the matter should be treated as a rule 3.220 violation in the manner prescribed in *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). *Bell* adopts 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. Thus 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 otherwise be remedied.

In *Austin v. State*, 461 So. 2d 1380, 1382 (Fla. 1st DCA 1984), the court reversed and remanded for a new trial based on the exclusion of three defense alibi witnesses not disclosed to the state until four days prior to trial:

> Inasmuch as we do not have the benefit of the trial court's determination of prejudice and absent any effort to employ reasonable means short of witness exclusion to overcome any such prejudice, we conclude that the trial court erred in ordering the exclusion of the subject witnesses.

Similarly, the court in *Fedd v. State*, 461 So. 2d 1384, 1385 (Fla. 1st DCA 1984) reversed and remanded for a new trial based on the exclusion of a defense alibi witness not disclosed to the state as required by rule 3.200:

> This record demonstrates that the trial court excluded the testimony of appellant's witnesses solely because defense counsel had violated the notice of alibi rule. The trial court did not inquire into the possible prejudice to the state if the witnesses were permitted to testify, nor did the trial court explore reasonable alternatives to the drastic remedy of exclusion, in an effort to mitigate any possible prejudice.

The same conclusion was reached by the court in *Briseno v. State*, 449 So. 2d

312, 312-313 (Fla. 5th DCA 1984):

> The record before us shows that the trial court excluded the testimony of an alibi witness because the notice of alibi rule had been violated by defense counsel. The trial court's inquiry should have considered whether the discovery 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.

Finally, in *Slaughter v. State*, 330 So. 2d 156, 157 (Fla. 4th DCA 1976), the court held that reversible error occurred when the defendant's claim of alibi and witness list in support thereof were excluded:

> Any 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.

To accept the state's claim that a failure to disclose a defense alibi witness will always result in prejudice to the state, and that such prejudice can never be remedied by any sanction other than exclusion, this Court would have to disapprove each of the foregoing decisions. Furthermore, this Court would have to disagree with the following reasoning which supports each of the foregoing decisions and discredits the state's position in this case:

> We are unable, however, to affirm the severe sanction of witness exclusion in this case because, even assuming the state would have been prejudiced by the use of the subject witnesses (although, as earlier noted, the trial judge declined to make any finding of prejudice), no effort was made to determine whether reasonable means could have been employed to overcome the prejudice without resorting to the total exclusion of the witnesses. For example, it is not uncommon in these kinds of situations for the court to provide for an appropriate delay or recess to afford the "aggrieved" side the opportunity to depose the new witnesses. It may well be that the state's inquiry of such witnesses would have demonstrated that there

> was nothing which the state could or would have done differently had it known earlier of such witnesses, thus allaying concern over the late notification. Similarly, it might be that the deposition testimony elicited by the prosecutor from such witness during the recess or delay in proceedings would suggest the need for further minimal investigation in order to avoid or minimize any prejudice of the late disclosure in which case such interests might be adequately accommodated by adjusting the court's trial calendar by, for example, changing the order of trials for the week (or trial period).

Austin v. State, supra, 461 So.2d at 1382.

To support its claim that the principles of *Richardson* do not apply to rule 3.200 violations, the state relies on the decisions in *Lail v. State*, 314 So. 2d 234 (Fla. 4th DCA 1975), *Barnes v. State*, 294 So. 2d 679 (Fla. 2d DCA 1974), and *Chester v. State*, 276 So. 2d 76 (Fla. 2d DCA 1973). From the one paragraph decision in *Lail*, it is not possible to determine the nature of the inquiry conducted by the trial court prior to the exclusion of the defense alibi witness. However, as previously noted, the Fourth District applied the principles of *Richardson* to a rule 3.200 violation in *Slaughter v. State, supra*, decided after *Lail*.

Likewise, it is not clear from the opinion in *Chester* whether an inquiry was made prior to excluding a defense alibi witness based on a violation of rule 3.200. In fact, the Second District specifically noted this ambiguity in its subsequent decision in *Barnes*, wherein the court found the principles of *Richardson* applicable to violations of rule 3.200. The court in *Barnes* did remand to the trial court for a post-trial *Richardson* hearing, rather than reversing and remanding for a new trial. However, prior to this Court's decision in *Smith v. State*, 372 So. 2d 86 (Fla. 1979), it was the practice of the Second District to remand for post-trial *Richardson* hearings for violations of rule 3.220 as well as rule 3.200. *See Smith v. State*, 353 So. 2d 205 (Fla. 2d DCA 1977). Following this Court's *Smith* decision in 1979, not one case, other than the instant case, has remanded to the trial court for a post-

trial *Richardson* hearing based on a violation of either rule 3.220 or rule 3.200.

The state does make an attempt to distinguish a few of the many cases cited in the initial brief of petitioner which apply the *Richardson* principles to rule 3.200. The state distinguishes *Bell v. State, supra*, a case where a defense alibi witness, Dr. Guest, was excluded based on a violation of rule 3.200, on the grounds that "the State could hardly claim any type of surprise or prejudice when the defendant failed to list Dr. Guest as its alibi witness." (Brief of respondent at 12). The state distinguishes two other cases in which alibi witnesses were excluded based on a violation of rule 3.200, *Fedd v. State, supra*, and *Briseno v. State, supra*, in similar fashion: "Because the State had access to the alibi witness prior to trial, no prejudice could be claimed by the State." (Brief of respondent at 13).

If the state takes the position that a failure to disclose a defense alibi witness will always result in prejudice to the state, and that such prejudice can never be remedied by any sanction other than exclusion, the state cannot turn around and distinguish *Bell*, *Fedd*, and *Briseno* on the grounds that the failure to disclose the defense alibi witnesses in those three cases did not result in prejudice to the state. In attempting to draw such a distinction, the state has unwittingly demonstrated the unsupportability of its claim that the dictates of *Richardson* do not apply to violations of rule 3.200 because the failure to disclose a defense alibi witness will always result in prejudice to the state.[3]

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[3]Indeed, the facts of this case would appear to present another example of a case where a technical violation of rule 3.200 did not result in any prejudice to the state. Although defense counsel did not file a written notice of alibi prior to the trial, the state had knowledge of the alibi defense and the witness who would testify in support of that defense well before the date of the trial. Mr. Small had attempted to raise an alibi defense at his first trial on these charges, which trial ended in a mistrial as a result of a hung jury. During the course of the proceedings at that first trial, the prosecutor learned the name of the alibi witness (R. 118), the present and previous address of that witness (R. 118, 159), and the substance of the testimony that witness was prepared to give in support of the alibi defense (R. 159-160). The prosecutor was even given the opportunity to cross-examine the witness (R. 160).

When dealing with violations of rule 3.220 or rule 3.200, prejudice must be determined on a case by case basis, and that determination must be made by the trial court. If prejudice is found, the trial court must determine whether reasonable means can be employed to overcome the prejudice without resorting to the total exclusion of the witnesses. Finally, because such determinations as to procedural prejudice and alternative sanctions to exclusion cannot be made post-trial, a trial court's failure to conduct an adequate *Richardson* inquiry requires reversal and remand for a new trial.

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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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 11th day of August, 1993.

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