IN THE SUPREME COURT OF FLORIDA

CASE No. 84,061

STATE OF FLORIDA

Petitioner/Appellant,

vs.

ERIC SCHOPP,

Respondent/Appellee.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal. Respondent, Eric Schopp, was the defendant in the trial court and the appellant on appeal. The parties shall be referred to as they stood in the trial court. The record and transcript shall be symbolized by "R" and "T" respectively.

STATEMENT OF THE CASE

The defendant was charged by information filed in the Nineteenth Judicial Circuit (St. Lucie County) with Count I, armed burglary of a dwelling, Count II and Count III, grand theft. (R. 1-2). The defendant was convicted of the lesser included offenses of burglary of a dwelling under Count I and petit theft under Count II and III (R. 21-22). The trial judge sentenced defendant within his Fla. R. Crim. P. 3.701 sentencing guidelines range to three (3) years probation with special condition of sixty (60) days in the county jail (R. 24-30).

The defendant timely filed notice of appeal to the District Court of Appeal, Fourth District (R. 33) raising the following argument:

> THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING APPELLANT'S DISCOVERY OBJECTION TO A STATE WITNESS NOT LISTED BY THE STATE IN PRETRIAL DISCOVERY AND THE TRIAL COURT'S FAILURE TO CONDUCT A COMPLETE RICHARDSON'S INQUIRY.

On July 6, 1994, the Fourth District Court of Appeal issued its opinion reversing defendant's conviction and remanding for a new trial as mandated by Richardson v. State, 246 So. 2d 771 (Fla. 1971) and Smith v. State, 500 So. 2d 125 (Fla. 1986). The court also certified the following question as one of great public importance:

> Should The Per Se Rule of Smith [1] Be Reconsidered In Light Of The Principles Set Out in DiGuilio [2]

This appeal follows.

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[1] Smith v. State, 500 So. 2d 125 (Fla. 1986).

[2] State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

STATEMENT OF THE FACTS

In opening statement to the jury, the defense counsel made the following statement:

> MR. FOSTER: Yes, Judge. Eric is a young man who grew up in Port St. Lucie, he went to Port St. Lucie High, he has a father Wayne and a mother Sharon that lives there in Port St. Lucie. Now December 2, 1992, Eric did something very stupid. He entered into someone's house, the house was not his.
>
> When he entered into the house, he removed a number of items. Among those items was a gun, the gun was in a case. You'll learn that after leaving the house, removing the items and leaving the house, Eric left the area. He was shortly apprehended by Detective Bennett and other officers of the Port St. Lucie Police Department. Almost immediately Eric was sorry, he confessed. There is a taped confession. You are going to hear the taped confession. He also wrote a letter of apology to the victims, Mrs. Kaven--Mr. and Mrs. Kaven, where he over and over again apologized for committing the crime and indicating that he was deeply sorry for doing it. And after hearing all the evidence, you are going to be able to conclude one thing. At the time Eric entered that house, he was unarmed and that he did not have a fully formed conscious intent to commit armed burglary of a dwelling. Therefore, ladies and gentlemen, there is only one verdict you can reach and that is not guilty as to armed burglary. Thank you.

(T. 137-138).

Charlotte Kaven, the victim, testified that on December 2, 1992, at 2:00 p.m. she returned home and observed a pickup truck in her driveway (R. 139-140). Kaven observed a male, identified by her as the defendant, enter the truck and speed out of the area (R. 140-141).

Mrs. Kaven went into her residence and discovered that someone had broken into the residence and taken electrical equipment, jewelry and a firearm (R. 143). Kaven, thereafter, identified defendant in a lineup as the man she saw fleeing her residence (R. 153). On December 9, 1992, defendant wrote Mr. and Mrs. Kaven a letter acknowledging that he had burglarized their residence (R. 153, 165-166).

Officer Nelson of the Port St. Lucie Police Department responded to the scene of the residence where a burglary had taken place (R. 202-203). Mrs. Kaven gave Mason a description of the man she saw fleeing the residence (R. 203). Mrs. Kaven later identified defendant from a lineup as the man who burglarized her home (R. 205-209).

Detective Lapricina was dispatched to defendant's residence and recovered a rifle that was identified as the rifle owned by Mr. Kaven (R. 214-216).

The defendant gave a voluntary statement to Detective Bennett concerning the burglary (R. 236-238). The defendant admitted to the detective that he broke into the residence and took electrical equipment and a rifle (R. 240).

The defendant testified at trial and admitted that he broke the window to the Kaven residence and entered the house (R. 264). He admitted taking electrical equipment, a videocassette recorder and a case which he believed contained a musical instrument (R. 265). The defendant testified that as he started to drive away with the stolen property, Mrs. Kaven saw him in the driveway (R. 266-267). The defendant then admitted to the police that he had committed the burglary (R. 268-269).

Prior to Officer Mason's testimony, the defense raised an objection to the prosecution's use of the police officer as a state witness on the grounds of a discovery violation [3]. The trial court heard argument and made the following finding in overruling that objection.

> MISS HILL: (For the State) I thought if there was a problem, Mr. Foster (for the defense) would bring it up before trial, knowing that he was listed on Friday. His report was given to Mr. Foster in initial discovery. It is totally inadvertent. I just didn't know -- I didn't look on the witness--I didn't file the witness list, somebody else did. I overlooked it and noticed his name wasn't listed, although his report was turned over to Defense Counsel and he was the initial responding officer.
>
> THE COURT: What will the witness testify to:
>
> MISS HILL: The witness is going to testify to the fact that he was the first responding officer to the scene of the burglary. He spoke to the victim, Charlotte Kaven, about what had happened. She told him she had seen a man leaving the scene, gave a description to Mike Mason, uh, who in response to that gave a BOLO over the radio to which Frank Bennett responded when he saw someone fitting the description driving the truck fitting the description that was given out over the BOLO. There was some investigation done at the scene. All this is included in the report. The above information was radioed to the other officers on duty, uh, Mrs. Kaven told me she left the house earlier in the day. It is a detailed long report

[3] The State had amended its witness list on the Friday preceeding the days of the trial Monday and Tuesday, April 26 and 27. The witness was called to testify on Tuesday.

about what she told him, about what was taken, uh, the investigation for the entry point, the screen was ripped, the investigation done--he was present for [backup] with Officer Howie. That he was contacted by Officer Bennett and advised he stopped the suspect. Officer Mason went back and picked up Mrs. Kaven, as she testified, brought her to the scene where she positively identified the Defendant as the person she saw leaving her house. Uh, that--that's the extent of his testimony. All of it is included in his report.

THE COURT: The report was an exhibit available to the Defendant in discovery?

MISS HILL: It was given to him in discovery, let me take a minute to find it, that was provided to him in discovery initially-the first pickup of discovery.

MR. FOSTER: My turn?

THE COURT: Yes, sir.

MR. FOSTER: Judge, first of all when I filed a demand for a speedy trial, that was done April 12, I believe. He was listed--he was listed April 23, last Friday. I didn't receive the notice on Friday. It came to my attention late yesterday afternoon when I went back to my office and found it. Uh, second of all, even though I had his report, that still doesn't obviate the necessity for her to list him as a witness. I think the case law is clear on that. Okay Judge, I've had absolutely no opportunity to speak to this witness, none.

THE COURT: But you knew of his existence?

MR. FOSTER: I had the report. I'm not going to call a witness that they haven't listed. I am not going to help prove their case Judge. That is not my burden, it is clear.

THE COURT: The question I'm asking though is --

MR. FOSTER: I had his report.

THE COURT: Whether you knew about him and whether you knew what his report said.

MR. FOSTER: I had his report.

THE COURT: Okay, and you are objection--objecting to his testimony?

MR. FOSTER: Absolutely.

THE COURT: Okay, the objection is noted and overruled. Uh, and I don't want to be as unartful as saying you can't have your cake and eat it, too, but that is essentially what I'm basing my ruling on. The Defendant actually knew of the existence of this witness, whether he was listed, knew the contents of his report, uh, with that knowledge demanded a speedy trial. Uh, based upon the, uh, the theory of the speedy trial rule and actually the letter of the speedy trial rule, the-- where the Defendant in good faith demands a speedy trial based upon actual knowledge of the case at that time, uh, I believe then waives any right to have a witness excluded who is a known witness, but was not listed as a potential witness at that trial. So, uh, I'm going to allow the witness to testify because of the demand for speedy trial and not hold a Richardson Inquiry because I don't think that is necessary under these circumstances. I assume if we had a Richardson Inquiry, the Defendant would have wanted to, uh, have at least a deposition or an interview of the witness before the witness could come to the courtroom to testify.

MR. FOSTER: Well Judge I'm not sure how to answer that because you are not holding the Inquiry.

THE COURT: Yeah, I'm just assuming that is what you would say. You would at least want to do that much.

MR. FOSTER: Well Judge, I'm not saying that, the Court is saying that.

THE COURT: Well, I'm saying is that a fair assumption that you at least --

MR. FOSTER: I don't know Judge, because you are not holding the inquiry.

THE COURT: Well, okay the Inquiry really is not necessary, but that is the minimum I can imagine that a Defendant would want to do before a witness were called to testify. And based upon what is in the record here, uh, I'm simply overruling the Defendant's objection at this point. Let's bring the jury in.

(Jury enters courtroom)

THE COURT: And you may proceed ma'am.

MISS FOSTER: Thank you.

THE COURT: You're welcome.

(R. 197-201).

SUMMARY OF ARGUMENT

The trial court made the necessary inquiry into whether the State had violated discovery by amending its witness list three days before trial. The trial court found no violation after making all the requisite inquiry regardless of the pronouncement that an inquiry was not necessary. If the trial court's inquiry was not sufficient, the error should be found harmless as the witness presented testimony that was not only known to the defendant, cumulative to other testimony, and concerned facts openly admitted by the defendant prior to and at trial in testimony to the jury. There was no prejudice to the defendant's ability to prepare for trial and because discovery requirements were "never intended to furnish a defendant with a procedural device to escape justice" any error should be deemed harmless.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S DISCOVERY OBJECTION AFTER INQUIRY WAS MADE TO DETERMINE PREJUDICE TO DEFENDANT.

The State of Florida supplemented its witness list on Friday, April 23, 1993 prior to the trial on Monday and Tuesday, April 26 and 27. The witness was the officer who was the initial responding officer. He had made a written report of the crime which the defense had in its possession. The defense objected to the witness testifying at trial because he was not on the State's original witness list. The trial court inquired into what the witness' testimony would be. The State responded that the witness had made the initial police report where he interviewed the victim, Charlotte Kaven. The testimony would be based upon what she had told him at the scene. The State informed the court that she had not made the original witness list and she amended it as soon as she had realized the officer was not listed. She had thought the supplementation was not a problem because she had listed him prior to trial and the witness was known to the defense. The defense had the report that he had made. The defense knew of the witness' existence. It was totally inadvertent omission. The victim had already testified as to what she told the officer which was the basis for the report (T. 138-167). The trial court overruled the objection and allowed the witness to testify. Although the trial court ruled that a "Richardson inquiry" was not required, he had already made the requisite inquiry and established the nonprejudice to the

defendant on the record. Richardson v. State, 246 So. 2d 771 (Fla. 1971).

The State would contend that the record does not disclose any noncompliance by the State with **Fla. R. Crim. P. 3.220(b)(1)(a).** The witness was known to the defense and they had announced ready for trial. Further, the defense could have taken the deposition of the witness sometime before he was called, had they been diligent. The testimony of the witness was only cumulative of other evidence already heard by the jury.

The defendant's contention that the State's noncompliance with the rule entitles him, as a matter of right, to a "non-listed" witness being excluded from testifying is not tenable. The rule was designed to furnish a defendant with information which would bona fide assist him in the defense of a charge against him. It was never intended to furnish a defendant with a procedural device to escape justice. Richardson, 246 So. 2d at 774.

Although the trial court verbalized that he did not think a Richardson hearing was required, in order to reach that conclusion he actually made the requisite finding to determine if the State's noncompliance resulted in harm or prejudice to the defendant. The record is clear here that there was no prejudice to the defendant. The same testimony put before the jury by this witness was put forth by previous witnesses, the defense had the report made by the witness and the defendant testified that he had committed the crime.

Richardson and its progeny, see e.g. Bradford v. State, 278 So. 2d 264 (Fla. 1983) and Cumbie v. State, 345 So. 2d 1061 (Fla. 1977), have established that if either the prosecution or the defense commits a discovery violation, and the aggrieved party raises a timely objection, the trial judge is obliged to conduct an inquiry into the circumstances surrounding the failure to disclose, in order to determine possible prejudice. This inquiry should include an assessment of whether the violation was willful or inadvertent, whether it was trivial or substantial, and whether or to what extent it impacted on the ability of the aggrieved party to prepare for trial. See also Wilkerson v. State, 461 So. 2d 1376, 1378-1379 (Fla. 1st DCA 1986). During the inquiry, the offending party has the burden of showing that there was no prejudice to the aggrieved party. If as a result of this inquiry the judge ascertains that the aggrieved party has suffered no prejudice, the circumstances upon which he or she based this conclusion should affirmatively appear in the record.

However, "the trial court's failure to...make formal findings concerning each of the pertinent Richardson considerations does not constitute reversible error," Wilkerson v. State, 461 So. 2d 1376, 1379. Compare Hall v. State, 509 So. 2d 1093 (Fla. 1987). Although the last pronouncement was to the contrary, in Smith v. State, 500 So. 2d 125 (Fla. 1987), a four-person majority of this Court believed that a trial judge's failure to hold even an embroynic Richardson hearing may be harmless error if the defense clearly suffered no prejudice resulting from a prosecutorial discovery violation. Smith v.

State, 500 So. 2d 125, 127-131 (McDonald and Shaw, J.J., dissenting) and Brown v. State, 515 So. 2d 211, 213-214 (Fla. 1987) (Grimes and Kogan, J.J., concurring). And axiomatically, "prejudice does not result where the defen[se] obtains the [disputed] information through other means." State v. Banks, 418 So. 2d 1059, 1060 (Fla. 2nd DCA 1982), review denied, 424 So. 2d 760 (Fla. 1982); see also Matheson v. State, 500 So. 2d 1341 (Fla. 1987).

In any event, a Richardson hearing is "not [even] required...without a showing of some wrongdoing on the part of the State," Marshall v. State, 413 So. 2d 872, 873 (Fla. 3rd DCA 1972), quashed in part on other grounds, 455 So. 2d 355 (Fla. 1984); see also Larkin v. State, 474 So. 2d 1282, 1284 (Fla. 4th DCA 1985); Jones v. State, 477 So. 2d 26 (Fla. 3rd DCA 1985), and Borges v. State, 459 So. 2d 459 (Fla. 3d DCA 1984). Moreover, in Richardson v. State, this Court stated that it's discovery requirements were "never intended to furnish a defendant with a procedural device to escape justice," id., 246 So. 2d 771, 774; see also Matheson v. State, 500 So. 2d 1341, 1343.

The State would further contend that if any error was committed it was harmless error. In Smith the court concluded that the error committed was the preclusion of the very evidence necessary for the court to determine whether the defendant was prejudiced or harmed. Here, the record reflects that the court found no prejudice to the defendant's ability to prepare for trial. Therefore, any error in the court's pronouncement that a Richardson hearing was not necessary would be harmless. Smith,

500 So. 2d at 126. McDugle v. State, 591 So. 2d 660 (Fla. 3d DCA 1991).

In Small v. State, 630 So. 2d 1087 (Fla. 1994), this Court recently held that:

> While a trial court's failure to conduct a Richardson inquiry has been treated as per se reversible error, Smith v. State, 500 So. 2d 125 (Fla. 1986), we hold that a trial court's failure to conduct a good cause hearing regarding compliance with the notice of alibi rule should be reviewed to determine whether the defendant was harmed by such failure.

Small, 630 So. 2d 1089.

This court in Small stepped down from the per se reversible error enunciated in Smith and remanded the case for a determination of harm to defendant. Chief Justice Barkett, in her concurrence, stated that the record reflects that given the circumstances of that case, the trial court did not abuse its discretion by excluding a defense witness without first conducting a Richardson inquiry. Small, 630 So. 2d 1089, 1090. The same is true in this case.

The State submits that the per se rule of reversal in Richardson cases should be replaced by a harmless error analysis under DiGuilio. The instant case presents a very strong showing of harmless error, and exemplifies the outdated nature of the per se rule. The State requests that this Court answer the certified question in the affirmative and hold that a harmless error analysis is proper for alleged Richardson violations.

CONCLUSION

For the foregoing argument and authority, the State of Florida respectfully requests that this Court reverse the ruling of the District Court of Appeal, Fourth District and affirm the trial court's judgment and conviction, and answer the certified question in the affirmative and opine that a harmless error analysis can be applied to a discovery violation and affirm the trial court's judgment and conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been forwarded by Courier to: ANTHONY CALVELLO, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 31st day of August, 1994.

Of Counsel

APPENDIX

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93-141023 IV

IV

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

ERIC SCHOPP, Appellant,	)	
v.	)	CASE NO. 93-1901.
STATE OF FLORIDA, Appellee.	)	L.T. CASE NO. 92-2722 CF.

Opinion filed July 6, 1994

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

Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Patricia Ann Ash, Assistant Attorney General, West Palm Beach, for appellee.

ANSTEAD, J.

Appellant, Eric Schopp, was charged with armed burglary and grand theft. Upon trial, he was convicted of the lesser offenses of burglary and petit theft. We reverse and remand for a new trial as mandated by the holdings in Richardson v. State, 246 So. 2d 771 (Fla. 1971) and Smith v. State, 500 So. 2d 125 (Fla. 1986).

Under Richardson and Smith we must reverse if we determine that the trial court permitted a previously undisclosed prosecution witness to testify without conducting an inquiry into the circumstances and the possible prejudice to the defendant.

We are not permitted to determine if the erroneous omission of the inquiry and the admission of the evidence constituted harmless error.

With some trepidation, absolute fealty to the doctrine of precedent, and genuine deference and respect for the substantial policy concerns underlying the per se rule affirmed in Smith, we urge the Florida Supreme Court to review this issue as a continuing issue of great public importance. We do so for two reasons, one case specific, and the other involving a change and clarification of the law of harmless error.

In this case, we have concluded that the trial court failed to conduct a proper inquiry after the state called a witness not previously disclosed to the defense. The court ruled that no inquiry was necessary and none would be conducted because the defendant had exercised his right to a speedy trial. This was error.

However, the witness presented testimony that was not only known to the defendant, cumulative to other testimony, but concerned facts openly admitted by the defendant prior to, and at trial in testimony to the jury. In fact, defense counsel, in his opening statement to the jury, admitted that the defendant committed the offenses for which the defendant was ultimately convicted:

> MR. FOSTER: Yes Judge. Eric is a young man who grew up in Port St. Lucie, he went to Port St. Lucie High, he has a father Wayne and a mother Sharon that lives there in Port St. Lucie. Now December 2, 1992, Eric did something very stupid. He entered into someone's house, the house was not his.

> When he entered into the house, he removed a number of items. Among those items was a gun, the gun was in a case. You'll learn that after leaving the house, removing the items and leaving the house, Eric left the area. He was shortly apprehended by Detective Bennett and other officers of the Port St. Lucie Police Department. Almost immediately Eric was sorry, he confessed. There is a taped confession. You are going to hear the taped confession. He also wrote a letter of apology to the victims, Mrs. Kaven--Mr. and Mrs. Kaven, where he over and over again apologized for committing the crime and indicating that he was deeply sorry for doing it. And after hearing all the evidence, you are going to be able to conclude one thing. At the time Eric entered that house, he was unarmed and that he did not have a fully formed conscious intent to commit armed burglary of a dwelling. Therefore, ladies and gentlemen, there is only one verdict you can reach and that is not guilty as to armed burglary. Thank you.

As already noted, the defendant was acquitted of armed burglary. Therefore, in effect, the defendant "won" this case at the trial level. We are absolutely convinced that the admission of the testimony of the undisclosed witness and the failure to conduct a Richardson inquiry were harmless under the strict harmless error test set out in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

It is because of the supreme court's landmark opinion in DiGuilio, adopting a very strict harmless error test, that we cautiously suggest reconsideration of the per se rule of Smith. DiGuilio receded from prior holdings that comments made at trial on a defendant's right to remain silent were not subject to a harmless error analysis. However, DiGuilio adopted a strict harmless error test that places a heavy burden on the state and

the reviewing court. Because DiGuilio involved one of the most important and fundamental constitutional rights of a defendant, and the abrogation of a per se rule like that involved herein, we believe the supreme court's holding and analysis may also be extended to the Richardson per se rule. We recognize that DiGuilio was decided before the supreme court's decision in Smith, although they were decided the same year and there is no discussion of DiGuilio in the majority opinion in Smith.

In accordance with the above, we reverse and remand and also certify the following question as one of great public importance:

> SHOULD THE PER SE RULE OF SMITH BE RECONSIDERED IN LIGHT OF THE PRINCIPLES SET OUT IN DIGUILIO?

KLEIN and STEVENSON, JJ., concur.