IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ERIC SCHOPP,

Respondent.

CASE NO. 84,061

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County and the Appellant in the Fourth District Court of Appeal and Petitioner was the Prosecution in the Circuit Court and Appellee in the Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE

Respondent, Eric Schopp, was charged with Count I, armed burglary of a dwelling and Count II, grant theft (R 1-2). During his jury trial, Respondent's trial counsel raised an objection to the prosecution's use of a police officer as a state witness on the basis of a discovery violation (R 196-202). After a hearing, this objection was overruled by the trial judge.

Respondent was convicted of the lesser included offenses of burglary of a dwelling under Count I and petit theft under Count II (R 21-22). The trial judge sentenced Respondent within his *Fla. R. Crim. P.* 3.701 sentencing guidelines range to three (3) years probation with a special condition of sixty (60) days in the county jail (R 24-30).

Timely Notice of Appeal was filed by Respondent to the Fourth District Court of Appeal (R 33).

On July 6, 1994, the Fourth District Court of Appeal, in a written opinion, *Schopp v. State*, 19 Fla. L. Weekly 1445 (Fla. 4th DCA July 6, 1994), held that the trial court committed reversible error by failing to conduct a *Richardson*[1] hearing after the prosecutor called a state witness not previously disclosed to the defense. However, the Fourth District certified the following question to this Court:

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

On July 12, 1994, Respondent filed a timely motion for

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

rehearing in the Fourth District. However, on July 14, 1994, Petitioner-State filed a Notice of Discretionary Review to this Honorable Court.

On July 21, 1994, pursuant to *Fla. R. App. P.* 9.350(b), Respondent filed a *Notice of Voluntary Dismissal* of the appeal then pending in the Fourth District Court of Appeal. Petitioner-State filed a "Motion to Strike" Respondent's Notice of Voluntary Dismissal. Respondent, in opposition, indicated to the Fourth District that the State had ***no standing*** to oppose Respondent's *Notice of Voluntary Dismissal*. See *Bird Road Baptist Church, Inc. v. Stevens*, 155 So. 2d 420, 422 (Fla. 3d DCA 1963).

On July 26, 1994, this Honorable Court, in a written order, expressly ***postponed*** a decision on jurisdiction in this cause and set a briefing schedule.

On August 1, 1994, Respondent filed in this Court a *Petition for Writ of Mandamus* [pending] requesting this Court to issue a writ of mandamus to compel the Fourth District to grant Respondent's *Notice of Voluntary Dismissal*. See pending case, *Schopp v. District Court of Appeal*, Case No. 84,227.

On August 15, 1994, the Fourth District, in a written order, denied Respondent's motion for rehearing. Further, the Fourth District ***granted*** Petitioner-State's "Motion to Strike" Respondent's *Notice of Voluntary Dismissal* filed in the Fourth District. A n amended *Petition for Writ of Mandamus* was filed in that cause ***after*** the Fourth District "struck" Respondent's *Notice of Voluntary Dismissal*. See *Schopp v. District Court of Appeal, supra*.

On September 2, 1994, Respondent filed a Renewed Motion to Dismiss Petitioner's Appeal.

Respondent's Answer Brief on the Merits now follows.

STATEMENT OF THE FACTS

Charlotte Kaven, who resides at 2517 S.W. Independence Road in Port St. Lucie, Florida, testified that on December 2, 1992, at 2:00 p.m. in the afternoon, she returned home to her residence (R 139). She observed a pickup truck in her driveway (R 139-140). She immediately became concerned. Mrs. Kaven then observed a male identified by her as Respondent enter this truck and speed off (R 140-141).

Mrs. Kaven went into her residence. She discovered that someone had entered her residence and taken electrical equipment, jewelry and a firearm (R 143). Mrs. Kaven subsequently identified Respondent in an informal lineup as the man she saw fleeing from her residence (R 153). On December 9, 1992, Respondent wrote Mr. and Mrs. Kaven a letter wherein he acknowledged that he burglarized their residence (R 153, 165-166).

Officer Mason of the Port St. Lucie Police Department responded to the scene of the Kaven residence where a burglary had taken place (R 202-203). Mrs. Kaven gave the officer a description of the person that she observed leave her residence (R 203). A BOLO was broadcast of this description (R 203-204). Officer Mason testified that Mrs. Kaven subsequently selected Respondent from a lineup as the person who burglarized her residence (R 208=209).

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

Respondent after being informed of his "Miranda" rights gave

a statement to Detective Bennett concerning this Kaven burglary (R 236-238). According to Bennett, Respondent admitted to him that he broke into the residence and took not only electrical equipment but also a rifle (R 240).

Respondent, Eric Schopp, took the stand in his own behalf at trial (R 261). Respondent candidly admitted that he broke the window to the Kaven residence and entered their house (R 264). When he entered the residence, he did *not* have a gun (R 265). Respondent testified that he took electrical equipment, a videocassette recorder and a case which he believed contained a musical instrument (R 265). Respondent testified that he did *not* realize this case contained a firearm (R 270). As Respondent drove off with the stolen property, Mrs. Kaven came upon him in her driveway (R 266-267). Respondent subsequently admitted to the police that he committed the Kaven burglary (R 268-269).

SUMMARY OF THE ARGUMENT

Point I

Respondent contends that this Honorable Court does *not* have subject matter jurisdiction over this appeal filed by Petitioner-State because Respondent filed a *Notice of Voluntary Dismissal* of this appeal in the Fourth District ***prior*** to a final decision on the merits. See *Thompson v. Filer*, 99 Fla. 539, 126 So. 766 (1930); *Gaskins v. Mack*, 91 Fla. 284, 107 So. 918, 920 (1920). The essential nature of a criminal appeal was somehow misplaced in the lower court. There was a clear legal right on the part of the Respondent to a dismissal of *his* appeal where Petitioner-State *never* filed a cross appeal and/or assignment of error in the Fourth District Court of Appeal.

Point II

Under Article V, Section 3(b)(4), *Florida Constitution* (1980), a district court of appeal can certify a question of "great public importance" to this Honorable Court. See also *Fla. R. App. P. 9.030(a)(2)(A)(v)*. However, this Court has absolute discretion to accept or decline to accept a question certified to it by a district court. Since the primary issues in the instant case are whether there was in fact a "discovery violation" by the State or an adequate *Richardson* inquiry by the trial judge [See Petitioner's Brief on the Merits], there is no compelling reason why this Honorable Court would want to review the instant cause. And further, if in the unlikely event that this Court reaches the "certified question," that particular issue (failure to conduct

Richardson inquiry is *per se* reversible error) has been repeatedly reaffirmed by this Honorable Court up to the present. This issue has been settled for over fifteen (15) years. See *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). In fact, few issues in the area of Florida criminal law and procedure have been as thoroughly settled as this one potentially before the Court.

Point III

Pursuant to *Fla. R. Crim. P.* 3.220, the State is required to furnish the defense a witness list of the names and addresses of all witnesses who the state expects to call as witnesses at trial. At bar, the trial judge failed to conduct a full *Richardson* inquiry on the discovery violation objection raised by defense counsel in the lower court. Hence, the trial court reversibly erred in overruling defense counsel's objection to the prosecutor's failure to list a particular witness on its witness list.

Point IV

This Honorable Court should reaffirm, once again, the *per se* rule contained in *Richardson*. In *Smith v. State*, 500 So. 2d 125 (Fla. 1986), former Chief Justice Barkett aptly articulated the legal and practical considerations for maintaining this rule. Petitioner has failed to present this Court with any valid grounds to abolish this long standing rule which has successfully accommodated the competing interests of all the parties.

ARGUMENT

POINT I

THIS HONORABLE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS APPEAL BECAUSE RESPONDENT FILED A NOTICE OF VOLUNTARY DISMISSAL PRIOR TO FINAL DISPOSITION OF THE APPEAL IN THE LOWER COURT.

Respondent initially contends that this Honorable Court does *not* have subject matter jurisdiction over this instant appeal filed by the State because Respondent filed a *Notice of Voluntary Dismissal* of this appeal in the Fourth District ***prior*** to a final decision on the merits. See *Thompson v. Filer*, 99 Fla. 539, 126 So. 766 (1930); *Gaskins v. Mack*, 91 Fla. 284, 107 So. 918, 920 (1920). The essential nature of a criminal appeal was somehow misplaced in the lower court. There was a clear legal right on the part of the Respondent to a dismissal of *his* appeal where Petitioner-State *never* filed a cross appeal and/or assignment of error in the District Court.

Article V, Section 4(b)(1), *Florida Constitution* (1980) establishes the jurisdiction of the District Courts of Appeal over "appeals that may be taken as a matter of right." This provision means that the district courts have jurisdiction provided there is a ***statute*** creating a substantive right to appeal. *State v. Creighton*, 469 So. 2d 735 (Fla. 1985). Hence, the right to appeal in Florida is purely ***statutory***. Respondent, Mr. Schopp, was convicted of burglary and petit theft in the circuit court and then appealed his convictions and sentences to the Fourth District pursuant to Sections 924.06(1)(a) and 924.06(1)(d), *Florida*

Statutes (1993).

In *Putnam Furniture Leasing Co., Inc. v. Borden*, 539 A 2d 73 (R.I. 1988), the Rhode Island Supreme Court noted "that if one has a right to take an appeal, it is to be assumed, in the absence of any statutory prohibition to the contrary, that the appellant has a ***right to withdraw the appeal***." *Id.*, at 74 [Emphasis added].

Turning to the instant circumstances, there is absolutely ***no statutory prohibition*** in Florida that bars a criminal defendant from withdrawing his appeal before it becomes final. Even if there was a potential conflict between the appellate statutes and court rule *Fla. R. App. P.* 9.350(b), the statute would clearly control. See Article I, Section 2(a) *Florida Constitution* (1968); *Vaughan v. State*, 410 So. 2d 142, 149 (Fla. 1982) (Florida Legislature is vested with the power to enact ***substantive laws*** whereas the Florida Supreme Court has the power to regulate practice and procedure in Florida courts).

Since there is no ***statutory*** prohibition in Florida that prohibits a criminal defendant from dismissing or withdrawing his appeal, it follows that once Respondent actually filed his *Notice of Voluntary Dismissal* in the Fourth District, said voluntary dismissal, in essence, dismissed the cause or the appellate court should have dismissed it due to the fact that there was no cross-appeal by Petitioner-State and the decision was ***not*** final at the time the *Notice of Voluntary Dismissal* was filed by Respondent.

Fla. R. App. P. 9.350(b) provides:

> A proceeding of an appellant or petitioner may be dismissed before a decision on the merits

> by filing a notice of dismissal with the clerk of the court without affecting the proceedings filed by joinder or cross-appeal; provided that dismissal shall not be effective until 10 days after filing the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later.

The *Committee Notes* (1977) to Rule 9.350(b) state:

> Subsection (b) is intended to allow an appellant to dismiss the appeal but ***a timely perfected cross-appeal would continue.*** A voluntary dismissal would not be effective until after the time for joinder in appeal or cross-appeal. This limitation was created so that an opposing party desiring to have adverse rulings reviewed by a cross-appeal ***cannot*** be trapped by a voluntary dismissal by the appellant after the appeal time has run but before an appellee has filed the notice of joinder or cross-appeal.

[Emphasis Added.]

This Honorable Court in *Thompson v. Filer*, 99 Fla. 539, 126 So. 766 (1930), ruled as follows after the appellant has filed its notice of voluntary dismissal:

> Upon this cause having been set down for oral argument, the appellant filed a motion to dismiss the appeal.
>
> Under the provisions of Rule 23 for the government of the Supreme Court, the appellant has the right to pursue this course, and, there having been no cross-assignments of error filed by the appellees and the cause not having been reached for ***final disposition by the court at the time when this motion was filed***, the Court is bound by the provisions of the rule. The motion should, therefore, be granted and it is so ordered.

Id. at 767 [Emphasis added]; see also *Gaskins v. Mack*, 91 Fla. 284, 107 So. 918, 920 (1920).

Respondent contends that due to the fact that there is no

statutory prohibition to his voluntary dismissal, and in conformity with Rule 9.350(b) and this Court's decision in *Thompson v. Filer, supra*, there was a clear legal right on the part of the Respondent to a dismissal of ***his*** appeal where Petitioner-State ***never*** filed a cross-appeal and/or cross-assignment of error in the District Court. It follows therefore that Respondent's appeal in the Fourth District was validly dismissed on the day he filed his *Notice of Voluntary Dismissal*. Hence, this present appeal filed by the State is a nullity.

The Fourth District did, in fact, grant the State's "Motion to Strike" Respondent's *Notice of Voluntary Dismissal*. In so doing, the Fourth District must have assumed it was bound to entertain this "Motion to Strike." However, that assumption was incorrect. See *Bird Road Baptist Church*, 155 So. 2d at 422. Since the State had absolutely *no standing* to oppose Respondent's *Notice of Voluntary Dismissal*, the Fourth District clearly erred in granting Petitioner-State's "Motion to Strike" the *Notice of Voluntary Dismissal* of ***his*** appeal. Since the lower court's decision was dismissed or should have been dismissed by operation of Respondent's *Notice of Voluntary Dismissal* [See pending Amended Petition for Writ of Mandamus, *Schopp v. Fourth District Court of Appeal*, Case No. 84,227], it follows that Petitioner-State has no case or controversy to appeal to this Honorable Court. Hence, this appeal should be dismissed for lack of subject matter jurisdiction.

POINT II

THIS COURT SHOULD *DECLINE* TO EXERCISE DISCRETIONARY JURISDICTION IN THIS CAUSE BECAUSE THE QUESTION CERTIFIED BY THE LOWER COURT IS WELL SETTLED IN PREVIOUS OPINIONS RENDERED BY THIS HONORABLE COURT.

Assuming *arguendo* that this Court rules that it does have subject matter jurisdiction, Respondent respectfully requests this Court to ***decline*** to exercise its discretionary jurisdiction in this particular cause.

This Court has discretionary jurisdiction under Article V, Section 3(b)(4), *Florida Constitution* (1980) to review a decision of a district court that is certified to pass on a question of "great public importance." See also *Fla. R. App. P.* 9.030(a)(2)(A)(v). However, this Court has absolute discretion to accept or decline to accept a question certified to it by a district court of appeal. Here, the Fourth District did certify a question to this Court as one passing upon a question of "great public importance[2]." However, a certificate of great public importance merely provides a jurisdictional basis for further appellate review by this Court. It does *not* automatically grant discretionary review or jurisdiction. See *Everard v. State*, 559 So. 2d 427 (Fla. 4th DCA 1990).

In *Everard*, the Fourth District declined to accept discretionary review of a question certified as one of great public importance by a county court judge. The Fourth District explained

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[2] SHOULD THE *PER SE* RULE OF *SMITH* BE RECONSIDERED IN LIGHT OF THE PRINCIPLES SET OUT IN *DIGUILIO*?

that it was not shown that the issue certified to it which involved the interpretation of the indecent exposure statute was really difficult or that it had widespread ramifications. Hence, the Fourth District found that the issue certified to it by the county court was not one of "great public importance."

Likewise, Respondent requests this Court to ***decline*** to accept jurisdiction to review the question certified here in light of this Honorable Court's recent decision in *Small v. State*, 630 So. 2d 1087, 1089 (Fla. 1994). In *Small*, this Court reaffirmed and reiterated its holding in *Smith v. State*, 500 So. 2d 125 (Fla. 1986), that a trial court's failure to conduct a *Richardson* inquiry is *per se* reversible error. *Small*, 630 So. 2d at 1089. Hence, no further debate, argument, or discussion is necessary to resolve this certified question. Further, Petitioner's main argument in its Initial Brief on the Merits is that the trial judge did in fact comply with *Richardson*. This has absolutely nothing to do with the certified question.

Finally, this Court has made it crystal clear for over twenty (20) years that the purpose of a *Richardson* inquiry is "to ferret out procedural prejudice occasioned by a party's discovery violation" not substantive prejudice. *Smith v. State*, 372 So. 2d 86, 88 (Fla. 1979); *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). In *Cumbie v. State*, 345 So. 2d 1061 (Fla. 1977), this Court held that the trial court's investigation into the question of prejudice should be on the record so as to facilitate meaningful appellate review:

> It is clear that the trial court's investigation of the question of prejudice was not the full inquiry *Richardson* requires.... ***A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules,*** as *Richardson* indicates. Especially is this so in cases such as this, where a false response is given to a request for discovery.

Id., at 1062 [Footnote omitted, emphasis added.]

Therefore, Respondent respectfully requests this Honorable Court in light of *Small*, *Wilcox*, and *Smith* to ***decline*** to review the question certified by the Fourth District as one of great public importance in this cause.

POINT III

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

Under *Fla. R. Crim. P.* 3.220(b)(1)(A), the prosecutor is required to furnish the defense a written list of the names and addresses of all witnesses the prosecutor expects to call as witnesses at trial. Further, there is a *continuing duty to disclose. Fla. R. Crim. P.* 3.220(j).

At bar, Petitioner-State called Officer Mason as a witness for the prosecution (R 196). Respondent's counsel ***objected*** to the state calling Officer Mason because he was not on the state's original witness list (R 196-197). The prosecutor acknowledged that this officer was not on the original witness list but added his name to an amended witness list right before trial (R 197-199). The prosecutor explained that she had inadvertently failed to include this officer's name on the original list. The prosecutor also noted that the defense had Officer Mason's police report which had been supplied in pre-trial discovery (R 198). The trial court stated that he would decline to actually hold a *Richardson* inquiry because of Respondent's demand for speedy trial filed fifteen (15) days before his trial commenced (R 199-200). Respondent's trial counsel wanted a *Richardson* inquiry on the failure of the state to list this state witness (R 201).

This Court has ruled that the exclusion of testimony is a permissible sanction under *Fla. R. Crim. P.* 3.220(j). Whether a

remedy such as exclusion should be imposed depends on the totality of the circumstances. *Richardson v. State*, 246 So. 2d at 775. A trial court's ruling on whether a discovery violation calls for the exclusion of testimony is discretionary and should not be disturbed on appeal unless an abuse is clearly shown. *State v. Tascarella*, 580 So. 2d 154, 157 (Fla. 1991).

Once a discovery violation occurs, the trial court ***must*** conduct a hearing as to the circumstances of the violation and its potential prejudice to the defendant which hearing must address whether the discovery violation was willful or inadvertent, whether it was trivial or substantial, and whether it prejudiced the defendant's ability to prepare for trial. *Richardson*; *State v. Hall*, 509 So. 2d 1093 (Fla. 1987); *Butler v. State*, 591 So. 2d 265, 266 (Fla. 4th DCA 1991). There is no "speedy trial" exception for *Richardson* inquiries. *Hahn v. State*, 626 So. 2d 1056 (Fla. 4th DCA 1993).

Respondent contends that the trial court's failure to conduct a full *Richardson* hearing after defense counsel objected to the State's clear failure to include the name of this state witness on its witness list constituted *per se* reversible error. See *Ward v. State*, 477 So. 2d 66 (Fla. 3d DCA 1985), *approved* 502 So. 2d 1245 (Fla. 1986); *McDugle v. State*, 591 So. 2d 660 (Fla. 3d DCA 1991). *Contra Craig v. State*, 585 So. 2d 278, 281 (Fla. 1991); *Banks v. State*, 590 So. 2d 465, 467 (Fla. 1st DCA 1991).

Here, the trial court expressly refused to hold a *Richardson* inquiry (R 200-201). A *Richardson* inquiry is designed to ferret

out procedural prejudice occasioned by a party's discovery violation on the record. *Cumbie*, 345 So. 2d at 1062. Therefore, the Fourth District correctly reversed Respondent's convictions for a new trial.

POINT IV

THIS HONORABLE COURT SHOULD REAFFIRM ONCE AGAIN THE *PER SE* REVERSAL RULE CONTAINED IN *RICHARDSON* BECAUSE BOTH LEGAL AND PRACTICAL CONSIDERATIONS SUPPORT IT.

Respondent respectfully requests this Honorable Court ***not*** to reconsider its numerous decisions on this issue in light of this Court's recent reiterations of the rule that it is *per se* reversible error to fail to conduct a *Richardson* inquiry. See *Suggs v. State*, 19 Fla. L. Weekly S423, 424 (Fla. Sept. 1, 1994) ("The failure to conduct a *Richardson* hearing in the face of a discovery violation is *per se* reversible error once the violation has been brought to the court's attention and a *Richardson* hearing has been requested. *Smith v. State*, 500 So. 2d 125 (Fla. 1986)"); *Small v. State*, 630 So. 2d 1087, 1089 (Fla. 1994). In *Small*, this Court reaffirmed and reiterated the holding in *Smith v. State*, 500 So. 2d 125 (Fla. 1986) that a trial court's failure to conduct a *Richardson* inquiry is *per se* reversible error. *Small*, 630 So. 2d at 1089. See also *Ward v. State*, 502 So. 2d 1245 (Fla. 1986).

This Honorable Court has repeatedly made clear that the purpose of a *Richardson* inquiry is "to ferret out procedural prejudice occasioned by a party's discovery violation" ***not*** substantive prejudice. *Smith v. State*, 372 So. 2d 86, 88 (Fla. 1979); *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). In *Cumbie*, this Court held that the trial court's investigation into the question of prejudice should be ***on the record*** so as to facilitate meaningful appellate review:

> It is clear that the trial court's investigation of the question of prejudice was not the full inquiry *Richardson* requires.... **A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules, as *Richardson* indicates.** Especially is this so in cases such as this, where a false response is given to a request for discovery.

Id., at 1062 [Footnote omitted, emphasis added].

Former Chief Justice Barkett in *Smith* aptly and concisely articulated the practical and legal reasons for adhering to the *per se* reversal rule for failure to conduct a *Richardson* inquiry:

> First, from a practical perspective, the rule of *Richardson* and its progeny works effectively and accommodates the various competing interests. The command of Rule 3.220(a) is simple, clear and direct. The state is required to disclose and provide discovery. If the state fails to discharge its duty in this regard, the trial court must inquire into the circumstances of the discovery violation and its possible prejudice to the defendant. This process contains enormous flexibility by providing a full panoply of remedies which a judge may apply if a discovery violation has occurred, including, if the evidence warrants, finding no prejudice or "harmless error" and proceeding with the trial.
>
> We see no evidence that the clear dictates of this integral component of Florida law have imposed any significant hardship on the bench or bar or have worked any injustice. On the contrary, the requirement that a trial court merely *listen* and evaluate any claim of prejudice accompanied by the minor delay which most hearings or inquiries will impose on a trial is more than justified by the assurance of compliance with our rules and requirements of due process.
>
> Second, legal considerations also mandate our continued adherence to *Richardson* and its progeny. The certified question in this case

> misapprehends the very purpose of a *Richardson* hearing, which is precisely to determine if a violation is, in fact, harmless. One cannot determine whether the state's transgression of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak to the question. We repeat what the court made clear in *Wilcox*. A reviewing court cannot determine whether the error is harmless without giving the defendant the opportunity to show prejudice or harm. 367 So. 2d at 1023. In *Wilcox*, the state sought to resist reversal by asserting that "no prejudice resulted because the trial court instructed the jury to disregard the [previously undisclosed] statement." *Id.* at 1022. In rejecting this argument, this court explained that the question of "prejudice" in a discovery context is not dependent upon the potential impact of ***the undisclosed evidence on the fact finder but rather on its impact on the defendant's ability to prepare for trial*** [citations omitted].
>
> If the "trial court [is] in no position to make an accurate judgment" without giving the defendant the opportunity to show prejudice, how then can a reviewing court do so? As this Court expressly held in *Cumbie*, "[a] review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules." 345 So. 2d at 1062. It is not adequate because the error committed is the preclusion of the very evidence necessary to make a judgment of the existence of prejudice or harm.
>
> The state is essentially asking us to disregard all concern for procedural prejudice and abandon *Richardson*. We can see no justification for doing so.

Id. at 125-126 [Emphasis Added].

This Court has repeatedly indicated over the years that the *per se* rule has satisfactorily accommodated the various competing interests involved. See *Brown v. State*, 515 So. 2d 121 (Fla.

1987); *Smith v. State*, 500 So. 2d at 125-126; *Ward*, 502 So. 2d 1245 (Fla. 1986). This rule is well settled and is thoroughly known by every criminal division trial judge and presumably by every prosecutor throughout our State. It cannot be seriously suggested by Petitioner-State that conducting a *Richardson* inquiry, causes any real inconvenience to our justice system. Finally, in *Smith, supra*, this Court saw no evidence that the *per se* reversal rule imposed any significant hardship on the court or has otherwise caused any real injustice. None has been demonstrated by Petitioner-State.

It should be noted that *Smith* and *Ward* were both decided well after this Court rendered it's decision in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), which is totally inapplicable to the discovery rule violation issue presented at bar. This totally negates the notion that "re-examination" of *Smith* is needed in light of this Court's decision in *DiGuilio*.

Respondent respectfully requests this Court to answer the certified question in the negative and affirm once again the *per se* reversal rule contained in *Richardson* and its progeny. Hence, Respondent's convictions must be reversed for a new trial due to the trial court's failure to conduct a full and complete *Richardson* inquiry. The decision of the Fourth District reversing Respondent's convictions for a new trial should be AFFIRMED.

CONCLUSION

Respondent respectfully requests this Honorable Court to dismiss the instant appeal with prejudice or decline to exercise its jurisdiction over the instant cause or affirm the decision of the Fourth District Court of Appeal which granted Respondent a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Patricia Ann Ash, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 19th day of September, 1994.

Attorney for Eric Schopp