

**FILED**

SID J. WHITE

SEP 29 1994

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,061

STATE OF FLORIDA,

Petitioner,

vs

ERIC SCHOPP,

Respondent.

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REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The State of Florida, Petitioner, was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal. Eric Schopp, Respondent, 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.

ARGUMENT

POINT I

THIS HONORABLE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS APPEAL BECAUSE RESPONDENT FILED A NOTICE OF VOLUNTARY DISMISSAL AFTER A DECISION ON THE MERITS WAS RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL

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

(b) Voluntary Dismissal. 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 a 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 State would contend that in this case the decision on the merits had been rendered by the Fourth District Court of Appeals even though the mandate had not been issued, making the filing of a voluntary dismissal untimely.

The test for determining when a judgment is subject to review is the finality of the judgment. Finality, in turn, is established by determining whether the judicial labor required or permitted to be done by the court has been performed. Hotel Roosevelt Co. v. City of Jacksonville, 192 So.2d 334, 338 (Fla. 1st DCA 1966); Holland v. Courtsey Corp., 563 So.2d 787 (Fla. 1st DCA 1990).

The mandate is the official method of communicating the judgment of the appellate court to the lower court directing

action to be taken or disposition to be made of the cause by the trial court. Livingston v. State, 113 Fla. 391, 152 So. 205 (Fla. 1933); Tierney v. Tierney, 290 So.2d 136, 137 (Fla. 2nd DCA 1974); State, DHRS v. South Beach Pharmacy, 635 So.2d 117 (Fla. 1st DCA 1994).

If the defendant's position were to prevail, it would allow anyone who takes an appeal to "shop" between the decision of the trial court and the appellate court after the appellate court has rendered an opinion. Further, the defendant here won his appellate issue and now seeks to take a voluntary dismissal, seemingly not in his best interest, to circumvent this Court's consideration of the question certified as one of great public importance. As the defendant has pointed out in his brief, in Thompson v. Files, 99 Fla. 539, 126 So. 766 (1930), the provisions of Rule 23 for the government of the Supreme Court, gives the appellant the right to take a voluntary dismissal when the cause has not been reached for final disposition at the time when the motion is filled. Filer's motion was filed prior to the decision on the merits, upon the cause having been set down for oral argument. The rule specifically states a voluntary dismissal may be filed "before a decision on the merits." There is no mention of mandate as a requirement for finality under the rule.

The defendant's motion for voluntary dismissal was not timely, and was properly stricken by the Fourth District Court, giving this court subject matter jurisdiction.

POINT II

THIS COURT SHOULD EXERCISE  
DISCRETIONARY JURISDICTION IN THIS  
CAUSE BECAUSE THE CERTIFIED QUESTION IS  
NOT WELL SETTLED BY PREVIOUS OPINIONS  
AND AS DEMONSTRATED BY THE FACTS IN  
THIS CASE RICHARDSON VIOLATIONS SHOULD  
BE SUBJECT TO HARMLESS ERROR ANALYSIS

The State will rely on its argument in its initial brief on  
this point.

POINT III

THE TRIAL COURT PROPERLY OVERRULED THE  
DEFENDANT'S DISCOVERY OBJECTION TO A  
STATE WITNESS NOT LISTED BY THE STATE  
IN PRETRIAL DISCOVERY AS THE TRIAL  
COURT CONDUCTED AN ADEQUATE INQUIRY

The State will rely on its argument in its initial brief on  
this issue.




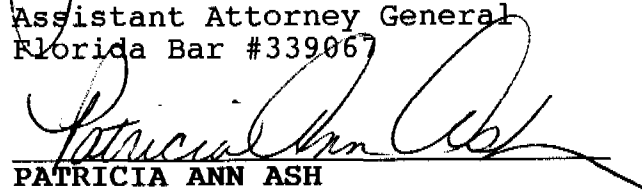
CONCLUSION

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,

**ROBERT A. BUTTERWORTH**  
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Tallahassee, Florida

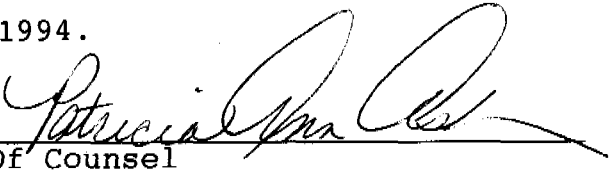
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to: **ANTHONY CALVELLO, ESQUIRE**, Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this 27th day of September, 1994.

  
Of Counsel

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