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IN THE SUPREME COURT OF FLORIDA

WILLIAM J. O'ROURKE,

Petitioner,

versus

CASE NO. 84,934

STATE OF FLORIDA,

Respondent.

________________________________)

PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
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TABLE OF CONTENTS

	PAGE NUMBER
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, SHOULD BE ANSWERED IN THE NEGATIVE.	
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX	

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Baker v. State 522 So.2d 491 (Fla. 1st DCA 1988)	14
Barrett v. State 19 Fla. L. Weekly S627 (Fla. 11/23/94)	10,11
Brazell v. State 570 So.2d 919 (Fla. 1990)	12
Brown v. State 515 So.2d 211 (Fla. 1987)	13
Cumbie v. State 345 So.2d 1061 (Fla. 1977)	13
Hicks v. State 400 So.2d 955 (Fla. 1981)	13
Justus v. State 438 So.2d 358 (Fla. 1983) cert denied 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984)	11
L.W. v. State 618 So.2d 349 (Fla. 2d DCA 1993)	14
Lee v. State 534 So.2d 1226 (Fla. 1st DCA 1988)	14
McDugle v. State 591 So.2d 660 (Fla. 3d DCA 1991)	13
O'Rourke v. State 19 Fla. L. Weekly D2430 (Fla. 5th DCA 11/18/94)	1,12
Patterson v. State 419 So.2d 1120 (Fla. 4th DCA 1982) rev. denied 430 So.2d 452 (Fla. 1983)	14
Plummer v. State 454 So.2d 61 (Fla. 1st DCA 1984)	13
Richardson v. State 246 So.2d 771 (Fla. 1971)	11,12,13
S.G. v. State 518 So.2d 964 (Fla. 3d DCA 1988)	14

Smith v. State
500 So.2d 125 (Fla. 1986) 12

Smith v. State
372 So.2d 86 (Fla. 1979) 13

Wilcox v. State
367 So.2d 1020 (Fla. 1979) 11

Z.B. v. State
576 So.2d 1356 (Fla. 3d DCA 1991) 14

OTHER AUTHORITY:

Fifth Amendment, United States Constitution 14
Sixth Amendment, United States Constitution 14
Fourteenth Amendment, United States Constitution 14

Article 1, Section 9, Florida Constitution 14
Article 1, Section 16, Florida Constitution 14
Article 1, Section 22, Florida Constitution 14

STATEMENT OF THE CASE

Petitioner, WILLIAM J. O'ROURKE, was charged by information on July 24, 1992, with attempted first degree murder in count one and with kidnapping in count two of Petitioner's former wife, Deborah Callahan. (R 1) The case proceeded to jury trial on February 22 through 25, 1993, before Circuit Judge Richard Watson in the Circuit Court of St. Johns County, Florida. (T 1-612) During the trial, without objection by the prosecutor, defense counsel requested permission from the trial court to call a witness, Joseph Vono, the landlord of the trailer park where the petitioner and Deborah Callahan lived prior to the incident. (T 233-234)

The trial court ruled, which it again reaffirmed after trial counsel's proffer, that this defense witness, Mr. Vono, would not be permitted to testify. O'Rourke v. State, 19 Fla. L. Weekly D2430, D2431 (Fla. 5th DCA November 18, 1994). (T 235, 407-410) The jury returned verdicts of guilty of attempted first degree murder and attempted kidnapping. (T 610-612; R 94-95)

Petitioner received a sentence on April 5, 1993, of 22 years imprisonment on count I followed by 8 years probation on count II. (R 165-166, 99-110)

Petitioner timely appealed and his convictions were affirmed by the Fifth District Court of Appeal on November 18, 1994. (R 123) O'Rourke v. State, 19 Fla. L. Weekly D2430 (Fla. 5th DCA November 18, 1994). (Appendix) In its opinion, the Fifth District Court of Appeal also certified the following

question:

> WHERE THE COURT'S INQUIRY INTO THE CIRCUMSTANCES OF A DEFENSE DISCOVERY VIOLATION FAILS TO ADDRESS THE EFFECT, IF ANY, THE VIOLATION HAS ON THE STATE'S ABILITY TO PREPARE FOR TRIAL, BUT A PROFFER IS MADE OF THE EVIDENCE EXCLUDED ON ACCOUNT OF THE VIOLATION, CAN THE PROFFER BE USED BY THE REVIEWING COURT TO DETERMINE THAT THE DEFICIENCY IN THE RICHARDSON HEARING CONDUCTED WAS HARMLESS ERROR?

On January 11, 1994, this Court postponed its decision on jurisdiction and ordered merit briefs to be submitted to the Court.

STATEMENT OF THE FACTS

On the evening of July 6, 1992, Donna Rhoden and her boyfriend, Mike Mozo, heard a faint knocking at the door while they were watching television inside their residence located at in Palm Valley, St. Johns County. (T 47-49) When they opened the door, they found Deborah Callahan sitting on their front porch up against the door with her hands holding a cloth on her throat. (T 48-50) Deborah appeared to be very fearful and told them that her boyfriend, the Petitioner, had slit her throat after she crashed his van. (T 49-52) She also explained to them that she first stayed in the petitioner's van for a while, which remained parked on the road further down their driveway, thinking the petitioner would return, but she later crawled to Donna Rhoden's porch. (T 51)

Kurt Johnson, a paramedic with St. Johns County Emergency Medical Services, responded to Ms. Rhoden's 911 call on behalf of Deborah. (T 53-56) He described Deborah's injury as a substantial, deep, clean laceration to the throat running almost from ear to ear, along with bruising around her eyes and that he had never seen this type of injury involving car accidents which he had responded to in the past. (T 57-59)

Deborah Callahan also testified that she married the petitioner in 1987, but that they broke up in the spring before the incident which caused the petitioner to threaten her by saying "I'll kill you and I don't care if I have to spend the rest of my life in prison for it." (T 201-206) On the evening

of the incident, Deborah received a phone call from the petitioner and she agreed to meet him at a bar named the "Ritz" because the petitioner stated he needed to borrow some money. (T 210-214)

The petitioner and Deborah next proceeded to another club that evening called the "Instant Replay" with Deborah following the petitioner. (T 214-215) When they arrived at the Instant Replay parking lot, Deborah stated she left her truck to smoke some pot with the petitioner in his van. (T 215-218, 249) Deborah further testified that a struggle ensued when she tried to leave Petitioner's van which culminated in the petitioner hitting her and taking off with her in the van. (T 218) While still driving the van, the petitioner, according to Deborah, told her to stay down on the van floor and struck her intermittently with his fist, threatening to kill her. (T 220)

Eventually, Deborah stated she managed to grab the van's steering wheel causing it to crash. (T 218) As she started to exit the van's side passenger door, however, she testified the petitioner immediately got out of his seat and grabbed her. (T 219) The next thing Deborah stated she heard was a clicking sound she thought was made from a "razor" type knife opening followed by the petitioner pulling her head back, causing her to fall, then cutting her from left to right across her throat with the box cutter, saying, "this is it, this is it, this is your last night." (T 219-224, 236-238) After the petitioner walked away, Deborah testified that she decided to

wrap her skirt around her neck and walk towards the porch light she saw on at Donna Rhoden's home. (T 219)

Deputy Helen Hayes with the St. Johns County Sheriff's office testified that upon speaking briefly with Deborah shortly after the incident, she proceeded to the petitioner's residence where the petitioner was apprehended at gunpoint. (T 308-314) According to Deputy Hayes, the petitioner stated numerous times to her that "he hoped she [Deborah] died so that he would get the electric chair and that he would be dead, also." (T 314) Deputy Hayes additionally stated that she had to summon emergency medical treatment for the petitioner when she noticed upon handcuffing him, that his wrists and the inside of his arms had been cut. (T 320-322, 329-330)

Deputy Mary Leuck, a detective with the St. Johns County Sheriff's office, testified that she arrived at the police investigation after the petitioner had been arrested. (T 332-340) She then read Petitioner his Miranda warnings upon which he stated that he did not cut Deborah's throat and that he had fallen on a dagger. (T 332-342) Deputy Leuck further testified that the petitioner told her that Deborah had changed her mind about going home with him on the evening of the incident while riding in his van approximately half the way there and that is when she punched him in the mouth and grabbed the Van's steering wheel causing the crash. (T 342, 344) In the petitioner's written statement to the police, he also explained that once the van had crashed, he pulled Deborah out of the side door by her

hair and told her to come with him, but that she did not want to because her shoulder hurt, so he left her there by the van. (T 344-345)

Daniel Knieriemen testified that he knew both Deborah and the petitioner and had seen them together on several occasions at the Ritz Bar prior to the date of the incident. (T 432-434) Marsha Gordon also testified that she too had seen the petitioner and Deborah together at the Ritz Bar and at the petitioner's trailer between May and July of 1992, but noticed nothing out of the ordinary to indicate that Deborah was in any way afraid of or angry with the petitioner. (T 440-449) Mary Wilson, a bartender at the Instant Replay additionally testified that she saw the petitioner and Deborah leave the bar in Petitioner's van on the evening of the incident and did not notice anything unusual or anything that would indicate that Deborah was being threatened or attacked by the petitioner or that she was in danger. (T 460-471)

SUMMARY OF ARGUMENT

The question certified by the Fifth District Court of appeal to this Honorable Court should be answered in the negative and Petitioner awarded a new trial. The District Court incorrectly held that based on the proffer made by defense counsel to the trial court concerning the expected testimony of an unlisted defense witness, Joseph Vono, the trial court was not required to conduct a full *Richardson* hearing under a "harmless error" analysis. When presented with an undisputed inadequate *Richardson* hearing, a harmless error analysis has been rejected on numerous occasions by this Court. Therefore, Petitioner urges this Court to continue to reject an appellate court's substituting a "harmless error" analysis for the firmly rooted procedural safeguards provided by the *per se* reversible error rule when a trial court fails to conduct an adequate *Richardson* inquiry. To hold otherwise, would jeopardize the historical constitutionally protected interests of both the State and the accused.

ARGUMENT

THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, SHOULD BE ANSWERED IN THE NEGATIVE.

The Richardson violation in the instant case occurred when defense counsel requested permission from the trial court to call an unlisted witness, Joseph Vono, the landlord of the trailer park where the Petitioner and the victim, Deborah Callahan, lived prior to incident. (T 233-235) This request by defense counsel took place during the following colloquy between the prosecutor, the trial court, and defense counsel prior to the defense presenting its case:

* * *

> MR. CANAN [Prosecutor]: Judge, can I, before, put something on the record?
>
> THE COURT: Yeah.
>
> MR. CANAN: Defense, as the court well knows, has listed six or seven witnesses in the past week or at least since pretrial.
>
> THE COURT: Yeah.
>
> MR. CANAN: And I would like the opportunity to speak with them and I'm hoping that
>
> THE COURT: You may do that before they take the witness stand. In fact, if you feel it necessary before they take the witness stand, I'll let you depose them.
>
> MR. BOYER [Defense counsel]: The only thing I would state for the record, Your Honor, of course that's within your discretion, but at the time that these witnesses were brought to the State's attention at pre-trial, they were given an opportunity to request a continuance and said they were nonetheless ready for trial. There was no request to the Court at

that time for any additional time to depose.

THE COURT: You shouldn't have any objection to the State deposing witnesses that the defense is going to produce. After all, they're what's known as last-minute witnesses, Mr. Boyer, quite common in the criminal practice.

MR. BOYER: We do have an additional last minute witness who has not been disclosed. His name is Joe Johnna (phonetic). He is the landlord for the particular trailer park in which this occurred. He was added today because of the fact that our witness from New York is unable to attend.

THE COURT: Well, this witness that you added today won't be permitted to testify. You've known about this witness for how long?

MR. BOYER: I've know bout the existence of this witness when my client brought him to my attention after we were told that --

THE COURT: Give me a time period. How long have you known about this witness?

MR. BOYER: I've known that there was a landlord for at least -- at least a month, I've known there was a landlord. However, Mr. O'Rourke gave me the gentleman's name and address after jury selection, Your Honor, and after I informed --

THE COURT: When did you tell Mr. Canan about it?

MR. BOYER: Just now, Your Honor.

THE COURT: Well you won't be permitted to call that witness.

MR. BOYER: Your Honor, I would ask that we have a Richardson hearing on that issue to determine --

THE COURT: You just had it.

MR. BOYER: I would request, Your Honor, that we be given an opportunity to voir dire the testimony because, as you are aware, there

are three factors that should be considered and I would ask that I be given an opportunity to make a record, Your Honor.

THE COURT: You can make a record, go right ahead.

MR. BOYER: Your Honor, as you --

THE COURT: When your time comes. Cal your next witness.

* * *

(T 233-235)

Later in the trial, after the State had presented its case-in-chief, defense counsel made the following proffer:

* * *

> MR. BOYER [Defense counsel]: ... Mr. Vono (phonetic) is the landlord at the particular facility. His testimony will be that during the three moths in which the Defendant and the victim were allegedly separated, that contrary to the statements of the State's witness, that they in fact did live together as man and wife, that he did view the truck there on occasions and that he found that during the several years that the two lived there, that he had no complaints whatsoever concerning any violence at that particular residence or concerning any threat.

(T 408) The trial court summarily concluded in response, however, that Mr. Vono's testimony would be " ... tangential, at best," and that because defense counsel had other witnesses who could testify that the petitioner and Deborah were "friendly", it was also "cumulative." (T 410)

This Honorable Court has recently reaffirmed in <u>Barrett v. State</u>, 19 Fla. L. Weekly S627 (Fla. November 23, 1994) (petition for rehearing pending, S. Ct. case number 78,743),

that where there is no dispute a discovery violation has occurred, the need for a full and adequate Richardson[1] hearing by the trial court into all the surrounding circumstances pertaining to the violation is automatically triggered. Id., S628. See also Justus v. State, 438 So.2d 358, 365 (Fla. 1983), cert denied, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984). Consequently, based on the record in the instant case cited above, it was clearly incumbent upon the trial court to conduct a full Richardson inquiry at the time Petitioner's counsel sought to include Mr. Vono as a defense witness, especially to determine what, if any, prejudice would have resulted to the State by Mr. Vono testifying. As specifically outlined by this court in Barrett, supra, and in Wilcox v. State, 367 So.2d 1020, 1022-1023 (Fla. 1979), because the purpose of an adequate Richardson inquiry is to ferret out, procedural, rather than substantive, prejudice, the trial court's inquiry should at least ascertain whether the particular violation was inadvertent or wilful, trivial or substantial, and most importantly what effect, if any, it had on the complaining party's ability to prepare for trial.

In the case sub judice, the prosecutor voiced no objection whatsoever to Mr. Vono testifying. (T 233-235) In fact, this entire matter could have been easily resolved if the trial court had simply allowed the prosecutor an opportunity to speak with Mr. Vono prior to his testifying just as the prosecutor had requested to do with the petitioner's other

---

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

defense witnesses whose names had been provided to the State shortly before the trial. (T 233-234)

The district court found in the case sub judice that the trial court failed to conduct an adequate Richardson inquiry concerning whether the State would be prejudiced by the testimony of Mr. Vono. O'Rourke, supra, D2432. Citing Brazell v. State, 570 So.2d 919 (Fla. 1990), the Fifth District Court proceeded to further extrapolate from the Brazell opinion that because defense counsel proffered to the trial court a synopsis of Mr. Vono's expected testimony, the District Court could then, acting as a reviewing court, hold that the trial court's sua sponte refusal to allow Mr. Vono to testify amounted to harmless error. Nowhere in this Court's opinion in Brazell, however, does this Court sanction a harmless error approach when the trial court has not conducted an adequate Richardson inquiry. To the contrary, this Court unequivocally held in Brazell that "when a party wishes to call a witness whose name has not been furnished to the other side, the trial judge has no alternative but to make the inquiries required by Richardson." Id. at 921. [emphasis added]

In Smith v. State, 500 So.2d 125 (Fla. 1986), this Court reaffirmed, as well, the long established and well settled rule that the failure of a trial judge to timely conduct an adequate Richardson inquiry in the face of a discovery violation constitutes per se reversible error:

> 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 inquires will impose on a trial is more than justified by the assurance of compliance with our rules and requirements of due process.

Smith, 500 So.2d at 126. Significant here is the observation that, "there is neither a 'rebuttal' or an 'impeachment' exception to the Richardson rule." Smith, 500 So.2d at 127. See also Hicks v. State, 400 So.2d 955, 956 (Fla. 1981) and Smith v. State, 372 So.2d 86 (Fla. 1979). Neither, under both of the above listed Smith cases, may a trial or appellate court make a post trial determination of prejudice suffered by the surprised party.

While the district court places great emphasis on the proffer made by defense counsel to the trial court, the content of a proffer, standing alone, is not the determining factor as to the bare bones issue of whether the trial court conducted an adequate Richardson inquiry. Plummer v. State, 454 So.2d 61 (Fla. 1st DCA 1984). Moreover, "[n]o appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the [discovery] breach ..., as Richardson indicates." Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977). See also McDugle v. State, 591 So.2d 660 (Fla. 3d DCA 1991) and Brown v. State, 515 So.2d 211 (Fla. 1987).

Finally, case law is well settled that the extreme sanction imposed by the trial judge in the instant case of

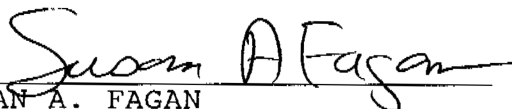
excluding the petitioner's witness from testifying is soundly disapproved of except in the most egregious, wilful cases of a discovery violation, and then, only after the trial court has made an adequate Richardson inquiry. Patterson v. State, 419 So.2d 1120, 1122-23 (Fla. 4th DCA 1982), rev. denied 430 So.2d 452 (Fla. 1983); Lee v. State, 534 So.2d 1226 (Fla. 1st DCA 1988); S.G. v. State, 518 So.2d 964 (Fla. 3d DCA 1988); and Z.B. v. State, 576 So.2d 1356 (Fla. 3d DCA 1991). Thus, in light of the cold facts in the instant case that the State voiced no objection to the petitioner's witness, Mr. Vono, testifying, and that the trial court abused its discretion in summarily excluding Mr. Vono from testifying without an adequate Richardson inquiry, this Court "cannot ignore the inequity of so severe a consequence for an otherwise non-prejudicial discovery violation." L.W. v. State, 618 So.2d 349, 351 (Fla. 2d DCA 1993). See also Baker v. State, 522 So.2d 491 (Fla. 1st DCA 1988). The district court's certified question must be answered in the negative and the petitioner's convictions reversed for a new trial under the due process clause of Article 1, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court answer the certified question by the Fifth District Court of Appeal in the negative, quash the decision of the District Court, and remand for a new trial.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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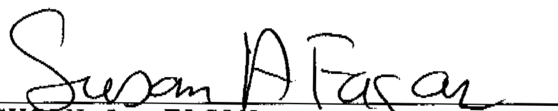
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and William J. O'Rourke, No. A 016652, Liberty C.I., P. O. Box 999, Bristol, FL 32321-0099 on this 6th day of February, 1995.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIAM J. O'ROURKE,

Petitioner,

versus

CASE NO. 84,934

STATE OF FLORIDA,

Respondent.

PETITIONER'S APPENDIX

JAMES B. GIBSON, PUBLIC DEFENDER
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Liquors v. State Department of Business Regulation, 432 So. 2d 93 (Fla. 3d DCA 1983); *approved* 463 So. 2d 1130 (Fla. 1985), and *W.C. Company, supra*. This holding is equally inconsistent with the principle that an agency has particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation the conduct of which is a privilege rather than a right. *See Department of Business Regulation v. Martin County Liquors*, 574 So. 2d 170 (Fla. 1st DCA 1991); and *Astral Liquors*.

Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), and the subsequent decisions of this court on which the majority relies do not support the majority's conclusion that the clear and convincing evidence standard is applicable to disputes over the granting of a license. The holding of *Ferris, supra*, was that the correct standard for *revocation* of a professional license is that the evidence be clear and convincing. In each of the subsequent cases cited by the majority, this court applied the clear and convincing evidence standard when the respondent was threatened with the revocation or suspension of an *existing* license. The majority's effort to extract from *Ferris* a clear and convincing evidence requirement in license application dispute proceedings is ill advised because there are valid reasons why the holder of an existing professional license should be afforded greater legal protection than an applicant for license. Certain of these reasons are suggested by the court in *Reid v. Florida Real Estate Commission*, 188 So. 2d 846, 850-51 (Fla. 2d DCA 1966), on which *Ferris* relies, as follows:

> The taking away of a person's license to engage in a privileged business or profession by administrative action is one of the most drastic proceedings known to the law. At one stroke of the pen it takes aways [sic] his means of livelihood, and casts an immediate blight upon his whole life and that of his family and business associates.... Such license is not only a paper writing that permits the holder to legally engage in the activities described therein but it is also a proclamation to the world that the person to whom the license is issued has qualified to be chosen as a recognized member of a privileged business or profession. It is a most valuable property right; one to be proud of and to be zealously guarded and protected. It singles out a person as being an honorable citizen in the society of people.

The foregoing considerations governing license revocation weigh considerably less heavily in application dispute proceedings.

The law recognizes a valuable property right in an existing license, but not in an application for license.[7] Another distinction is the time requirement governing applications for license. Under Florida Statutes section 120.60(2), an application must be granted or denied within 90 days, a time frame not applicable to revocation proceedings. In view of this time frame, the additional proof requirements for denial of licensure, now imposed by the majority, may very well result in licenses being granted which normally would not be granted, and licenses being obtained by default. *See, e.g., Naples Community Hospital v. H.R.S.*, 463 So. 2d 375 (Fla. 1st DCA 1985); *and also, State, DOT v. Calusa Trace Development, Corp.*, 571 So. 2d 543 (Fla. 2d DCA 1990).

---

[1]Both appellants were required by section 517.12, Florida Statutes (1989), to register with the Department before engaging in the securities business in this state. This registration process is closely akin to, if not in fact, a licensure proceeding, because one is precluded from engaging in certain business activities unless validly registered by the state to do so.

[2]Section 517.161, Florida Statutes (1989), in pertinent part:

> Revocation, denial, or suspension of registration of dealer, investment adviser, associated person, or branch office.—
>
> (1) Registration under s. 517.12 may be denied or any registration granted may be revoked, restricted, or suspended by the department if the department determines that such applicant or registrant:
>
> (a) Has violated any provision of this chapter or any rule or order made under this chapter.
>
> ....
>
> (c) Has been guilty of a fraudulent act in connection with any sale of securities, has been or is engaged or is about to engage in making fictitious or pretended sales or purchases of any such securities, or has been or is engaged or is about to engage in any practice or sale of securities which is fraudulent or in violation of the law;
>
> (d) Has made a misrepresentation or false statement to, or concealed any essential or material fact from any person in the sale of a security to such person;
>
> ....
>
> (h) Has demonstrated his unworthiness to transact the business of dealer, investment adviser, or associated person;
>
> ....
>
> (l) Is of bad business repute.
>
> ....
>
> (4) It shall be sufficient cause for denial of an application or revocation of registration, in the case of a partnership, corporation, or unincorporated association, if any member of the partnership or any officer, director, or ultimate equitable owner .... has been guilty of an act or omission which would be cause for denying or revoking the registration of an individual dealer, investment adviser, or associated person.

[3]Section 517.12(1), Florida Statutes (1989), provides in pertinent part:

> No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons of this state from offices outside this state ... unless the person has been registered with the department pursuant to the provisions of this section.

Section 517.07 (1989), Florida Statutes, provides in pertinent part:

> Registration of securities.—No securities except of a class exempt ... shall be sold or offered for sale within this state unless such securities have been registered, as hereinafter defined, and unless prior to each sale the purchaser is furnished with a prospectus meeting the requirements of rules adopted by the department.

Section 517.301 (1989), Florida Statutes, provides in pertinent part:

> 517.301 Fraudulent transactions; falsification or concealment of facts.—
>
> (1) It is unlawful and a violation of the provisions of this chapter for a person:
>
> (a) In connection with the offer, sale, or purchase of any investment or security, ... directly or indirectly:
>
> ....
>
> 2. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading....
>
> ....
>
> (c) In any matter within the jurisdiction of the department, to knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.

[4]Section 517.221, Florida Statutes (1989), provides in pertinent part:

> (1) The department may issue and serve upon a person a cease and desist order whenever the department has reason to believe that such person is violating, has violated, or is about to violate any provision of this chapter, any rule or order promulgated by the department, or any written agreement entered into with the department.
>
> ....
>
> (3) The department may impose and collect an administrative fine against any person found to have violated any provision of this chapter, any rule or order promulgated by the department, or any written agreement entered into with the department in an amount not to exceed $5,000 for each such violation. All fines collected hereunder shall be deposited as received in the Anti-Fraud Trust Fund.

[5]Section 517.12(11), Florida Statutes (1989), provides in pertinent part:
If the department finds that the applicant is of good repute and character and has complied with the provisions of this chapter and the rules made pursuant hereto, it shall register the applicant.

[6]Adherence to the preponderance of the evidence standard applied in federal administrative law cases for revocation of a license to engage in a particular occupation is inappropriate under Florida law. *See McDonald*, 582 So. 2d 660, 674-75 (Fla. 1st DCA 1991) (Zehmer, J., concurring).

[7]*Reid v. Florida Real Estate Commission*, 188 So. 2d 846 (Fla. 2d DCA 1966); *Delk v. D.P.R.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

* * *

Criminal law—Discovery—Defendant's failure to disclose witness—Trial court did not commit reversible error in excluding defense witness without conducting sufficient inquiry where proffer of witness's testimony was made and proffer established that testimony was tangential and cumulative—Question certified: Where the court's inquiry into the circumstances of a defense discovery violation fails to address the effect, if any, the violation has on the state's ability to prepare for trial, but a proffer is made of the evidence excluded on account of the violation, can the proffer be used by the reviewing court to determine that the deficiency in the Richardson hearing conducted was harmless error?

WILLIAM JOSEPH O'ROURKE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-1073. Opinion filed November 18, 1994.

Appeal from the Circuit Court for St. Johns County, Richard O. Watson, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Mrya J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) The issue of substance raised in this appeal concerns an alleged *Richardson*[1] violation.

William Joseph O'Rourke was convicted of the attempted first degree murder and the attempted kidnapping of his estranged wife. On July 6, 1992, O'Rourke attempted to drive his wife to his home to have sex with her. In her efforts to resist, the wife grabbed the steering wheel of O'Rourke's van and caused a wreck. Shortly after she exited the van, O'Rourke came up behind her with a knife and slit her throat. When O'Rourke was apprehended at his residence the next day, according to the arresting officer, he repeatedly stated that he hoped "she [presumably his wife] died so that he would get the electric chair." Another officer testified that later, at the station, O'Rourke denied having slit his wife's throat but admitted that she wrecked his van and that he had intended to have sex with her, regardless of her consent, because she was his wife.

In *Brumley v. State*, 500 So. 2d 233 (Fla. 4th DCA 1986), *rev. denied*, 508 So. 2d 15 (Fla. 1987), the following question was certified to the Florida Supreme Court as one of great public importance:

> IS A NEW TRIAL REQUIRED WHEN THE TRIAL COURT FAILS TO CONDUCT A *RICHARDSON* INQUIRY WHERE, IN THE OPINION OF THE REVIEWING COURT, EXCLUSION OF DEFENSE EVIDENCE BECAUSE OF A DISCOVERY VIOLATION IS HARMLESS ERROR BEYOND A REASONABLE DOUBT?

The fourth district granted a new trial and the supreme court denied review. *State v. Brumley,* 508 So. 2d 15 (Fla. 1987). But later, in *Brazell v. State*, 570 So. 2d 919 (Fla. 1990), the supreme court noted:

> The same requirements are applicable to a discovery violation by the defendant. *Smith v. State*, 372 So. 2d 86 (Fla. 1979). The failure to hold a *Richardson* hearing is per se reversible error. *Smith v. State*, 500 So. 2d 125 (Fla. 1986).

In the instant case, during trial, the state informed the court of the need for time to depose some of the defendant's witnesses. Defense counsel responded by informing the state and the court of a previously undisclosed witness that he wanted to call to replace an out of state witness that had become unavailable. The following dialogue then took place between defense counsel and the trial court:

> THE COURT: Well, this witness that you added today won't be permitted to testify. You've known about this witness for how long?
>
> MR. BOYER: I've known about the existence of this witness when my client brought him to my attention after we were told that—
>
> THE COURT: Give me a time period. How long have you known about this witness?
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> MR. BOYER: I've known that there was a landlord for at least—at least a month, I've known there was a landlord. However, Mr. O'Rourke gave me the gentleman's name and address after jury selection, Your Honor, and after I informed—
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> THE COURT: When did you tell [the prosecutor] about it?
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> MR. BOYER: Just now, Your Honor.
>
> THE COURT: Well, you won't be permitted to call that witness.
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> MR. BOYER: Your Honor, I would ask that we have a *Richardson* hearing on that issue to determine—
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> THE COURT: You just had it.
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> MR. BOYER: I would request, Your Honor, that we be given an opportunity to voir dire the testimony because, as you are aware, there are three factors that should be considered and I would ask that I be given an opportunity to make a record, Your Honor.
>
> THE COURT: You can make a record, go right ahead.

Later in the proceedings the trial court allowed defense counsel to proffer the testimony of the undisclosed witness, the landlord of the trailer park where O'Rourke lived. The landlord, defense counsel proffered, would have testified that it was the landlord's belief that O'Rourke and his wife, contrary to the wife's statement, were still living together on the date of the attempted murder. The landlord also would have testified that in the several years that the couple had lived at the park he had had no complaints of any violence at the residence. The court found the evidence as to the lack of prior violence at the residence to be irrelevant. The court found that the rest of the evidence tending to show that the husband and wife were on friendly terms would be cumulative. The trial court re-affirmed his earlier decision to disallow the landlord's testimony and defense counsel then put on his case. Witnesses for the defense included a friend of O'Rourke's who testified that while he had seen O'Rourke and his wife in public together he believed they were separated at the time. The next witness, the fiancée of the prior witness, testified that she observed O'Rourke and his wife together at various bars and once at O'Rourke's trailer. This witness testified that she had "no idea they were not living together" and further stated, "[t]hey were still together. I mean, I seen them together." A third witness testified that he observed O'Rourke's wife's pickup truck at O'Rourke's trailer one time between April of 1992 and July of 1992. As the trial court concluded, the landlord's testimony indeed would have been cumulative and tangential at best. The wife herself testified that while she had moved out of the trailer in April, she had been back to the trailer on more than one occasion since then and that she had also met with her husband on occasion at various bars. The landlord's proffered testimony that he believed the wife still lived at the trailer would have added little to O'Rourke's defense, particularly in light of the overwhelming evidence against him. Had no proffer of the landlord's testimony been made, and had no inquiry been made into the nature and circumstances of the defense's discovery violation, a new trial would clearly be required. *Smith v. State*, 500 So. 2d 125 (Fla. 1986); *Brazell v. State*, 570 So. 2d 919, 921 (Fla. 1990). The inquiry that was made by the trial court was clearly insufficient under *Richardson*. As in *Plummer v. State*, 454 So. 2d 61, 62-63 (Fla. 1st DCA 1984), rev. denied, 461 So. 2d 116 (Fla. 1985), "[t]he court made no attempt to ascertain the extent to which the state would be prejudiced, and the court further 'made no search for a manner in which to rectify any possible prejudice short of the exclusion.' " Nonetheless, the question remains whether the inquiry and proffer that were made were sufficient to remove this case from the per se reversible rule of *Smith*. In *Brazell v. State,* the supreme court addressed the following certified question:

> IS THE DEFENDANT WHO FAILS TO PROFFER OR OTHERWISE ESTABLISH ON THE RECORD THE NATURE OF THE TESTIMONY OF A WITNESS, WHOSE IDENTITY HAD NOT PROPERLY BEEN DISCLOSED TO THE STATE, FORECLOSED FROM ASSERTING THE EXCLUSION OF SUCH WITNESS TESTIMONY AS ERROR ON APPEAL?

In answering the question in the negative the supreme court noted that the Fourth District in *Nava v. State*, 450 So. 2d 606 (Fla. 4th DCA 1984), *appeal dis'm.*, 508 So. 2d 14 (Fla. 1987) "had sought to harmonize the requirements of *Richardson* with the longstanding rule that requires the party against whom the exclusion has been made to make a proffer of the proposed testimony so that the trial and the appellate courts may be able to evaluate its weight, relevancy and competency in determining the effect of the exclusion." *Brazell*, 570 So. 2d at 921. The *Nava* court concluded that a defendant, in order to preserve his *Richardson* objection, must proffer or otherwise establish on the record the nature of the excluded testimony. The supreme court in *Brazell* disagreed, concluding:

> The thrust of our decisions is that when a party wishes to call a

witness whose name has not been furnished to the other side, the [illegible] judge has no alternative but to make the inquiries required [illegible]*ichardson*. In view of the prophylactic purpose intended to be served by this rule, we believe that it represents an exception to the general principle that one cannot complain of the exclusion of testimony in the absence of a proffer.

Brazell at 921. Clearly, under *Brazell*, a new trial would be required in the instant case had there been no proffer of the testimony of the excluded witness. In the instant case, however, unlike *Brazell* a proffer was made and the proffer established that the offered testimony was tangential and cumulative. Given that a proffer of the testimony was made and that an inquiry was also made into the willfulness and materiality of the discovery violation, we conclude that this case does not fall under the per se reversible rule imposed for the failure to conduct a *Richardson* inquiry. *Smith v. State*, 500 So. 2d 125 (Fla. 1986). Because we further conclude there is no reasonable possibility that the testimony of the landlord would have altered the jury's conclusions as to O'Rourke's guilt, we affirm his convictions. Nonetheless, we do certify the following question to the supreme court:

WHERE THE COURT'S INQUIRY INTO THE CIRCUMSTANCES OF A DEFENSE DISCOVERY VIOLATION FAILS TO ADDRESS THE EFFECT, IF ANY, THE VIOLATION HAS ON THE STATE'S ABILITY TO PREPARE FOR TRIAL, BUT A PROFFER IS MADE OF THE EVIDENCE EXCLUDED ON ACCOUNT OF THE VIOLATION, CAN THE PROFFER BE USED BY THE REVIEWING COURT TO DETERMINE THAT THE DEFICIENCY IN THE RICHARDSON HEARING CONDUCTED WAS HARMLESS ERROR?

CONVICTIONS AFFIRMED; QUESTION CERTIFIED. (HARRIS, C.J., concurs. DIAMANTIS, J., concurs specially in [illegible], with opinion.)

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

(DIAMANTIS, J., concurring in result.) I concur in the majority opinion's result because an independent ground exists to affirm the trial court's ruling excluding the proffered testimony of O'Rourke's landlord. In excluding the landlord's testimony, the trial court ruled that the proffered testimony was tangential and cumulative. Thus, the trial court did not abuse its discretion in excluding this testimony. *Hall v. State*, 614 So. 2d 473, 476-77 (Fla.), *cert. denied*, __ U.S. __, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993). Because an independent basis exists to sustain the trial court's evidentiary ruling, I find it unnecessary to address the *Richardson* issue.[1] *Cherry v. State*, 544 So. 2d 184, 186 (Fla. 1989), *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1835, 108 L. Ed. 2d 963 (1990).

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

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Condominiums—Torts—Slander of title—Where developer had successfully challenged condominium association's action in passing of amendment to declaration of condominium which prevented sale of condominium to a person unless an occupant was 55 years of age or older, developer was not entitled to damages and attorney's fees for slander of title—There was no slander of title where defendant association acted in good faith in passing the amendment, where no false or malicious statement was made, and where plaintiff was unable to show that it was [d]amaged by amendment

[RESI]DENTIAL COMMUNITIES OF AMERICA, et al., Appellant, v. [ESC]ONDIDO COMMUNITY ASSOCIATION, et al., Appellee. 5th District. Case No. 93-459. Opinion filed November 18, 1994. Appeal from the Circuit Court for Seminole County, C. Vernon Mize, Jr., Judge. Counsel: Albert R. Cook and John C. Winfree of Robison, Owen & Cook, P.A., Casselberry, for Appellant. Janet L. Brown of Boehm, Brown, Rigdon, Seacrest & Fischer, P.A., Orlando, for Appellee.

(THOMPSON, J.) Residential Communities of America ("RCA") appeals the entry of an order, in favor of Escondido Community Association ("ECA"), denying its request for damages and attorney's fees. We affirm.

This appearance is the second for this case before this court. Previously, RCA appealed ECA's passing and recording of the fifth amendment to the declaration of condominium which prevented the sale of any condominium to a person unless an occupant of the condominium was 55 years of age or older. This amendment was prospective only but it would have applied to the future development of two undeveloped parcels owned by RCA. This amendment was passed without the approval of the developer, RCA. We reversed, ruling that RCA's approval was necessary. *Residential Communities of America v. Escondido Community Ass'n*, 603 So. 2d 122 (Fla. 5th DCA 1992). Once the case was returned to the lower court, ECA passed and recorded the seventh amendment to the declaration of condominium to eliminate the fifth amendment. RCA then sought attorney's fees and damages in the lower court, asserting that the fifth amendment of ECA amounted to a slander of title on the property. *Glusman v. Lieberman*, 285 So. 2d 29 (Fla. 4th DCA 1973) (attorney's fees are recoverable as expense of litigation to remove the cloud cast upon a title in a slander of title action). In order to prevail, however, RCA had to prove there was a slander of title by ECA.

To establish the elements of slander of title, the plaintiff must prove that the defendant has communicated to a third party a false statement disparaging title which has caused the plaintiff actual damage. *Gates v. Utsey*, 177 So. 2d 486 (Fla. 1st DCA 1965). If a defendant establishes a defense of good faith, or other privilege, however, a plaintiff must prove actual malice. *Allington Towers Condominium North, Inc. v. Allington Towers North, Inc.*, 415 So. 2d 118, 119 (Fla. 4th DCA 1982). In the instant case, ECA had a good faith belief, albeit mistaken, that they could enact the fifth amendment without consulting RCA. Moreover, the fifth amendment was neither a false nor malicious statement; it was simply an amendment that did not apply to the RCA parcels, as this court determined. *Residential*, 603 So. 2d at 124-25. Therefore, there was no slander of title. Even if there was a slander of title, RCA was not able to prove that it was damaged by the fifth amendment. RCA is not entitled to attorney's fees. *Cf. Atkinson v. Fundaro*, 400 So. 2d 1324 (Fla. 4th DCA 1981) (attorney's fees can be recovered in a slander of title action even if there are no damages, but the moving party *must* prove there was a slander of title).

AFFIRMED. (GRIFFIN, J., concurs and concurs specially, with opinion. HARRIS, C.J., dissents, with opinion.)

(GRIFFIN, J., concurring and concurring specially.) Slander of title is a species of injurious falsehood. I agree with Judge Thompson that the enactment of an amendment to the declaration of condominium in an effort to meet federal age and occupancy requirements did not constitute slander of title. Even if the concept of "injurious falsehood" could be stretched far enough to include the amendment, ECA clearly fits within the broad range of parties privileged to act or speak concerning the property. See William L. Prosser, *Handbook of The Law of Torts*, § 128 at 924-25 (4th ed. 1971). Given ECA's status, RCA would have to establish malice and, as Judge Thompson correctly notes, there was never any evidence of malice in this case.

(HARRIS, C. J., dissenting.) As the majority opinion indicates, even though Residential Communities of America (RCA) had turned over the management of the condominium project to Escondido Community Association (ECA), it continued to own parcels of property within the condominium boundaries subject to future development. For that reason, the condominium Declaration of Covenants and Restrictions provided that no amendment would be effective against RCA unless it joined in the amendment:

Notwithstanding the foregoing [the established procedure for