067

IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH O'ROURKE,

Petitioner,

v. CASE NO. 84,934

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State accepts O'Rourke's Statement of Facts with the following additions:

O'Rourke made numerous threats against his wife, Deborah Callahan, before the night of the attempted murder. He and Callahan were arguing over possession of the trailer in which they had lived. O'Rourke told a mutual friend that if his wife took the trailer he would kill her. (T. 27). When the friend told O'Rourke the trailer wasn't worth killing someone over, O'Rourke stated that he was an old man, dying of asbestos poisoning, and he did not care if the state took care of him for the rest of the time he had left. (T. 30). O'Rourke also told another friend that if he couldn't have his wife no one would. (T. 39).

The paramedic who responded to the crime scene testified that O'Rourke's wife had a clean, one-half to three-quarters of an inch-deep laceration from ear to ear. (T. 58-59; 62). The paramedic had responded to 500-600 traffic accidents in his ten years experience, and he had never seen that type of injury from such an accident. (T. 54, 59). The doctor who examined Callahan at the hospital testified that the smooth, straight line of the laceration to her throat was consistent with the cut of a box cutter and was not consistent with an injury from a car accident. (T. 193-94). Several knives and a box cutter were found in O'Rourke's van, although there was no blood on these items. (T. 113, 137). Callahan testified that O'Rourke had the knife in his hand as he walked away after cutting her. (T. 224).

Callahan also had bruising around her eyes and dry blood around her nose and mouth. (T. 58). Callahan testified that O'Rourke had punched her in the face when she tried to get away from him in the van. (T. 221).

The evidence technician who examined the crime scene testified that the windshield from the van had become wrapped around a tree. (T. 81). She examined the windshield to determine if anyone had impacted it and found no hair, skin, or blood on the glass, nor any blood in that area. (T. 133-34).

The excluded witness, the trailer park landlord, would have testified that he believed O'Rourke and his wife still lived together during their separation and that he had heard no complaints of violence while they lived together. (T. 408). The trial court found that this testimony would be cumulative and irrelevant. (T. 408-10).

Several defense witnesses testified that O'Rourke and Callahan were often seen together during their separation, both in public and at their trailer. (T. 433-34; 442-43; 445-47; 459; 462-63). Callahan herself testified, in fact, that she still saw O'Rourke during their separation, in public and at their trailer, and she admitted that she willingly met O'Rourke the evening of the crime. (T. 263-67; 271-73). Callahan never testified that she had complained to her landlord about O'Rourke. O'Rourke's next door neighbor testified that he had never heard O'Rourke make any threats against his wife. (T. 451, 458).

SUMMARY OF ARGUMENT

This Court has recently concluded that a harmless error analysis is appropriate where the defendant contends that the trial court erred in failing to conduct an adequate Richardson hearing. In the decision below, the district court conducted a harmless error analysis and concluded that any error in the trial court's failure to inquire into prejudice did not necessitate a new trial, since the excluded testimony of the undisclosed defense witness was cumulative and irrelevant. The decision of the district court should be approved and the certified question answered in the affirmative.

ARGUMENT

THE TRIAL COURT'S EXCLUSION OF THE CUMULATIVE, IRRELEVANT TESTIMONY OF THE TRAILER PARK LANDLORD WAS, AT WORST, HARMLESS ERROR.

Section 924.33, Florida Statutes (1993), provides that "[n]o judgment shall be reversed unless the appellate court is of the opinion ... that error was committed that injuriously affected the substantial rights of the appellant." This provision reflects the legislature's intent that Florida's appellate courts should not "apply a standard of review which requires that trials be free of harmless errors." State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986).

Deciding whether to apply a harmless error rule to certain errors, as opposed to a per se reversible error rule, involves an analysis which attempts to provide to the accused a fair trial while at the same time "not make a mockery of criminal prosecutions by elevating form over substance." Id. at 1135. A per se rule is only appropriate for those errors which always vitiate the right to a fair trial and are therefore always harmful. Id.

This Court developed the per se reversible error rule in cases involving the failure to hold a Richardson[1] hearing for a different reason. Such a rule was "based on our assumption that 'no appellate court can be certain that errors of this type are harmless.'" State v. Schopp, 20 Fla. L. Wkly. S136, S137-38 (Fla. March 23, 1995) (quoting Cumbie v. State, 345 So. 2d 1061,

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

1062 (Fla. 1977)). This Court recently reconsidered the wisdom of such a rule, however, and concluded that a per se reversal rule is not warranted in this context, and that continued application of such a rule would have the effect of elevating form over substance. Schopp, 20 Fla. L. Wkly. at S138. Accordingly, this Court held that the failure to conduct an adequate Richardson hearing is, like virtually all other trial error, subject to a harmless error analysis. Id.

While this Court's ruling in Schopp arose in the context of a discovery violation by the State, its rejection of a per se reversible error rule is equally applicable to the situation in the present case, wherein the defendant committed the discovery violation.[2] However, the actual harmless error analysis itself must be somewhat different in the two situations.

In the case of a discovery violation by the State, the purpose of the Richardson inquiry is to ferret out procedural prejudice to the defense from the State's nondisclosure. Id. at S137. Accordingly, in conducting a harmless error analysis of the trial court's failure to hold such an inquiry, the appellate

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[2] In fact, the inequity of the per se reversal rule is probably best illustrated in a case where the defendant commits the discovery violation. For example, suppose Defendant decides to call Witness, who will testify that he knows absolutely nothing about the case. The trial court discovers that Defendant had failed to disclose Witness to the State. Frustrated with Defendant's repeated violations of the discovery rules, the trial court decides, without holding a Richardson hearing, that Witness will not be allowed to testify. Under the old rule, on appeal the trial court's failure to conduct a Richardson hearing would have been deemed to be per se reversible error, and Defendant would receive a new trial -- even though Witness' testimony would have added absolutely nothing to his defense and his own misconduct was the catalyst for the error.

court must determine whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense -- that is, whether the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Id. at S138.

In the case of a discovery violation by the defendant, on the other hand, the purpose of the Richardson inquiry is to ferret out procedural prejudice to the State. By the time the case has reached the point of an appeal, however, the issue of prejudice has essentially become moot. The defendant surely does not have the right to contend that a new trial is warranted because the State was harmed in its trial preparation by the defendant's nondisclosure.[3] The defendant has absolutely no interest in protecting the State's right to fully prepare for trial, and, accordingly, has no interest in ensuring that the Richardson hearing was adequate to protect that right. Rather, the only interest the defendant could possibly have is in ensuring that the remedy for his rule violation is fair to him.

Accordingly, the real interest the defendant has in the adequacy of a Richardson hearing rests not in the hearing itself, but in the result of the hearing -- a reasoned sanction for the discovery violation. This principle is well illustrated by cases where convictions have been reversed on the basis of defense discovery violations. Such rulings have not been based simply on the inadequacy of the Richardson hearing, but rather on the

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[3] If this was in fact the issue on appeal the State will obviously be willing to waive its prejudice and allow the verdict to stand.

impropriety of the sanction imposed by the trial court. See, e.g., L.W. v. State, 618 So. 2d 349 (Fla. 2d DCA 1993); Lee v. State, 534 So. 2d 1226, 1227-28 (Fla. 1st DCA 1988); Wilkerson v. State, 461 So. 2d 1376 (Fla. 1st DCA 1985). But see Brumley v. State, 500 So. 2d 233 (Fla. 4th DCA 1986) (reversing conviction solely on basis of inadequate Richardson hearing, but noting that exclusion of evidence was harmless and certifying question to this Court), rev. denied, 508 So. 2d 15 (Fla. 1987).

Because the defendant's interest in an adequate Richardson inquiry where the State is the victim of the rule violation rests solely on his interest in a reasoned sanction, it is the sanction itself which must be the subject of a harmless error analysis. Accordingly, the inquiry in such cases should follow the basic harmless error test -- whether the error complained of (i.e. -- the exclusion of the witness' testimony) contributed to the jury's verdict. See DiGuilio, 491 So. 2d at 1135. The answer to this question in the present case is obviously "no".

In finding the exclusion of the landlord's testimony to be harmless, the district court stated as follows:

> 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 fiancee 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.

O'Rourke v. State, 645 So. 2d 569, 570-71 (Fla. 5th DCA 1994).

The district court's analysis of this issue is correct. The evidence against O'Rourke was overwhelming, and the testimony of an additional witness that O'Rourke and his wife were not totally separated at the time of the attempted murder, a fact which had virtually nothing to do with the crime and which was essentially admitted by the wife, would not have affected the jury's verdict. Any error in excluding this testimony was harmless beyond a reasonable doubt.

The State would further note that, since the focus of the harmless error analysis must be substantive in the case of a defense discovery violation, this Court may want to reevaluate the applicability of Richardson to such cases. Because of the vastly different ramifications of a defense discovery violation versus a State discovery violation, it is questionable whether the inquiry into a discovery violation by the defense should be termed a "Richardson hearing" at all, and it is certainly arguable that such an error should never be subject to review in this context.

The original purpose of requiring a Richardson hearing was to protect the right of the defendant to prepare for trial with full disclosure of the evidence against him and to ensure that when this right is violated the effect of such a violation is fully explored and remedied. Richardson, 246 So. 2d at 774-75. The failure to hold such a hearing will in many cases be reversible error, although in some cases the appellate court will be able to see that there was in fact no prejudice to the defendant and the failure to hold such a hearing was therefore harmless. Schopp, 20 Fla. L. Wkly. at S138.

In the case of a discovery violation committed by the defendant, on the other hand, the failure to explore the procedural prejudice to the State and to adequately cure that prejudice, to the extent possible, will never harm the defendant -- it can only work to his benefit. Accordingly, the actual failure to hold the Richardson hearing itself will always be, at worst, harmless error. It is only when a sanction is

imposed that the defendant is in any way harmed -- and the harm is substantive (i.e. -- the exclusion of an important witness) rather than procedural.

Of course, a hearing should still be held when the defendant commits a discovery violation, in order to ensure that the State is not procedurally prejudiced. However, the failure to hold such a hearing (i.e. -- to protect the rights of the State), should not be available as a point of error to be raised by the defendant on appeal. Accordingly, the State submits that confusion can best be avoided by expressly recognizing the different postures of the two situations and by refusing to continue to categorize both situations as requiring "Richardson hearings," the inadequacy of which may be the subject of appeal. Rather, the only point which should be the subject of a defendant's appeal is whether, when a sanction is imposed for his discovery violation, that sanction was erroneous and harmful.

Moreover, because the prejudice inquiry in cases of a defense discovery violation is substantive, rather than procedural, and because this Court has recently recognized, in Schopp, that the prophylactic purpose of the Richardson rule had been elevated to such a degree that form was more important than substance, the State submits that this Court should revisit its holding in Brazell v. State, 570 So. 2d 919 (Fla. 1990). There, this Court held that a Richardson situation presents an exception to the general rule that a defendant cannot complain about the exclusion of evidence without having proffered that evidence. Id. at 921.

Placing on the trial court, rather than the defendant, the burden of establishing a record by holding a Richardson hearing makes sense when the defendant's rights have been violated and need protection. However, the same justification is not present when the purpose of the hearing is to protect the State's rights.

The defendant should bear the burden of preserving the record sufficiently to allow for complete appellate review of the trial court's alleged errors. An appellate court's evaluation of the remedy for a defense discovery violation should be treated like any other alleged trial error. Where the remedy is exclusion of evidence, the defendant should be required to proffer the evidence in order to preserve the issue for appeal, just as he is required to do in any other context. The defendant's burden to preserve issues at trial should not be lightened because he has violated the rules of discovery.[4]

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[4] Moreover, as pointed out by Judge Anstead:

> [I]t would appear logical, where it is the defendant who has committed the discovery violation, to place some burden upon him, a burden similar to that placed upon the state under Richardson, to demonstrate not only a lack of substantial procedural prejudice to the state, but also of demonstrating the prejudice he would suffer by exclusion of the witness who would allegedly testify in his favor. Of course, he can hardly demonstrate such prejudice if he fails to disclose on the record the nature of the evidence to be presented by the witness.

Nava v. State, 450 So. 2d 606, 609 (Fla. 4th DCA 1984), appeal dismissed, 508 So. 2d 14 (Fla. 1987), disapproved, Brazell v. State, 570 So. 2d 919, 921 (Fla. 1990).

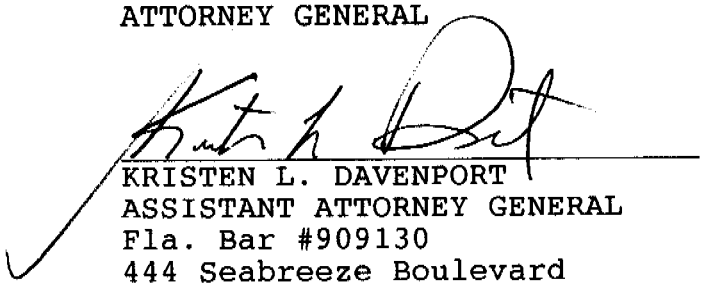
At any rate, the record in the present case is easily sufficient to allow the appellate court to evaluate the effect of the trial court's alleged error, and the district court properly found this error to be harmless. The decision of the district court should be approved by this Court, and the certified question asking whether a harmless error analysis is appropriate should be answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court answer the certified question in the affirmative and approve the decision of the district court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief has been furnished to Susan A. Fagan, Assistant Public Defender, by delivery to the Public Defender's basket at the Fifth District Court of Appeal, this 6th day of April, 1995.

Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH O'ROURKE,

Petitioner,

v. CASE NO. 84,934

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1994

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

WILLIAM JOSEPH O'ROURKE,

Appellant,

v. CASE NO. 93-1073

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed November 18, 1994

Appeal from the Circuit Court
for St. Johns County,
Richard O. Watson, Judge.

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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

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

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?

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 [the prosecutor] 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.

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 fiancee 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 trial judge has no alternative but to make the inquiries required by *Richardson*. 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 result, with opinion.

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).