IN THE SUPREME COURT OF FLORIDA

WILLIAM J. O'ROURKE,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 84,934

PETITIONER'S REPLY BRIEF ON MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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ARGUMENT

IN REPLY TO RESPONDENT'S ARGUMENT THAT THE TRIAL COURT'S EXCLUSION OF PETITIONER'S WITNESS FROM TESTIFYING, WITHOUT HOLDING AN ADEQUATE RICHARDSON HEARING, WAS HARMLESS ERROR AND IN SUPPORT OF THE PROPOSITION THAT THE DISTRICT COURT IMPROPERLY DETERMINED THE RICHARDSON VIOLATION BY THE TRIAL COURT TO CONSTITUTE HARMLESS ERROR.

The cornerstone of Respondent's argument in this case is that, based on the trial record below, the Fifth District Court of Appeal correctly applied a "harmless error analysis" after finding that the trial court failed to conduct an adequate Richardson[1] hearing. (Resp. Brief pgs. 4-6) Citing to this Court's decision in State v. Schopp, 20 Fla. L. Weekly S138 (Fla March 23, 1995), Respondent initially argues that the instant case presents a similar harmless error example irrespective of the trial court's failure to fully address a discovery violation. (Resp. Brief pgs 7-8) What is not addressed by Respondent in its brief is the most critical fact concerning the discovery violation at issue in the case sub judice, i.e., that the State voiced no objection on the basis of being "surprised" by the Petitioner calling Mr. Vono as a defense witness. (T 233-235) Consequently, not only did the trial court fail to conduct an adequate Richardson inquiry, but it also improperly proceeded to impose the most drastic of sanctions, i.e., the exclusion of Joseph Vono as a defense witness, in spite of the prosecutor's apparent lack of concern that the state would in any way be

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

prejudiced by the addition of Mr. Vono as a defense witness.

Such an abuse of discretion by the trial court is even more egregious when viewed in light of the prosecutor affirmatively stating to the trial court that he merely wished to speak with Petitioner's witnesses before the defense presented its case. (T 233-235) This remedy fashioned by the trial court easily could have included Mr. Vono. (T 233-235)

As pointed out by the Fourth District Court of Appeal in Dorry v. State, 389 So.2d 1184 (Fla. 4th DCA 1980):

> ... Most importantly the trial court made no determination of prejudice occasioned [to the state] by the discovery violation. Absent that determination the record provides no basis for the sanction imposed; namely, exclusion of the [defense] witness' testimony. The trial court's sole consideration was the fact that the law firm representing [the defendant] knew of the witness two months prior to trial. It was incumbent upon the trial court to then determine if the discovery violation hindered or prevented [the state's] proper preparation for trial and, only if a finding of prejudice was made, fix a just sanction authorize by Florida Rule of Criminal Procedure 3.220(j)... Id. at 1186. [emphasis added] [citations omitted]

Consequently, the prejudice to the defendant in Schopp, supra, as the recipient of the discovery violation, and found by this Court to be "harmless", is not the same type of prejudice suffered by the Petitioner in the instant case. In fact, even Respondent acknowledges that the prejudice caused to Petitioner by the trial court's exclusion of Mr. Vono as a defense witness is different than that affecting the defendant in Schopp who was faced with a surprise state witness. (Resp. Brief pgs. 5-6) Respondent

further extrapolates that, in spite of the different "postures" of prejudice involved, the harmless error analysis applied by the District Court in the case sub judice is nevertheless appropriate because there were "other" defense witnesses called to testify concerning their own individual accounts of seeing the Petitioner and Deborah Callahan together prior to the incident. (Resp. Brief pgs. 7-8) This conclusion, however, is not borne out by the trial record.

Specifically, Deborah Callahan testified that she had not lived with Petitioner at the trailer park since April of 1992. (T 204) Ms. Callahan further testified that because she was afraid to be alone with the Petitioner after they separated, she would only meet with him if there were other people around. (T 212) Deborah did admit, however, returning to the trailer on an occasion when the Petitioner was present in order to pick up some paperwork concerning their divorce, but she additionally indicated she stayed in her vehicle when she encountered the Petitioner. (T 212-213) More importantly, Deborah directly indicated during cross-examination that the landlord, Mr. Vono, had been present when she went to the trailer and told the Petitioner to go into the trailer to get the paperwork she needed from a folder. (T 271-272) Thus, there simply was no additional defense witness, other than Mr. Vono, who could have testified for the defense concerning what happened during this particular visit by Deborah to the Petitioner's trailer as well as what Mr. Vono personally observed at the trailer park during the period

Deborah testified she was separated from the Petitioner. Moreover, Respondent recognizes specifically in its brief that the state's case against petitioner was intimately connected to the proposition that the Petitioner had made "numerous threats" against Deborah prior to the incident. (Resp. Brief pg. 1)

Clearly then, Mr. Vono's testimony was both relevant and not cumulative considering it was uniquely related to attacking Deborah's credibility, irrespective of other defense witnesses' testifying to seeing Deborah and the Petitioner together in public on friendly terms. Additionally, under the interpretation of cumulative evidence amounting to harmless error as applied by the District Court and Respondent, a trial court could exclude any newly-listed defense witnesses who would offer critical testimony directly challenging the credibility of a state witness solely on the basis that another defense witness was also being used by the defense to attack the credibility of athis same state witness.

In Florida, there exists a plethora of case law holding that the sanction by a trial court of excluding a witness is an extreme remedy and should only be invoked under the most compelling and aggravating circumstances as a "last resort." Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985); Williams v. State, 264 So.2d 106 (Fla. 4th DCA 1972). Further, it is incumbent on the trial court to fully explore whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice caused to the surprised party. Obviously,

in the case at bar, there was no prejudice voiced by the state, although the trial court had ample opportunity to employ less drastic sanctions, such as allowing the prosecutor to interview or depose Mr. Vono prior to his testifying, in order to overcome any possible appearance of prejudice. As a result, it was an abuse of the trial court's discretion to exclude Mr. Vono from testifying. See also Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984); Fedd v. State, 461 So.2d 1384 (Fla. 1st DCA 1984); Picot v. State, 280 So.2d 693 (Fla. 4th DCA 1973); Johnson v. State, 461 So.2d 1385 (Fla. 1st DCA 1984) and Baker v. State, 522 So.2d 491 (Fla. 1st DCA 1988).

Turning again to this Court's recent decision in Schopp, supra, this Court reaffirmed the basic fundamental constitutional principle stated in State v. Diguilio, 491 So.2d 1129 (Fla. 1986), that a defendant must be afforded a fair trial free of harmful error. Accordingly, setting aside the waiver by the state of any prejudice to Mr. Vono testifying and the inadequate Richardson hearing conducted by the trial court concerning the inclusion of Mr. Vono as a defense witness, the District Court's determination that such procedural irregularities amounted to harmless error must likewise be held by this Court to be incorrect. This is because the trial court's exclusion of Mr. Vono as a defense witness obviously materially hindered the defense in challenging Deborah's credibility. Unlike the benign prejudice arising from the discovery violation in Schopp, supra, where the defense already possessed the police

report which formed the basis for the surprise witness' testimony, the trial court's neglect of Richardson's procedural safeguards in the instant case prevented the defense from calling one of the most logical and knowledgeable witnesses to challenge Deborah's version of the nature of her contacts with the Petitioner prior to the incident, i.e., Mr. Vono. Without Mr. Vono's testimony, the jury was only made aware through the other defense witnesses of isolated incidents of when Deborah and the Petitioner were seen together in public in the presence of other individuals or when Deborah's truck was seen parked at the Petitioner's trailer.

In sum, Petitioner was denied his basic guaranteed right to fully present his defense and to challenge Deborah's claim that she lived apart from the Petitioner prior to the incident due to her fear of being alone with Petitioner. As held by the appellate court in Baker, supra, the trial court's exclusion of relevant evidence attacking the credibility of the victim cannot be considered harmless since it may have created a reasonable doubt in the minds of the jurors. Id., 493.

Accordingly, the decision of the Fifth District Court of Appeal finding the deficiency in the Richardson hearing conducted by the trial court to be "harmless" as to its affecting the jury's determination of Petitioner's guilt should be disapproved by this Court and Petitioner granted a new trial. The certified question should also be answered in the negative.

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,

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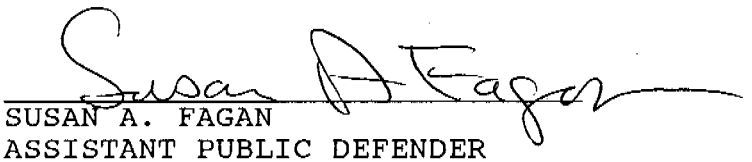
CERTIFICATE OF SERVICE

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 26th day of April, 1995.



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