IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,042
5TH DCA CASE NOS. 93-1832 and 93-1942

THE STATE OF FLORIDA,

Petitioner,

v.

KEVIN WALTER PENDER AND
CLARENCE PENDER

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT.

AMENDED

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In the instant cause, Respondents, Clarence and Kevin Walter Pender, father and uncle of the victim, were jointly tried for the Capital Sexual Battery of Clarence's daughter, Tara, who was approximately 10 years old at the time of her abuse.[1] They were tried before a jury of their peers and were found guilty as charged in the information.

Respondents appealed to the District Court of Appeal of Florida, Fifth District, which reversed, finding that the trial court committed per se reversible error when it refused to conduct a *Richardson* hearing, requested by Respondents' counsels, regarding an alleged failure by the State to produce a colposcopic photograph Respondents' trial counsels requested. However, the Fifth District concluded its opinion as follows: *"It is not subject to a harmless error analysis. Schopp v. State, 641 So. 2d 141 (Fla. 4th DCA 1994), rev. granted, No. 84,061 (Fla. Oct. 13, 1994)."* Slip Opinion, at 2-3.

Given the Fifth District's concluding sentence, the State respectfully requested that it Certify the Question posed in Schopp, which is now pending before this Honorable Court for ultimate determination. The State's motion was denied,

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[1] Petitioner, The State of Florida, was the Appellee in the District Court, and the prosecution in the trial court. Respondents were the Appellants in the District Court, and the Defendants in the trial court. The parties will be referred to as they stood in the trial court. All emphasis is supplied unless the contrary is indicated.

necessitating its notice to invoke this Honorable Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

This cause is most definitely suited to a harmless error review if this Honorable Court should determine to recede from Smith v. State, 500 So. 2d 125 (Fla. 1986). It should, therefore, be allowed to join Schopp v. State, supra, which is currently pending before it.

ARGUMENT

THIS CAUSE SHOULD BE ALLOWED TO JOIN SCHOPP V. STATE, CASE NO. 84,061, AS IT CONCERNS THE REVERSALS OF CAPITAL SEXUAL BATTERY CONVICTIONS OF A FATHER AND UNCLE OF THE FATHER'S DAUGHTER, WHERE SUCH WOULD NOT BE THE CASE IF IT WAS SUBJECT TO HARMLESS ERROR REVIEW.

This cause is most definitely suited to a harmless error review if this Honorable Court should determine to recede from Smith v. State, 500 So. 2d 125 (Fla. 1986). Error was harmless in view of the following facts.

Mr. Sterling's, cross-examination of Dr. Tokarski as to the victim's scar, which would have appeared in the colposcopic photograph, was cursory at best.[2] (T.454-460) Rather, Mr. Sterling focused upon the victim's contraction of chlamydia. (T.454-460) The very fact that the victim had chlamydia at her age is evidence of Defendants' guilt. Mr. Ross, on behalf of the father, asked absolutely nothing about the victim's scar during his cross-examination, and did not mention the photograph in his motion for new trial. (R1:94-95; T.460-463) All of Mr. Ross' cross-examination concerned the matter of chlamydia. (T.460-463)

Besides the apparent true insignificance of the photograph to the defense, the record demonstrates "invited error." First, the record demonstrates that the prosecutor did not know of the photograph until just prior to Dr. Tokarski's testifying. (T.448-454) If this photograph was so crucial to the defense,

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[2] In its opinion at page 2, the Fifth District mistakenly refered to Mr. Sterling as the father's counsel. The father's counsel was in fact Mr. Ross. Mr. Sterling represented the uncle, Kevin Walter.

why did it *wait until its cross-examination of Dr. Tokarski to allege a discovery violation in her failure to provide it with the colposcopic photograph?* Why did the defense fail to bring Dr. Tokarski's noncompliance with the alleged subpoena to the trial court's attention before trial commenced, so that it could be enforced?

Second, these questions should be viewed in the light of Mr. Sterling's experience in these types of cases as seen in his admission: *"I have consulted other doctors on this photograph --."* (T.449) Whether he was speaking about the particular photograph in Dr. Tokarski's possession, or about photographs in other sexual abuse cases, his comment exhibits knowledge that such photographs exist, and where they originate.

Think about it! A criminal trial attorney who knows from his experience, by his own admission, of the existence of colposcopic photographs, and has consulted with doctors about them before, waits until the examining doctor in this cause takes the stand to allege he has not been provided the photograph. Consider the outset of Mr. Sterling's cross-examination of Dr. Tokarski:

> THE COURT: Mr. Ross, cross-examination?
>
> MR. STERLING: *I am going to go first on this one.*
>
> MR. ROSS: I am going to defer to Mr. Sterling, your Honor.
>
> THE COURT: Go ahead, Mr. Sterling.

- - - -

CROSS EXAMINATION

BY MR. STERLING:

Q Doctor, how long have you been doing this?

A 13 years.

Q And you said you used a colposcope?

A Yes.

Q And a colposcope has the ability to take a photograph, is that correct?

A Yes.

Q Did you take a photograph in this case?

A Yes, sir.

Q You did?

A Yes.

Q And what did you do with that photograph?

A *I have it.*

Q Did you produce it to the State Attorney?

A *I didn't give it to him, no. We discussed it.*

Q You discussed it --

MR. STERLING: May we approach?

THE COURT: You may.

(T.447-448)

Why did Mr. Sterling want to go first? Why did his cross commence with the colposcopic photograph? The State respectfully submits it was because he knew from experience a photograph had

most likely been taken; he had not received it yet; and he could attempt to allege a discovery violation. Mr. Sterling was sandbagging. If in fact this photograph was so crucial to the defense, given Mr. Sterling's familiarity of its use, why did he not do as the prosecutor suggested and go through the Child Protection Team to get it? (T.448-451) This was a clear and simple "Gotcha" maneuver. State v. Belien, 379 So. 2d 446, 447 (Fla. 3d DCA 1980).

Another factor to be considered as to a harmless error review, concerns footnote 3 of the Fifth District's opinion. The State's analysis to this point has been based upon the assumption that the alleged subpoena duces tecum was in fact served upon Dr. Tokarski. However, as the State argued in its answer brief (p.12), where an insufficient record has been provided to the reviewing court, error cannot be presumed. Howel v. State, 337 So. 2d 823, 826 (Fla. 1st DCA 1976); Yearty v. State, 354 So. 2d 76 (Fla. 4th DCA 1978). The burden is on the appellant to produce a sufficient record to demonstrate reversible error. State v. G.P., 588 So. 2d 253, 254 (Fla. 1st DCA 1991), citing Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982).

The State respectfully submits that the absence of this subpoena from the record is highly significant, particularly in light of the aforementioned tactics by the defense. Its existence, or lack thereof, would be a factor to consider under a harmless error analysis. Given the victim's contraction of chlamydia, which was the defense's primary concern, and rightfully so, the failure to disclose the colposcopic photograph was harmless error.

Justice has not been served in this cause given the aforementioned facts. The child victim, and the citizens of this State, should not be punished for the prosecutor's oversight. The Fifth District's reversal has culminated in a "windfall" for the father and uncle, who engaged in incestuous relations, which will scar the child for the remainder of her life. Not only has she been scarred by these transgressions, but she had to undergo the trauma of a trial, and because of the per se rule in Smith v. State, supra, will have to potentially undergo such trauma again. That such a result would derive from a photograph, the existence of which the defense knew about, but waited until the cross-examination of the examining doctor to allege a discovery violation, is outrageous. Such tactics should not be condoned, nor should such a result be accepted.

CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, Petitioner respectfully requests that this Honorable Court allow this cause to join Schopp v. State, Case No. 84,061, as it concerns the question regarding harmless error analysis.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION has been furnished by hand delivery to JAMES T. COOK and NOEL PELELLA, Counsels for Appellants, Office of the Public Defender, via his basket at the Fifth District Court of Appeal, this 18th day of January, 1995.

MARK S. DUNN
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 93-1832 and 93-1942

KEVIN WALTER PENDER,
and CLARENCE PENDER

Respondents.
_____/

APPENDIX

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KEVIN WALTER PENDER,
and CLARENCE PENDER,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 93-1832 and 93-1942

Opinion filed December 2, 1994

Appeal from the Circuit Court for Orange County, Belvin Perry, Judge.

James B. Gibson, Public Defender, and James T. Cook and Noel A. Pelella, Assistant Public Defenders, Daytona Beach, for Appellants.

Robert A. Butterworth, Attorney General, Tallahassee, and Mark S. Dunn, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Clarence Pender and Kevin Walter Pender appeal their convictions for sexual battery on a child less than twelve years of age.[1] Clarence Pender is the victim's father, and Kevin Pender is the victim's uncle.

[1] The defendants, who are brothers, were tried together below, and their cases have been consolidated for the purposes of appeal.

Dr. Tokarski, an examining pediatrician with the Child Protection Team,[22] testified at trial that she examined the victim on June 11, 1992. According to Dr. Tokarski, although the child's hymen was intact, she had a discharge at the opening of the vagina, scarring and a cyst. Dr. Tokarski opined that these "abnormalities" had been caused by "blunt trauma" to [the child's] "outer genitals," but was unable to date the trauma beyond stating that it was more than five to seven days old. Dr. Tokarski also stated that she did a culture which showed that the child had chlamydia.

On cross-examination by the father's counsel, Dr. Tokarski was asked whether she had examined the child with a colposcope, an instrument which has the ability to take a photograph. She acknowledged that she had taken a colposcopic photograph of the child, and had "discussed it" with the prosecutor, although she had not given the photograph to him. At this point, both defense counsel asked for a Richardson hearing, claiming a discovery violation based on the state's failure to produce the photograph.[33] See Fla. R. Crim. P. 3.220(b)(1)(J) (1993). The trial court refused. This was per se reversible error. James v. State, 639 So. 2d 688 (Fla. 2d DCA 1994); Smith v. State, 500 So. 2d 125 (Fla. 1986); Richardson v. State, 246 So. 2d 771 (Fla. 1971). It is not subject to a harmless

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[2] A multidisciplinary team funded by state grants to investigate suspected abuse or neglect of children referred by HRS or a law enforcement agency.

[3] Defense counsel also informed the court that he had served a subpoena duces tecum on Dr. Tokarski specifically requesting any colposcopic photographs. No such subpoena is contained in the record on appeal and it is unclear when and where the photographs were to be produced.

error analysis. Schopp v. State, 641 So. 2d 141 (Fla. 4th DCA 1994), rev. granted, No. 84,061 (Fla. Oct. 13, 1994).

REVERSED and REMANDED.

PETERSON and GRIFFIN, JJ., concur.
DIAMANTIS, J., concurs specially in result, with opinion, in which PETERSON, J., concurs.

DIAMANTIS, J., concurring in result.

I concur that the trial court committed reversible error in not conducting a Richardson[1] hearing regarding the state's failure to disclose to the defense the existence of the colposcopic photograph taken by Dr. Tokarski, a member of the Child Protection Team. See Lee v. State, 538 So. 2d 63, 65 (Fla. 2d DCA 1989), and cases cited therein.

PETERSON, J., concurs.

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

ises, vague or precise, in exchange for a confession, it crosses the line and the confession must be suppressed.

Kennedy was a young white male who had run away from home to join a young black male he met in the detention center. They were not friends, but he was the only person Kennedy felt he could turn to for help. During the course of one evening, Kennedy was involved in a robbery and a homicide. At the time he was arrested by the police, he was tired, hungry and frightened. While under the influence of this volatile combination, he was befriended by Detective Carter. Carter lied to him, used race to bait him and then told him about immunity. Carter says he realized his mistake and explained what he could do and what he could not do as far as granting immunity. While the concept of use and transactional immunity causes many criminal lawyers problems, the trial court found that this young man, who was under a great deal of emotional stress, was able to sort out Detective Carter's explanation. The finding is not supported by the facts or by common sense.

I would reverse the trial court's order denying appellant's motion to suppress because it is erroneous on its face in that it misapplies the law to its findings of fact. Further, the state failed to clearly and effectively remove the taint of the confession, as the court's findings indicate that appellant did not understand the officer's attempt to disclaim his statements and promises. In short, the totality of the circumstances as evidenced by the trial court's findings of fact preclude a finding that the appellant's confession was knowing, intelligent and voluntary and, therefore, the confession should be suppressed.

fact and telling the accused that it would be easier on him if he told the truth did not require suppression of a confession where *Miranda* warnings were given), *review dismissed*, 570 So.2d 1303 (Fla.1990).

Eric SCHOPP, Appellant,

v.

STATE of Florida, Appellee.

No. 93-1901.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Rehearing and Stay Denied Aug. 25, 1994.

Defendant was convicted in the Circuit Court, St. Lucie County, Dwight L. Geiger, J., of burglary and petit theft, and defendant appealed. The District Court of Appeal, Anstead, J., held that circuit court erroneously permitted previously undisclosed prosecution witness to testify without conducting inquiry into circumstances and possible prejudice to defendant.

Reversed and remanded, and question certified as one of great public importance.

Criminal Law ⇐629.5(8), 1166(10.10)

District Court of Appeal must reverse defendant's conviction if it determines that circuit court permitted previously undisclosed prosecution witness to testify without conducting inquiry into circumstances and possible prejudice to defendant, and Court is not permitted to determine if erroneous omission of inquiry and admission of evidence constituted harmless error.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Patricia Ann Ash, Asst. Atty. Gen., West Palm Beach, for appellee.

ANSTEAD, Judge.

Appellant, Eric Schopp, was charged with armed burglary and grand theft. Upon trial, he was convicted of the lesser offenses of

burglary and petit theft. We reverse and remand for a new trial as mandated by the holdings in *Richardson v. State*, 246 So.2d 771 (Fla.1971) and *Smith v. State*, 500 So.2d 125 (Fla.1986).

Under *Richardson* and *Smith* we must reverse if we determine that the trial court permitted a previously undisclosed prosecution witness to testify without conducting an inquiry into the circumstances and the possible prejudice to the defendant. We are not permitted to determine if the erroneous omission of the inquiry and the admission of the evidence constituted harmless error.

With some trepidation, absolute fealty to the doctrine of precedent, and genuine deference and respect for the substantial policy concerns underlying the per se rule affirmed in *Smith*, we urge the Florida Supreme Court to review this issue as a continuing issue of great public importance. We do so for two reasons, one case specific, and the other involving a change and clarification of the law of harmless error.

In this case, we have concluded that the trial court failed to conduct a proper inquiry after the state called a witness not previously disclosed to the defense. The court ruled that no inquiry was necessary and none would be conducted because the defendant had exercised his right to a speedy trial. This was error.

However, the witness presented testimony that was not only known to the defendant, cumulative to other testimony, but concerned facts openly admitted by the defendant prior to, and at trial in testimony to the jury. In fact, defense counsel, in his opening statement to the jury, admitted that the defendant committed the offenses for which the defendant was ultimately convicted:

> MR. FOSTER: Yes Judge. Eric is a young man who grew up in Port St. Lucie, he went to Port St. Lucie High, he has a father Wayne and a mother Sharon that lives there in Port St. Lucie. Now December 2, 1992, Eric did something very stupid. He entered into someone's house, the house was not his. When he entered into the house, he removed a number of items. Among those items was a gun, the gun was in a case. You'll learn that after leaving the house, removing the items and leaving the house, Eric left the area. He was shortly apprehended by Detective Bennett and other officers of the Port St. Lucie Police Department. Almost immediately Eric was sorry, he confessed. There is a taped confession. You are going to hear the taped confession. He also wrote a letter of apology to the victims, Mrs. Kaven—Mr. and Mrs. Kaven, where he over and over again apologized for committing the crime and indicating that he was deeply sorry for doing it. And after hearing all the evidence, you are going to be able to conclude one thing. At the time Eric entered that house, he was unarmed and that he did not have a fully formed conscious intent to commit armed burglary of a dwelling. Therefore, ladies and gentlemen, there is only one verdict you can reach and that is not guilty as to armed burglary. Thank you.

As already noted, the defendant was acquitted of armed burglary. Therefore, in effect, the defendant "won" this case at the trial level. We are absolutely convinced that the admission of the testimony of the undisclosed witness and the failure to conduct a *Richardson* inquiry were harmless under the strict harmless error test set out in *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

It is because of the supreme court's landmark opinion in *DiGuilio*, adopting a very strict harmless error test, that we cautiously suggest reconsideration of the per se rule of *Smith*. *DiGuilio* receded from prior holdings that comments made at trial on a defendant's right to remain silent were not subject to a harmless error analysis. However, *DiGuilio* adopted a strict harmless error test that places a heavy burden on the state and the reviewing court. Because *DiGuilio* involved one of the most important and fundamental constitutional rights of a defendant and the abrogation of a per se rule like that involved herein, we believe the supreme court's holding and analysis may also be extended to the *Richardson* per se rule. We recognize that *DiGuilio* was decided before the supreme court's decision in *Smith*, although they were decided the same year and

there is no discussion of *DiGuilio* in the majority opinion in *Smith*.

In accordance with the above, we reverse and remand and also certify the following question as one of great public importance:

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

KLEIN and STEVENSON, JJ., concur.

Steaven C. CONNER, Appellant,

v.

STATE of Florida, Appellee.

No. 93–1366.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Rehearing and Rehearing En Banc Denied Aug. 17, 1994.

Defendant was convicted of resisting arrest, in the Circuit Court, Broward County, Howard M. Zeidwig, J., and defendant appealed. The District Court of Appeal, Farmer, J., held that defendant's misdemeanor offense of resisting arrest without violence, or even "battery" on defendant's mother, did not constitute serious enough offenses to uphold warrantless entry into defendant's home to arrest for what were then two minor misdemeanors.

Reversed.

1. Arrest ⇐68(10)

Defendant's misdemeanor offense of resisting arrest without violence, or even defendant's "battery" on his mother by pushing and slapping her, did not constitute serious enough offenses to uphold warrantless entry into defendant's home to arrest for what were then two minor misdemeanors; there was no suggestion that defendant would not have been available later after officers had presented their story to neutral magistrate and obtained warrant for his arrest. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐68(10)

Court approval of warrantless home entries to arrest for minor offenses should be rare. U.S.C.A. Const.Amend. 4.

Marc H. Gold of Gold & Heyer, Fort Lauderdale, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

FARMER, Judge.

In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), the Court invalidated a warrantless arrest for a misdemeanor made by police who gained nonconsensual access to defendant's home. In explaining the Court said:

> "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *Payton v. New York*, [445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980)]. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate."

466 U.S. at 750, 104 S.Ct. at 2098. The Court went on to hold that:

> "although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, * * * application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue