IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN W. PENDER, and
CLARENCE PENDER,

Respondents.

85,042

5th D.C.A. Case Nos. 93-1832
93-1942

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

~~RESPONDENTS'~~ BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. KEVIN PENDER, and CLARENCE PENDER, Respondents.	)	5th D.C.A. Case Nos. 93-1832 93-1942

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in Petitioner's Brief on Jurisdiction, with the following additions:

At trial below, when defense counsel alleged a discovery violation and requested a Richardson inquiry, the trial court and the prosecution acknowledged that the prosecution had been aware of the existence of the photograph at issue, and that the State's witness having possession of the photo had been served with, but had refused to comply with a defense subpoena to produce the photo. See, Excerpt of trial transcript included as an Appendix to this brief, (hereinafter "A"), at Pp. 1-3,5. The trial court refused a specific request for inquiry to determine the prejudicial effect of the witness' refusal to produce the photograph. (A 4-7)

SUMMARY OF ARGUMENT

The decision of the District Court which has been cited as controlling authority in the instant case is presently under review by this Court. This Court therefore has jurisdiction to review the decision of the District Court in this case. However, Petitioner's brief does not contain a demonstration of the necessity for this Court's exercise of jurisdiction in this particular case.

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, AS THE DECISION OF THE DISTRICT COURT IN THIS CASE WAS FOUNDED UPON A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH IS PRESENTLY UNDER REVIEW BY THE FLORIDA SUPREME COURT. RESPONDENTS SUGGEST THAT EXERCISE OF THIS COURT'S JURISDICTION IS NOT NECESSARY IN THIS CASE.

The decision of the Fourth District Court in Schopp v. State, 641 So. 2d 141 (Fla. 4 DCA 1994), is presently before this Honorable Court for review, and in accordance with Jollie v. State, 405 So. 2d 418 (Fla. 1981), undersigned counsel is unable to argue that this Court has no discretionary jurisdiction to entertain the review now sought by the Petitioner. However, in what purports to be its brief on jurisdiction, the State has offered neither a rule, statute, nor the precedent cited hereinabove, with regard to the jurisdiction of this Court in the instant case. Instead, what the State has offered, is supposition and condemnation as to the tactics and strategy of trial counsel, personal opinion as to whether the error complained of was harmless; such opinion being based in turn upon the State's subjective opinion as to the merits of the defense presented at trial, and subjective outrage at the prospect of a retrial of this case, which the State blames on the Respondents and/or their counsel's "invited error."

First, it is important to note that defense counsel made a timely, specific objection, and a request for a remedy, which the

trial court refused. In refusing the request for a Richardson inquiry, the trial court invited the defense to file a motion for a new trial. (A 3,4) The reason for a new trial in this case, if that should occur, would be, as the District Court ruled, that the trial court refused to follow an established procedure for the making of a record of the basis for the trial court's ruling regarding a timely specific objection. Indeed, the very purpose of objections, and of a Richardson inquiry, is to provide the reviewing court with a basis for affirming the trial court's ruling, which, on appeal, would be presumed correct. If defense counsel had been "sandbagging", as the State now presumes, a Richardson inqury would have revealed that fact. If, as the State now presumes, the defense was not prejudiced by the failure of the State and its witness to provide discovery, proper inquiry would have revealed that fact as well. The defendants' objection was based on the clear refusal of the State and/or its witness to produce a photograph to which the defense was unquestionably entitled. (A 2,5,6) The District Court ruled in this case, that the defendants were deprived of their right to a fair trial by the trial court's refusal to conduct a Richardson inquiry, and noted that the error was not subject to harmless error analysis. The District Court offered no opinion as to whether the preclusion of harmless error analysis was inappropriate in this case, nor any opinion as to whether the error would have proven harmless if that analysis had been conducted. Moreover, the District Court did not, as it is free

to do, certify a question to this Court as to whether harmless error doctrine should apply in such cases. In fact, the District Court denied the State's motion to certify the precise question as to whether the harmless error doctrine should be applied to cases in which the trial court has refused a Richardson inquiry. (A 8) State's argument in its Jurisdictional Brief is simply a repetition of the motion to certify a question that was denied by the District Court. (A 9-14) It would thus appear that the State's request for this Court's exercise of its jurisdiction in this case, is founded upon the State's desire to avoid a retrial, rather than the need for resolution of a legal issue.

simple "Gotcha" maneuver. State v. Belien, 379 So. 2d 446, 447 (Fla. 3d DCA 1980).

4. Another factor to be considered as to a harmless error review, concerns footnote 3 of this Honorable Court'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 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.

In accordance with the foregoing facts, authorities and reasoning, Appellee respectfully requests this Honorable Court to join its sister court and certify the question currently pending before the Florida Supreme Court in Schopp v. State, supra. The State further requests this Court to stay its mandate pending the Florida Supreme Court's resolution of the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing MOTION TO CERTIFY 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 7th day of December, 1994.

Mark S. Dunn

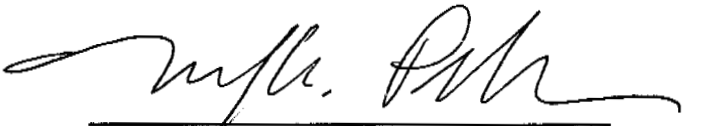
MARK S. DUNN
ASSISTANT ATTORNEY GENERAL

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court decline the exercise of its jurisdiction to review the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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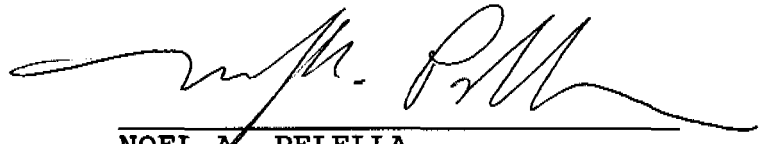
I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Kevin Walter Pender, Inmate #140449, Hardee Correctional Institute, Route 2, Box 200, Bowling, Green, FL 33834 and Clarence P. Pender, Inmate #334268, Central Florida Reception Center, P.O. Box 628040, Orlando, FL 32862-8040, on this 26th day of January, 1995



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