IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN W. PENDER, and
CLARENCE PENDER,

Respondents.

Case No. 85,042

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

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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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, that the witness and the State Attorney had discussed the photo, 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 from transcript of trial proceedings included as an appendix to this brief, (hereinafter "A"), at Pp. 1-7 The trial court found there had been "no discovery violation", refused a specific request for inquiry to determine the prejudicial effect of the witness' refusal to produce the

photograph, and acknowledged that without a Richardson inquiry, the trial court could not determine, "based upon what has been elicited so far, whether or not there ha[d] been any prejudice" to the defense. (A 4-7)

SUMMARY OF ARGUMENT

The facts of the instant case are in no way similar to those in Schopp, where the District Court found that record facts proved beyond a reasonable doubt that the State's discovery violation had not prejudiced the defense. In the instant case, the District Court made no finding regarding harmless error, despite the State's request to certify a question, and the trial court indicated, on record, that without conducting the Richardson inquiry which the defense had requested, which the trial court refused to conduct, the trial court could not determine whether the defense had been prejudiced. Given on such a record, there is no way the State could meet its burden to prove, beyond a reasonable doubt, that the error in this case was harmless.

ARGUMENT

THERE WAS NO RICHARDSON HEARING IN THE TRIAL COURT, AND THE RECORD ON APPEAL PROVIDES NO BASIS OF PROOF, BEYOND A REASONABLE DOUBT, THAT SAID ERROR WAS HARMLESS.

(Restated)

In Schopp v. State, ___ So. 2d ___ , 20 Fla. L. Weekly S 136 (Fla. 3/23/95), this Court ruled that the record upon which its finding was based proved harmless error beyond a reasonable doubt, as did the specific finding by the District Court that beyond question, Schopp had not been prejudiced by the State's discovery violation. This Court also noted that circumstances such as those in Schopp were the exception, not the rule.

Initially, it must be emphasized that despite the State's argument, there was no "de facto" Richardson inquiry in this case. There was no finding as to whether the State's discovery violation was intentional or inadvertent; no inquiry as to whether it was trivial or substantial; and there was a specific statement by the trial judge that the State had not met its discovery obligation, and that it was impossible to determine, without a hearing, whether or how the defense had been prejudiced. (A 1-6) More important however, is that the record in this case demonstrates that the State has not, and cannot show beyond a reasonable doubt that the defense was not prejudiced.

Unlike Schopp, the Respondents in this case did not "win", they were convicted of capital sexual battery. Unlike the

Schopp trial court, the trial court in this case made a record finding that without a Richardson hearing, the court could not determine whether or not the defense had been prejudiced by the State's discovery violation. (A 5) Unlike the District Court in Schopp, the District Court here made no findings regarding harmless error, although the State asked the District Court to do so in the State's Motion to Certify a Question of Great Public Importance. (A 8-14) Despite this record, the State now asks this Court to assume that the defense was not prejudiced by the discovery violation at issue.

For example, the State now argues, without a record citation, that "there was no evidence of any prejudice to the defense." That is patently incorrect, as the trial court said specifically that the State had not provided adequate disclosure, and that there was not enough evidence before the court to make a determination as to prejudice. (A 5,6) There is no record proof that defense preparation was unaffected by the failure of disclosure, because the trial court refused to allow the defense to make inquiry of the witness outside the presence of the jury. Without knowing what the doctor found, and what she discussed with the State about the colposcopy photo, it is impossible, without total conjecture, to determine how the defense would have prepared its case once proper disclosure had been made.

The State now argues that because the defense knew of Dr. Tokarsky prior to trial, and was allowed the opportunity to cross-examine the doctor about the photograph and her discussions

with the State regarding what the photograph showed, the defense was not prejudiced by the failure to disclose the photograph. That argument illustrates more than any other, how the record in this case is insufficient to meet the State's burden to prove harmless error.

The State is always responsible for the failure of its agents to disclose discovery material that is in their exclusive possession. State v. Coney, 294 So. 2d 82 (Fla. 1974); Lee v. State, 538 So. 2d 63,65 (Fla. 2 DCA 1989) Second, the State's duty of disclosure is not limited to material that the State considers relevant. Hickey v. State, 484 So. 2d 1271,1273 (Fla. 5 DCA 1986); Wortman v. State, 472 So. 2d 762,765 (Fla. 5 DCA 1985) Moreover, simply listing an expert witness or checking a box on a discovery form does not constitute compliance with the discovery obligation. Lee, supra, and Blatch v. State, 495 So. 2d 1203,1204 (Fla. 4 DCA 1986); Boshears v. State, 511 So. 2d 721,724 (Fla. 1st DCA 1987) Full disclosure in advance of trial, as to the reports and/or information relied upon by expert witnesses, is essential to avoid trial by ambush. The State cannot evade responsibility for a the obligation to make full disclosure by simply saying that they gave the defense the name of a witness and did nothing more to insure that the witness complied with subpoenas or other court orders.

In addition, to suggest that the failure to provide discovery was cured by the opportunity to cross-examine the witness at trial is quite clearly without merit. No sane,

rational defense attorney would cross-examine a State expert in front of the jury, in a capital case, without first having had the opportunity to depose the witness in order to learn what answers the witness would give. For defense counsel to have cross-examined Dr. Tokarsky in front of the jury regarding the undisclosed photograph and her discussions with the State Attorney as to her findings, would have been, at the very least, in incredible gamble with the defendant's lives, and could reasonably be called legal malpractice and ineffective assistance of counsel. Likewise, there is no merit to the State's argument that the error was harmless because the trial court told defense counsel that they could file a motion for a new trial if it proved that the defense had been prejudiced by the failure to disclose the colposcopy photo. That "remedy", like cross-examination of the doctor in front of the jury, would force the defendants and their counsel to trial by ambush in a capital case.

In sum, the State now asks this Court to assume that the State's discovery violation was inadvertent, trivial and had no effect on the defendants' trial preparation. Such assumptions are contrary to this Court's ruling in Schopp, and contrary to the record in this case. The State has thus failed to meet its burden to prove beyond a reasonable doubt that the refusal to conduct a Richardson inquiry was harmless error.

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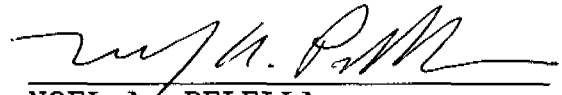
APPENDIX TO
RESPONDENTS' BRIEF ON THE MERITS

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that the Florida Supreme Court affirm the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

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 W. 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 18th day of May, 1995.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER