IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,479

THIRD DCA NO. 93-2622

THE STATE OF FLORIDA,

Petitioner,

vs.

BOB MICHAEL CHAMPAGNE,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee before the Third District Court of Appeal. The respondent, Bob Michael Champagne, was the defendant in the trial court and the appellant before the Third District Court of Appeal.

In this brief, the petitioner and the respondent will be referred to as the State and as Bob Michael Champagne, respectively.

References to the record on appeal will be denoted by "R" and references to transcripts will be denoted by "T" followed by a page number. References to documents in the state's appendix will be denoted by "Ex." followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

Nature of the Case, Course of Proceedings and Disposition in the Courts Below With Incorporated Facts

The record reflects that Bob Michael Champagne was charged by information with three counts of armed robbery (R-1). He was tried by a jury on August 17, 18 and 19, 1993 (T-1 to 289).

As set out in the defense opening statement, the contested issues at trial would be the identification of Bob Champagne as the perpetrator, based upon varying descriptions given by the victims; and whether his confession was given voluntarily since it appears to have been rehearsed and read from a script (T-8 to 12).

Evidence showed that on December 4, 1992 two men entered the office of Maximum Protection Insurance in Northwest Miami. In the office were the owner's wife Marie Zizi, employee Chantal Xavier and a customer named Samuel Darcius (T-18, 20, 43). The larger of the two men pulled a gun and held Chantal Xavier by the neck. At trial, she identified Bob Champagne as that man (T-22).

At trial, Marie Zizi identified Bob Champagne as one of the men. She said he came in before, asking about insurance (T-44, 45). He said he needed money when he held the gun to

Chantal's neck; Ms. Zizi told him to take the money, and not kill anyone; the other man tied up the customer and took his wallet; they tied up Ms. Zizi with a telephone cord and threatened to kill her unless she gave them the safe; she gave them $5,000 from her purse. They took Chantal Xavier's jewelry; they cut the telephone lines and threw papers all over the office; Ms. Zizi was scared (T-47 to 51).

According to Chantal Xavier, the larger man held a gun to her head; they said they wanted money and asked for the cash box; she was terrified; they found money in Ms. Zizi's purse; the larger man ordered Chantal Xavier to lie on the floor, took her jewelry and said they would kill her if they did not find money; the skinny man tied Marie Zizi to a desk (T-23 to 25).

The big man continued to point a gun at Chantal Xavier; the skinny man tied her to a cabinet, and told her not to look at him (T-26, 27). The men had cut the telephone lines, but not the fax line. When they left, Ms. Zizi got free and called the police (T-52). In her statement, Chantal Xavier identified the skinny man as tall and light skinned. She recognized him, but not the other man whom she described as big, dark skinned, about 200 pounds and five feet six inches tall. She said she was upset at the time. She saw photo-

graphs the following Saturday and identified Bob Champagne and another man. She was positive, she said, that it was Bob Champagne who took her jewelry at gunpoint (T-28 to 31).

Marie Zizi described the larger man as tall, fat, large lips, gold teeth and a high top; and the other as light, taller and skinny. She described the larger man as being five feet six inches tall, although she could have been mistaken, since Bob Champagne is six feet, three inches tall. In spite of the discrepancy, she had no doubt that he was the man. She identified him from photographs (T-53 to 56). She originally had said that Bob Champagne was five feet five inches tall and 150 to 200 pounds with gold teeth (T-59, 60).

Samuel Darcius testified that it was Bob Champagne who robbed him (T-74). He had originally described the man as being five feet seven or eight inches tall (T-77).

Emanuel Zizi, the insurance office owner, testified that a few days before the robbery, Bob Champagne came in to the office asking for insurance quotes for a Mercedes (T-80).

Descriptions to the Police

According to a detective at the scene, telephone cords were ripped out and tied to desk legs. The victims were upset, emotional, frightened and teary-eyed (T-84). They gave different descriptions to different officers. They told

Detective Cope that the larger man was six feet two inches tall and weighed 200 to 240 pounds; but they told Officer Darby that the man was five feet five inches tall and weighed 140 pounds (T-85). The three victims identified Bob Champagne's photograph. Emanuel Zizi identified his photograph as a man who had come in to ask about insurance a few days before the robbery (T-87 to 89).

On cross examination Detective Cope said, regarding the heavier of the two men, that the first description given by the victims, a few minutes after the robbery, was that he was a black male, 18 to 21 years old, five feet five inches tall, 150 to 200 pounds, dark and heavy; but the description the victims gave him was different: six feet tall, 200 to 240 pounds (T-92, 93, 94, 98).

Bob Champagne's Statement

After Bob Champagne's arrest on December 18, 1992 Metro Dade robbery detective John Deegan advised Mr. Champagne of his rights and elicited a tape recorded statement from him. The tape was played at trial. In the statement Mr. Champagne said that he went to the insurance office and asked about insurance; two days later he and a friend robbed the place; he held a gun (T-112, 117, 122, 123).

On cross examination Detective Deegan said that he did a "pre-interview" and that Bob Champagne confessed without any promises made to him (T-127, 131).

At the conclusion of Detective Deegan's testimony the state rested. The defense moved for a judgment of acquittal which was denied (T-132).

Bob Champagne's Testimony

Bob Champagne testified that he was 23 years old and attended Iowa State University for three years on an athletic scholarship. He returned to Miami because his parents had filed for bankruptcy (T-134, 135). He is six feet three inches tall and weighs 280 pounds (T-138). He does not have gold teeth. He denied being present at the robbery, and he denied that he went to the insurance office for a price quote (T-136 to 138).

Mr. Champagne explained that he gave the tape recorded statement because he was promised that he could go home if he gave a statement, and if he did not, he would go to prison for the rest of his life. He was tired. He wanted to go home to his girlfriend. Detective John Deegan gave him a pad of paper with information about the case on it. He and the detective had a long discussion about the case. He read the statement from the pad because he wanted to get out on bond and go home (T-140, 141).

The detective, he said, tricked him. He would never have given a statement except for the promises (T-142).

On cross examination, it was elicited that Mr. Champagne studied business administration and made good grades. He wanted to go home that night. He believed that they would let him go home. The statement, he said, was given to him by the detective (T-142 to 145).

Then the prosecutor began to inquire about whether Mr. Champagne spoke with other officers that night (T-145). At sidebar the defense objected because Mr. Champagne did have contact with other officers that night about other cases, and he had carefully avoided opening that door (T-146). The Miranda waiver was signed at 12:35. The tape was made at 1:40. The state complained that Mr. Champagne alleged that he spoke with Detective Deegan all that time. But the court would not permit it to get into his discussions with other officers because "it's going to lead to a mistrial." (T-147). In fact, Bob Champagne was confessing to another crime during that time (T-148).

The court sustained the objection to the line of questioning, so long as defense counsel would not make argument taking advantage of the situation (T-149). When cross continued, Mr. Champagne said that Detective Deegan gave him

the details of the robbery on the pad of paper (T-150). His discussion with Detective Deegan lasted about an hour and thirty minutes, "it was quite a long time" (T-152).

The state announced its intention to call Detective Iris Deegan (John Deegan's wife) as a rebuttal witness. Defense counsel noted that her name was not on the witness list (T-153). The court ruled that the state could ask Mr. Champagne what he did between 12:30 and 1:40 that night, but could not ask about other cases (T-155).

The state elicited from Bob Champagne that between 12:35 and 1:40 he was "getting harassed * * * made false promises to" by Detective John Deegan who detective was there with "his lynch mob" (T-157, 158).

Defense counsel moved for a mistrial because he had instructed Mr. Champagne not to discuss the other detectives, and now the state was implying that he had changed his testimony and lied (T-159, 160). The motion for a mistrial was denied (T-160).

Mr. Champagne said that a group of five or six people in the room were saying they would make it easy on him and he could bond out (T-162). "All of them were interrogating me . . . they was lashing slurs, lashing out remarks, trying to

scare me. They did scare me." They threatened to send him to Ward D where he would "get beat down" (T-164).

On redirect, Mr. Champagne said that he was interviewed by Detective Deegan. The others were "muscle men" to make sure they got what they wanted. They threatened him. He thought he could bond out and go home. That is why he made the taped statement. The people in the room did not make noise while he gave the statement (T-166 to 169).

The State Calls Iris Deegan on Rebuttal

The defense rested (T-170). The state again said that it wanted to call Detective Iris Deegan on rebuttal to say that she spoke with Mr. Champagne for about 45 minutes about another case that night (T-172). The court ruled that the state could call Iris Deegan to testify that she spent 45 minutes with this defendant about a subject unrelated to this case. Defense counsel argued that it was not relevant, and that it would open the door (T-174).

The court decided to permit the rebuttal testimony, finding that it was not unfairly prejudicial. Defense counsel argued that the court was allowing the state to introduce evidence of uncharged criminal conduct, Williams Rule evidence by implication without a motion (T-177, 178).

The judge recognized the prejudice: "That's true, it's prejudicial to the defendant, no question it's prejudicial to him." (T-180).

Defense counsel continued to argue that for Iris Deegan to testify would be prejudicial and would deny the defendant a fair trial, allowing the jury to decide the case on issues totally unrelated to whether or not the state met its burden in the case (T-181).

When the trial resumed the following morning, the court found that there had been a discovery violation by the state, but that it was inadvertent. The defense contended that rebuttal witnesses are subject to the same rules as other witnesses and the prejudice was enormous (T-192, 193). The court countered that the problems were created by the defense (T-202). The judge then told defense counsel he could put his cases on the record, and she left the courtroom (T-204, 205).

The defense made a continuing objection to the testimony of Detective Iris Deegan, on grounds including that if they knew she was going to be a witness, the defense would have been presented differently (T-207, 209).

Detective Iris Deegan testified that she interviewed Mr. Champagne at 12:30. Detective John Deegan, her husband, was

present. No one else was in the room. They spoke about another matter. There were not five or six people there. They did not show Mr. Champagne their notes. She concluded at 1:37, and Detective John Deegan went in (T-211 to 214).

When the state rested, the defense renewed all objections, moved for a judgment of acquittal and for a mistrial based upon the rebuttal testimony (T-222 to 226).

Procedural History After Trial

The jury found Bob Champagne guilty on three counts of robbery with a firearm (R-41 to 43). He was adjudicated guilty (T-45). The state filed a notice of intent to seek enhanced penalty under Florida Statutes Section 775.084 (R-48). Bob Champagne was sentenced on October 1, 1993 by Dade County Circuit Judge Paul Seigel (T-290 to 325).

The presentence investigation report states that the recommended guidelines range was 12 to 17 years, with a permitted range of 9 to 22 years (R-49 to 60, at 59).

At the risk of being somewhat argumentative in this portion of our brief, we ask the court to note that the PSI report contains inappropriate and unduly prejudicial editorial comments by the probation officer going well beyond the individual before the court for sentencing, by addressing the ills of society in general (R-59). A copy of page ten of

the PSI is included in the Appendix at the end of this brief.

The court found Mr. Champagne to be a habitual violent felony offender and sentenced him to three consecutive terms of life in prison, with three concurrent fifteen year minimum mandatory terms (R-62 to 65)(T-313, 314). The defense objected to the consecutive life terms (T-314 to 317).

Bob Michael Champagne appealed to the District Court of Appeal of Florida, Third District. That court affirmed his convictions, rejecting the issue challenging the trial court permitting the state to present a rebuttal witness who was not on the witness list; and the issue challenging the state's lack of proof of identity beyond a reasonable doubt by simply noting that (Ex. 1):

> The remaining points raised by the defendant present no reversible error. Accordingly, we affirm the defendant's convictions.

The Third District did, however, reverse the consecutive sentences and remand the cause with directions to impose concurrent sentences (Ex. 1). On rehearing, the Third District certified the subject question to this Court (Ex. 2).

The state filed a notice to invoke this Court's discretionary jurisdiction to address the certified question. This Court postponed its decision on whether to exercise jurisdic-

tion to hear this case pending briefing on the merits. Thus, Bob Michael Champagne now presents his brief on the merits.

In addition to the certified question brought by the state, we raise the other two issues presented on direct appeal: the unlisted witness and the questionable identification. Because the Third District rejected these issues without discussion, there does not exist a separate and independent basis to raise these issues before this Court on petition for discretionary review. However, this Court possesses jurisdiction to review any and every issue in a case that is properly before the Court on some other ground. Freund v. State, 520 So.2d 556, 557, n.2 (Fla. 1988) (citing Trushin v. State, 425 So.2d 1126, 1130, (Fla. 1982) and Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977)).

Therefore, if this Court grants review on the certified question, then Bob Michael Champagne respectfully would ask the Court to address his two additional issues, as they identify prejudicial error that materially affects his convictions and for which he has no other available remedy.

QUESTIONS PRESENTED

WHETHER THE STATE HAS PROVIDED ANY COMPELLING, OR EVEN CREDIBLE JUSTIFICATION FOR ASKING THIS COURT TO OVERRULE ITS DECISION IN HALE V. STATE (restated)

TWO ADDITIONAL QUESTIONS PRESENTED BY RESPONDENT:

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL MUST BE REVERSED BECAUSE

THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE, OVER REPEATED OBJECTION AND MISTRIAL MOTION, TO PRESENT ON REBUTTAL, A WITNESS WHO HAD NOT BEEN INCLUDED ON THE STATE'S WITNESS LIST, AND WHOSE TESTIMONY SUGGESTED OTHER CRIMINAL CONDUCT, MUCH TO MR. CHAMPAGNE'S GREAT PREJUDICE, DENYING HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL; AND

THE EVIDENCE OF IDENTITY WAS INSUFFICIENT TO PROVE THAT BOB MICHAEL CHAMPAGNE COMMITTED THE CHARGED ROBBERIES IN THAT THE ASSAILANT WAS IDENTIFIED BY THE VICTIMS SHORTLY AFTER THE ROBBERY AS BEING MUCH SHORTER AND WEIGHING MUCH LESS THAN BOB CHAMPAGNE, AND HAVING GOLD TEETH.

SUMMARY OF THE ARGUMENT

Point I contends that Bob Champagne's sentence was properly vacated and the cause was properly remanded for a resentencing on all counts because the trial court erred when it made consecutive each of his enhanced habitual offender sentences, for offenses committed during a single criminal episode, contrary to this Court's decision in Hale v. State, 630 So.2d 521 (Fla. 1993).

The state's position essentially, is nothing more than a belated motion for rehearing of this Court's well-reasoned and unanimous decision in Hale v. State, and at that, the state has failed to provide compelling, or even credible reason for overruling Hale.

Point II contends that the Third District incorrectly affirmed the trial court's ruling allowing the state to present Detective Iris Deegan as a rebuttal witness for several reasons. First, there was a discovery violation in that her name was not included on the state's witness list; the prejudice to the defense was great; and had the defense known that Iris Deegan would be called to testify, it would have presented its defense differently.

The confession was a key issue at the trial. The defense was sandbagged by allowing this eleventh hour, and

previously unknown witness to rebut Bob Champagne's testimony regarding that critical issue. Rebuttal witnesses are subject to the same disclosure rules as all other witnesses. Even more appalling, is that the thrust of her testimony made it quite clear to the jury that Bob Champagne was being questioned by the police that night about other, uncharged criminal conduct, all in violation of the constitutional guarantees of fairness and due process.

Point III contends that the Third District incorrectly affirmed, where the record shows that the state failed to prove the essential element of identity beyond a reasonable doubt. Shortly after the robbery, the three victims described the larger assailant, whom they later identified as Bob Michael Champagne, as being five feet five, six or seven inches tall and weighing 150 or 200 pounds and having gold teeth. This is not Bob Champagne. He is six feet three inches tall, weighs 280 pounds and has no gold teeth. The significant discrepancies in the descriptions given were not satisfactorily explained at trial to overcome the burden to prove all elements of the offense, including and especially identity, beyond a reasonable doubt.

ARGUMENT ON THE CERTIFIED QUESTION

THE STATE HAS PROVIDED NO COMPELLING, OR EVEN CREDIBLE JUSTIFICATION FOR ASKING THIS COURT TO OVERRULE ITS DECISION IN HALE V. STATE (restated)

The court found Bob Michael Champagne to be a habitual violent offender, and sentenced him to three consecutive terms of life in prison, with three concurrent fifteen year minimum mandatory terms (R-62 to 65)(T-313, 314). The first life term was imposed for the conviction for robbery of Chantal Xavier; the second life term was imposed for the conviction for robbery of Marie Zizi and/or the Maximum Protection Insurance office; and the third life term was imposed for the conviction for robbery of Samuel Darcius. All three offenses occurred at the same place and time.

The defense objected to the consecutive life terms (T-314 to 317). Although the trial court properly made the mandatory minimum sentences concurrent with each other, the court erred in making the three enhanced life sentences consecutive to each other.

This Court clearly held in Hale v. State, 630 So.2d 521 (Fla. 1993) that a trial court may not both enhance a defendant's sentence under the habitual offender statute and also make the enhanced sentences consecutive to each other,

when the offenses were committed in a single criminal episode. Expanding the holding in Daniels v. State, 595 So.2d 952 (Fla. 1992), which held that mandatory minimum sentences for offenses committed in a single criminal episode could not be made consecutive to each other, this Court held that, similarly, 630 So.2d 522:

> [w]e find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.

There can be no dispute that all three of Bob Champagne's convictions arose from a single criminal episode. See Palmer v. State, 438 So.2d 1, 2 to 3 (Fla. 1983) in which the robbery of 13 victims at a funeral was a single criminal episode; and Simon v. State, 615 So.2d 236, 238 (Fla. 3d DCA 1993) in which the false imprisonment of six victims was committed in a single episode.

Consequently, the Third District was eminently correct in finding that having chosen to sentence Bob Champagne as an habitual offender, the trial court should not have ordered his enhanced sentences to run consecutively. Hale, supra.

The sentences were properly be set aside and the case was properly remanded for resentencing.

The certified question before this Court, essentially asks whether this Court really meant what it said in its unanimous decision in Hale. Given the clear language in Hale, the state's arguments provide no compelling reasons to overrule that decision. Just as in the case of State v. Hill, Case No. 84-727, which is also pending before this Court on a certified question issued by the Third District Court of Appeal, the state's arguments are tantamount to a belated motion for rehearing challenging the wisdom of this Court's opinion.

Did this Court mean what it said in Hale? We note that since announcing the Hale decision, this Court has affirmed the rule in several other cases, including Edler v. State, 630 So.2d 528 (Fla. 1993); Brooks v. State, 630 So.2d 527 (Fla. 1993); and Penton v. State, 630 So.2d 526 (Fla. 1993).

Moreover, since this Court announced Hale, the district courts also have found its holding to be quite clear, applying it without difficulty in at least fifty cases, which are too numerous to cite.

We next address the state's arguments functionally questioning the word and wisdom of Hale on its face. From

the language in Hale, this Court could not have made its intent any clearer, that habitual offender sentences, as well as their mandatory minimum components, must run concurrently where they arise out of a single criminal episode, 630 So.2d at 524, 525 (emphasis added):

> We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.
>
> * * *
>
> [T]he trial court is not authorized, in our view, to both enhance Hales' sentence as a habitual offender and make each of the enhanced habitual offender sentences for the possession and the sale of the same identical piece of cocaine consecutive, without specific legislative authorization in the habitual offender statute.

We note that in this case, the permitted guidelines range was 9 to 22 years. The sentence imposed was life, consecutive life and a third consecutive term of life. Under these circumstances, we question why the state would use its resources, and those of this Court, to pursue this case where Bob Champagne's sentence will still be three life sentences, just run concurrently instead of consecutively.

Although it is not the situation before the Court in the present case, the state proceeds to argue the possibility, based upon the application of Hale, that a habitual offender sentence could be less than the defendant's permitted guidelines sentence; and that in such cases, defendants could benefit from a windfall in the form of a downward departure from the guidelines, so to speak, rendering the habitual offender statute meaningless.

But this concern by the state, should be alleviated by the very fact of Hale's announcement. Now, in every case, the trial court will know the Hale rule, and can discern and choose from among, the various options available, and fashion the most appropriate sentence for each case. As a matter of common sense, it is highly unlikely, that any Florida trial court is going to make a practice of suing the habitual offender statute to circumvent the guidelines to give a more lenient sentence.

It is significant that in every case, it is always at the instance of the state that a trial court is asked to declare a defendant to be a habitual offender and to so sentence that defendant. With full awareness of Hale, the state can simply calculate the various sentencing options in any given case, and act accordingly. If the state finds the

sentence will be more favorable to it under the guidelines, it just can choose not to seek a habitual offender sentence.

The answer to these perceived problems, rests solely in within the state's own power and authority. There is no reason for this Court to and fashion a new rule which necessarily will only be redundant of what already is available to the state. That would not be a fitting exercise of this Court's jurisdiction, or scarce judicial resources.

With respect to the notion that habitual offender sentencing is rendered meaningless by Hale, we must not lose sight of the most important fact here, that Bob Michael Champagne was sentenced to LIFE in prison. This is certainly a significant upward departure from the maximum of 22 years permitted under the guidelines.

In summary, the state's arguments are nothing more than a plea for a rehearing of Hale. The arguments do not present sound or compelling reasons for this Court to retreat from that unanimous holding.

The exercise of this Court's jurisdiction here is not warranted in the present case. If this Court decides to take this case and write an opinion, then we most respectfully submit, based upon the state's failure to meet its burden of proving any credible reason for overruling the clear holding

in Hale, that this Court should affirm the decision of the Third District Court of Appeal reversing the sentence imposed on Bob Michael Champagne, and answer the certified question in the affirmative:

that Hale does preclude, under all circumstances, the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony, or habitual violent felony offenders.

II

THE THIRD DISTRICT INCORRECTLY AFFIRMED WHERE THE TRIAL COURT ERRED IN ALLOWING THE STATE, OVER REPEATED OBJECTION AND MISTRIAL MOTION, TO PRESENT ON REBUTTAL, A WITNESS WHO HAD NOT BEEN INCLUDED ON THE STATE'S WITNESS LIST, AND WHOSE TESTIMONY SUGGESTED OTHER CRIMINAL CONDUCT, MUCH TO MR. CHAMPAGNE'S GREAT PREJUDICE, DENYING HIM DUE PROCESS AND A FAIR TRIAL.

The state and federal constitutions guarantee all defendants in criminal cases, the right to a fair and impartial trial, and to due process. Article I, Sections 9 and 16, Florida Constitution; United States Constitution, Amendments V, VI and XIV.

It was unduly prejudicial to Bob Champagne for the trial court to allow the state to call Detective Iris Deegan to testify on rebuttal. By allowing that testimony, the court allowed the state to bring in the suggestion of other criminal conduct which was not charged in this case.

If defense counsel had known that Iris Deegan was going to be a witness, he would have counselled Mr. Champagne differently regarding his testimony. Counsel gave his client advice to avoid opening the door out of concern that it would lead to a problem. Had counsel known that Iris Deegan would testify about her interview with Mr. Champagne, perhaps he would have mentioned it himself, to avoid being made to look like a liar on rebuttal.

The court realized that it would be prejudicial to allow Iris Deegan to testify that for 45 minutes, she spoke with Mr. Champagne about "another matter." "That's true, it's prejudicial to the defendant, no question it's prejudicial to him." (T-180).

The jurors surely were not so stupid as to think they were discussing sports or the weather during that time.

The court said that there had been, "effectively," a Richardson hearing. See Richardson v. State, 246 So.2d 771 (Fla. 1971). Defense counsel did not realize that it had happened. The court found that there was a discovery violation, but ruled that the state's failure to list Iris Deegan was "inadvertent, couldn't have been anticipated under the circumstances . . . " (T-183, 184).

At the outset of proceedings on the following day, the trial court stated that there was no significant procedural prejudice to the defense since the court had instructed that defense counsel would have an opportunity to talk with the witness before she testified (T-192).

Defense counsel requested a Richardson inquiry on both prongs of the test. Failure to make a proper inquiry on both aspects of Richardson, he argued, is per se reversible (T-

192). The state has an obligation to list rebuttal its witnesses, just as it does its witnesses for the case in chief.

In Smith v. State, 319 So.2d 14, 16 (Fla. 1975) Justice Boyd, writing for the Florida Supreme Court, and citing the United States Supreme Court in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), set out Ruvel Smith's arguments that discovery must be a two-way street, and that it is unfair to require a defendant to divulge the details of his defense while at the same time submitting him to the hazards of surprise concerning refutation of the very evidence which he has disclosed. We note that the Smith case involved an alibi defense.

Ruvel Smith further contended that the state's failure to comply with the reciprocal provisions of the discovery rules resulted in a denial of due process. The admission over objection of surprise rebuttal testimony impaired the defendant's ability to adequately prepare his defense and was highly prejudicial to his right to a fair trial. See Ramirez v. State, 241 So.2d 744 (Fla. 4th DCA 1970). Of course the requirements of the rules may be waived in the court's discretion for good cause. In Smith as in the present case, the defense sought discovery and the name of the surprise rebuttal witness was not included on the state's list.

If a trial court fails to make full inquiry into the circumstances surrounding the state's calling a witness whose name was not supplied to the defendant and where that witness testified about a material issue, the refusal by the trial court to exclude the testimony by the surprise witness is reversible error. Smith, 319 So.2d at 17.

In Smith, Justice Boyd also refers to Watson v. State, 291 So.2d 661 (Fla. 4th DCA 1974) which recognized that discovery is reciprocal, affording both state and defense an opportunity to eliminate surprise; and that fairness is the watchword in all discovery.

Indeed the very problems set out in Smith also arose in this case. After the defense rested, the state wanted to bring a surprise witness, the supreme prejudice imaginable, once the defense had laid its cards out on the table. Perhaps the defendant would not have testified at all, or would have been advised differently by counsel regarding his testimony, if Iris Deegan had been on the witness list. The prejudice goes to the very heart of the defense.

By allowing Iris Deegan to testify, the trial court torpedoed the entire defense, and in mid-trial, changed the rules (T-196).

The state is expected to list, as a matter of its responsibilities in discovery, the names and addresses of all persons known to have any involvement in the case (T-197).

Defense counsel was never able to speak with John Deegan because he was subpoenaed twice for deposition but failed to appear. The first time counsel spoke with him was the day on which he testified.

Defense counsel never even heard of Detective Iris Deegan, nor did he have any reason to suspect that she was a witness in this case. If any blame is to be assigned, it is the because state witness John Deegan failed to appear for his deposition - twice (T-198).

There is extreme prejudice to Bob Champagne and the entire defense. Had Iris Deegan been listed, the course of the preparation of defense would have been different (T-199).

The Florida Rules of Criminal Procedure are supposed to protect the defendant from trial by ambush. The rules of discovery and specifically the Richardson cases show that both sides are supposed to expose all issues and facts before the trial. The system does not work when the defendant takes the stand, reveals his entire defense and then the state can bring in new witnesses. That is not fair (T-200).

And to make things worse, defense counsel wanted to take Iris Deegan's deposition that morning if she was going to testify, and the trial court found that unnecessary: "I'll permit her to testify, what she says will be on the record in this court. You'll have a full record. You don't need to take a deposition." The court then said "Okay, you want to take her deposition, go take her deposition." (T-201, 202).

When defense counsel wanted to cite other authorities the judge said that she did not have to be present, and counsel could make his record when she left the courtroom (T-201). The court found that any problem was created by the defense. When counsel wanted to argue procedural prejudice, the court would not allow further argument (T-202).

The judge then told defense counsel to put his cases on the record and take Iris Deegan's deposition, whereupon she left the bench (T-204, 205).

Raising the implication that there were other criminal cases being discussed with Mr. Champagne that night, allowed the jury to take into the jury room, matters which should not have been considered in reaching a verdict in this case. The jury verdict should have been based solely upon whether the witnesses were correct in their identification, whether there

was a legitimate confession to the crime and whether the state had met its burden of proof.

In Sharif v. State, 589 So.2d 960 (Fla. 2d DCA 1991), Judge Frank, reversed the defendant's conviction and remanded the cause for a new trial where an undisclosed rebuttal witness was allowed to testify. The Court was not persuaded that the witness's testimony was no prejudicial. Had the defendant been able to anticipate such testimony, Judge Frank wrote, his preparation for trial might have proceeded differently. 589 So.2d 961.

In Sharif, the state failed to reveal a rebuttal witness who, over defense objection, testified and contradicted n aspect of the defendant's testimony. The identity of rebuttal witnesses is not excepted from the state's discovery obligations. The trial court's inquiry into the circumstances surrounding the state's non-compliance was not adequate. Richardson required a reversal of the conviction. In fact, a per se basis for reversal arises from failure to fulfill the Richardson requirement. 589 So.2d 960-61.

For the foregoing reasons, Bob Champagne's convictions must be reversed and the cause remanded for a new, and fair trial.

POINT III

THE THIRD DISTRICT INCORRECTLY AFFIRMED WHERE THE EVIDENCE OF IDENTITY WAS INSUFFICIENT TO PROVE THAT BOB MICHAEL CHAMPAGNE COMMITTED THE CHARGED ROBBERIES IN THAT THE ASSAILANT WAS IDENTIFIED BY THE VICTIMS SHORTLY AFTER THE ROBBERY AS BEING MUCH SHORTER AND WEIGHING MUCH LESS THAN BOB CHAMPAGNE, AND HAVING GOLD TEETH.

It is fundamental that it is an essential of due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979).

There is no question that a robbery was committed in the present case, but the state failed to prove beyond a reasonable doubt that Bob Michael Champagne was the larger man who participated in the robbery of the Maximum Protection Insurance office on December 4, 1992, taking property at gunpoint from Ms. Zizi, Ms. Xavier and Mr. Darcius and tying them up with telephone cord.

There were two men involved. One was skinny and the other was large. The three victims all identified Bob Champagne as the larger man, both from photographs and in the

courtroom. However, shortly after the robbery, they gave descriptions which did not even come close to accurately describing Bob Champagne who stands six feet three inches tall, and weighs 280 pounds. He does not have gold teeth.

Chantal Xavier described the skinny man as being tall and light skinned. She said that she recognized him, but she did not recognize the other man whom she described as big, dark skinned, about 200 pounds and five feet six inches tall. The Saturday after the robbery, she was shown photographs and she picked out Bob Champagne's photograph. At trial, she said that she was positive that this defendant was the man who robbed her at gunpoint (T-28 to 31).

Marie Zizi described the larger man as tall, fat, large lips, gold teeth and a high top; and the other as light, taller and skinny. She also had described the larger man as being five feet six inches tall, but acknowledged that she might have been mistaken, since Bob Champagne is six feet, three inches tall. In spite of the discrepancy, she said she had no doubt that he was the man. She identified him from photographs (T-53 to 56).

Ms. Zizi's original description to the police was that the man was five feet five inches tall and weighed 150 to 200 pounds, and that he had gold teeth (T-59, 60).

Samuel Darcius also testified at trial that he recognized Bob Champagne as the man who robbed him (T-74). He had originally described the larger man as being five feet seven or eight inches tall (T-77).

According to a robbery detective, the victims gave different descriptions to different officers. They told Detective Cope that the larger man was six feet two inches tall and weighed 200 to 240 pounds; but they also had told Officer Darby that the man was five feet five inches tall and weighed 140 pounds (T-85).

On cross examination Detective Cope said that regarding the heavier of the two men, the first description given by the victims, a few minutes after the robbery, was that he was a black male, 18 to 21 years old, five feet five inches tall, 150 to 200 pounds, dark and heavy; but the description the victims gave him was different: six feet tall, 200 to 240 pounds (T-92, 93, 94, 98).

Clearly there was sufficient conflict in the descriptions given by the victims, to create a reasonable doubt as to whether Bob Champagne was the larger man who took part in the robbery on December 4, 1992.

CONCLUSION

Based on the foregoing arguments and authorities, Bob Michael Champagne respectfully requests that this Court decline to exercise its discretionary authority to review the certified question.

However, should this Court elect to exercise its discretionary jurisdiction to review the certified question in this case, then we respectfully ask the Court to answer the certified question in the affirmative; and to affirm the decision of the Third District Court of Appeal insofar as it held that Hale requires that Bob Champagne's habitual offender sentences cannot be further enhanced by running the three life terms consecutively.

And should this Court elect to exercise its discretionary jurisdiction to review this case, we also respectfully request that this Court reverse the decision of the Third District Court of Appeal insofar as it rejected our arguments that Bob Champagne is entitled to a new and fair trial or in the alternative, that he is entitled to be discharged because of the obvious violations of his state and federal constitutional rights in allowing an unlisted rebuttal witness to

testify; and in convicting Mr. Champagne where the essential element of identity was not proven beyond a reasonable doubt.

Respectfully submitted,

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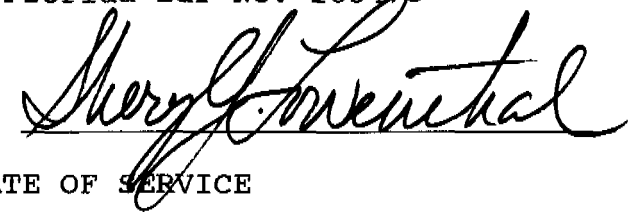

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief on the merits was mailed on May 11, 1995 to Angelica D. Zayas, Assistant Attorney General, Suite N-921, 401 NW Second Avenue, PO Box 013241, Miami FL 33101.

APPENDIX TO THE RESPONDENT'S BRIEF ON THE MERITS

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