IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,548

THE STATE OF FLORIDA,

Petitioner,

-vs-

JOHN WILLIAM PARKER,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This a petition for discretionary review following a certified question posed by the Third District Court of Appeal. The symbol "A" will be used to refer to the petitioner's appendix. The respondent has filed, contemporaneously with the filing of this brief, a motion directing the Third District Court of Appeal to transmit the transcript of the trial proceedings to this Court for inclusion in the record. The symbol "T" will be used to refer to the trial transcript.

STATEMENT OF THE CASE AND FACTS

Following John Parker's finding of guilt by a jury for fraudulent use of a credit card and grand theft, the trial court sentenced Mr. Parker to consecutive terms of ten years incarceration as a habitual felony offender. (R. 45-47, 53-57, T. 482). Mr. Parker's judgments of convictions and sentences were appealed to the Third

District Court of Appeal during which the following three arguments were raised: the trial court's finding that the defense was not prejudiced by the state's failure to disclose a rebuttal witness who impeached the defendant's trial testimony; the trial court's denial of a defense motion for recusal filed after the trial court stated she was offended by the testimony of a defense witness during the sentencing hearing; and the imposition of consecutive habitual offender sentences for acts arising out of the same conduct.

The District Court of Appeal issued the following opinion affirming Mr. Parker's conviction but reversing the consecutive habitual offender sentences:

> Appellant, John Parker, appeals his sentence and conviction for fraudulent use of a credit card and grand theft. We affirm the conviction. However, we reverse the imposition of consecutive habitual offender sentences, pursuant to the State's proper confession of error
>
> It is error for a trial court to sentence an individual to consecutive habitual offender sentences where the crimes arose from the same criminal incident. See Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, _ U.S. _, 115 S.Ct. 278, 130 L.Ed. 2d 195 (1994); Hill v. State, 645 So. 2d 90 (Fla. 3d DCA 1994). Accordingly, we vacate appellant's sentence and remand with instructions to the trial court to impose concurrent sentences. Finally, we certify the same question framed in Hill and Simmons to the supreme court.
>
> Affirmed in part; reversed and remanded in part; question certified.

(A. 5).

As the certified question in this case has been briefed before this Court in State v. Hill, Case No. 84,727 and State v. Champagne, Case No. 85,479, respondent adopts the arguments raised by the respondents' in their briefs on the merits.

The respondent has raised the issues previously raised before the Third District Court of Appeal. The district court rejected the issues without discussion

thereby foreclosing an independent basis by which to seek discretionary review before this Court, however this Court possess jurisdiction to review any and every issue in a case properly before it. *Freund v. State*, 520 So. 2d 556, 557, *n.* 2 (Fla. 1988) (citing *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982); *Bould v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977)). Therefore respondent requests that this Court address the arguments presented in Issues II and III as they identify prejudicially errors which materially affect the respondent's convictions and for which he has no other available remedy.

The Richardson Hearing:

The charges in the instant case arose as a result of Mr. Parker's presentation of a stolen credit card at an Office Depot in an attempt to purchase a T.V. and fax machine. (T. 213-215). The essence of Mr. Parker's defense was that he had been coerced into committing the crime by a man to whom he owed money. (T. 299-300). Prior to the commencement of opening statements, the defense asked the state whether the state had any evidence that Mr. Parker had attempted to commit any other crimes at that store. (T. 182-183). The state responded that it was investigating the possibility of an additional witness but had no evidence at that point:

> MR. TASEFF (defense): All I want to know is, did they accuse him of going in that store at any other time and using that credit card.
>
> MR. WALSH (state): Right now, he's charged with what we've charged in the Information. Now, counsel had the right to depose my witnesses and I'm sure he did and can ask them whether they had any information about him being in the store.
>
> MR. TASEFF: They -- I certainly did depose them and they couldn't say he, in fact, had been in the store at another time. In terms of any independent knowledge that they have.

THE COURT: That's what they testified to?

MR. TASEFF: There was suspicion.

MR. WALSH: I think that what he's alluding to, the cashier in the store said a colleague of hers described someone.

MR. TASEFF: Like him.

THE COURT: One at a time.

MR. WALSH: Similar in appearance to this man who had used a credit card the day before and the credit card turns up stolen. So, when my witness came in to work on the day in question, this cashier told her, by the way, that's the guy who used the credit card here yesterday that was stolen. That's what he looked like.

MR. TASEFF: You know he looks like. She couldn't testify that he used nor has any other evidence that shows he used and frankly, I think they're mistaken because of the testimony in its entirety in deposition, this isn't the man they're alluding to, they had suspicion. Perhaps and it was waived by the use of the credit card and perhaps his appearance but unless they know, which based on what I've been provided, this is the man they were thinking, as it turns out, this is a man who has been arrested and charged with the crime.

THE COURT: Let me ask you this. Do you believe there will be any witness who will be able to testify on the stand that they saw the Defendant in the store the day before?

MR. WALSH: Haven't listed any witness, Judge. But I believe if I research further and interviewed this woman, this other cashier who told my witness that a man meeting this description had been in the store the previous day, maybe she could identify him. I don't know. I haven't talked to her.

(T. 183-184). The trial commenced immediately thereafter.

During Mr. Parker's cross-examination, the state asked Mr. Parker whether he was familiar with the store or owned any credit cards:

Q (state): When you walked into the store, you are familiar with where everything was?

A: No, sir.

Q: Why not?

A: I never been in that store before in my life.

Q: Had Ironside ever pulled it on you, this scam on you before, giving you a credit card and forcing you to use it?

A: No.

Q: Do you own any credit cards?

A: No.

(T. 317). At the conclusion of Mr. Parker's testimony, the state announced it intended to call Dina Dainov as a rebuttal witness. (T. 319). The prosecutor indicated Ms. Dainov would be available to testify within fifteen minutes. (T. 319).

A proffer of Ms. Dainov's testimony established that Dainov was a cashier at the Office Depot and was going to testify that Parker entered the store the day before his arrest and purchased a T.V. with a credit card. (T. 324). Defense counsel objected on the grounds that the state had not listed Ms. Dainov as a witness. (T. 319). The state asserted there was no obligation to disclose Ms. Dainov unless the state intended to call her. The state insisted it had not anticipated calling Ms. Dainov until Mr. Parker testified during cross-examination that he had never been at the store and did not own any credit cards. (T. 324).

The trial court conducted a *Richardson* Hearing. At the conclusion of the hearing, the court ruled that the state had not violated the rules of discovery. The court reasoned that the state was under no obligation to disclose Ms. Dainov, in spite of defense counsel's earlier request, because her testimony was not relevant and the state could not have anticipated calling Ms. Dainov until Mr. Parker testified and denied being in the store previously. (T. 325-327). The defense was subsequently permitted to depose Dina Dainov. (T. 328).

At the conclusion of the deposition, the defense requested a continuance in

order to investigate information which had come to light during the deposition:

> MR. TASEFF: Given the facts that we just had the opportunity to depose this witness today I'm moving for a continuance in the case so I can elicit information and evidence which I learned about for the first time during this deposition.
>
> Specifically, Ms. Dainov informed me of the name of an individual who works at Office Depot, a person named Rick Kell who was the front line supervisor. She spoke to this person -- the whole series of events is she saw the person come in the store on two prior occasions, prior to Mr. Parker being arrested on the 28th and she alerted other people of this, these events that she had seen this person. Okay.
>
> I believe Mr. Kell may have relevant information and I would like an opportunity to review any and all purchase slips or transaction slips that supposedly were made during these transactions.
>
> Ms. Dainov would testify I believe that the person came in on two occasions and bought T.V.'s with a credit card, and I would like to see those transaction slips. And I just learned for the first time Ms. Dainov on the day after Mr. Parker was arrested was shown a photograph of this individual.
>
> THE COURT: I missed the first part, who was shown?
>
> MR. TASEFF: This witness was shown a photograph, Ms. Dainov. He doesn't know who took the photograph or how it came to be.
>
> THE COURT: Who showed it to her?
>
> MR. TASEFF: Her manager, Mr. Miller and she was also shown the police reports at the time she was shown the photograph.
>
> I would like to see what she was shown. She identified apparently that picture as being the person who came into the store, that she waited on two times before. I believe I'm entitled to see that. And I need to investigate this case further before proceeding.

(T. 333-334). The defense also informed the trial court that Ms. Dainov had stated she was not sure she could identify Mr. Parker as the man she had waited on in the store the day prior to the incident. (T. 336).

The trial court denied the defendant's request for a continuance and ruled that the defense had not been prejudiced. The trial court stated that a continuance was not needed because a handwriting expert could not determine whether Mr. Parker had signed the purchase slips in question. The trial court also ruled that the defense was not being prejudiced by it's inability to view the photograph identified by the witness because the state was not going to introduce the photograph into evidence. (T. 341-343). The defendant's request for a continuance in order to consult a handwriting expert was denied. (T. 342-342). The trial court also denied a defense request to conduct a line up before Ms. Dainov took the stand in order to ascertain whether Mr. Parker was in fact the man Ms. Dainov had seen in the store the day before the incident. (T. 343).

The Sentencing:

During the sentencing hearing, the defense stipulated that Mr. Parker was the person convicted in the cases proffered by the state. (T. 422). Qualifying convictions were then introduced into the record and the trial court took judicial notice of the presentence investigation as well as the previously filed Notice of Enhancement. (T. 425). A certificate indicating that the qualifying convictions had not been pardoned was also introduced. (T. 425). The defense thereafter called witnesses on the appellant's behalf.

Carl Duncan testified he had known John Parker for eight years. (T. 429-430). Duncan indicated that Parker was addicted to drugs when he first met him. (T. 430). Parker was subsequently able to stop his addiction and change his life. (T. 431). Parker became involved with a church during that time. (T. 431). Parker subsequently discovered he had the AIDS virus and reverted to drug use. (T. 431). At the time of his arrest, Parker worked for Duncan in a store Duncan owned in

Overtown. (T. 430).

The defense also called Elise Hubbard. Ms. Hubbard lived in Overtown and described herself as a community activist. (T. 436). She stated that her work with a church in Overtown had allowed her to help young men like Parker better their lives. (T. 437). Ms. Hubbard stated that her experience had shown her that "junkies" became tougher in prisons. (T. 437). Ms. Hubbard also stated that she felt that the system often gave up on men once they served time in prison because the men were treated as though they could never change. (T. 437-438). Ms. Hubbard stated she thought the system was "hard to think that because, you know, in every part of life we all been -- Your Honor, we all something maybe not in our life, in our family life, someplace along the road someone have problems, but you didn't give them up to the system. You tend to try to deal with problems." (T. 438).

Ms. Hubbard stated she had known Parker for approximately five years. (T. 438). When asked to express her opinion about Parker prior to the court imposing sentence, Ms. Hubbard made the following statement:

> Your Honor, you see, in dealing with street peoples, when you have a problem and we got a system with no jobs, it will kill you. You know, if he was standing here before you I would tell you this man is really not a criminal; just the system fail him. No one really to give him the opportunity he should have, you know, and you know, You Honor, he's a very, very ill man and I believe if you turn him out here he learn from his experience with a job and someone to report to you. And his other few days would be good days and, you know --
>
> Q: (by defense): Are you willing, with your church, to provide whatever support system you can for him?
>
> A: I most certainly am, and would check in to her every time she would tell me. I mean, you know, because I feel like at that later stage in your life, how many more days do you have? And I feel it is time for trying time, not jail time. I feel like a person should get themself right with God. A lot of people weren't that fortunate. You go out

there and a car hits you and you can't say Lord, have mercy. When you have a life sentence or you -- I suppose you should try to make the best out of it.

(T. 439-440).

As Ms. Hubbard was leaving the witness stand, the trial court made the following statement:

I would like to say something to Ms. Hubbard.

I have to tell you that I am offended when people come before me and tell me that the system has failed, the system has done nothing to help the person, and I look back and see all the things the system has done to help that individual.

In Mr. Parker's case he has been given drug treatment and other kinds of opportunities.

MR. TASEFF: Judge, may I?

THE COURT: I intend to say what I intend to say. I will have my say.

MR. TASEFF: Is this in the form of questioning or --

THE COURT: No, this is not. It is in the form of a statement which is going to be followed up with a question.

MR. TASEFF: What I'm asking --

THE COURT: Quiet. Quiet.

MR. TASEFF: I ask you to withhold any statement until you have heard everything here is to hear before you pass judgment.

THE COURT: I am not passing judgment. I intend to ask a question of the witness.

MR. TASEFF: With all due respect --

THE COURT: No more Mr. TASEFF.

MR. TASEFF: May I be heard?

THE COURT: No, you may not.

MR. TASEFF: I would object to silence.

THE COURT: Quiet. That's it.

Are you aware that he received drug treatment in 1991 in the DADE County Jail? Were you aware of that?

THE WITNESS: No, ma'am, I wasn't.

THE COURT: Okay. And --

MR. TASEFF: Judge, may I be heard?

It is our position that the drug treatment that was supposedly had in 1991 amounted to no drug treatment.

In fact, he never, like many people in Dade County when sentenced to T.A.S.C., never received it, given the passage of sentence and unavailability of treatment or counseling, that there was no space for him at that time, that he, in fact, never did receive any drug treatment in 1991.

(T. 440-442).

The defense then called Robert Brown. (T. 442). Mr. Brown stated he was a pastor and had met John Parker at a revival at his church. (T. 443-444). Mr. Brown had known Parker since the early 1980's and indicated there was a period of time in which Parker was able to change his life and overcome his addiction. (T. 444). Brown subsequently lost touch of Parker but had begun seeing Parker again before Parker's arrest. (T. 444). At the conclusion of Mr. Brown's testimony, the trial court granted the defendant's motion to continue the sentencing hearing in order to afford the defense an opportunity to secure medical records documenting Mr. Parker's illness. (T. 445-448).

When the sentencing hearing resumed several days later, the defense filed a motion seeking to recuse the trial court from any further proceedings. (R. 48-51). The motion set forth in pertinent part the following in support of the recusal:

11. As Ms. Hubbard turned to leave to take her seat in the audience, the court called Ms. Hubbard back. The court then raised its voice to Ms. Hubbard and told her that the court found Ms. Hubbard's comment that the

defendant had never been given a break to be "offensive." The court verbally berated Ms. Hubbard and expressed her outrage that she found it offensive that someone from the community "would come in here" and say that this defendant had never been given treatment. The court then attempted to confront Ms. Hubbard with the court's belief that the defendant had actually received drugs treatment while in jail in 1991. Counsel for the defendant objected numerous times to the court's conduct but was ordered by the court to be silent.

. . .

SPECIFIC ALLEGATIONS OF PREJUDICE AND BIAS

1. Based on the court's reaction and open hostility to the testimony of Ms. Hubbard, the defendant reasonably believes that the court cannot be fair and impartial in imposing sentence. By attacking Mr. Hubbard and openly commenting that she found her testimony "offensive," the court has pre-judged the worth and weight of Ms. Hubbard's testimony prior to the conclusion of the sentencing hearing. The defendant fears that the court has pre-determined the appropriate sentence before hearing all the evidence and argument of counsel.

2. The court's conduct in sua sponte commenting on the testimony of Ms. Hubbard prior to the conclusion of the hearing violated Canon 2 of the Code of Judicial Conduct. Canon 2 states that a judge should avoid impropriety and the appearance of impropriety and act "at all times in a manner that promotes public confidence and impartiality." The court's comments on Ms. Hubbard's testimony, in both content and tone, were delivered as an advocate and not as an impartial magistrate charged with the responsibility of imposing a just and fair sentence. 'When the judge enters in to the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so that disqualification is required.' Chastine v. The Honorable Virginia Gay Broome, 19 FLW D14, Vol. 19, No. 1, Jan. 7, 1994.

3. The Court's conduct in openly berating Ms. Hubbard for her view that the system had failed the defendant violated Canon 3 of the Code of Judicial Conduct. Canon 3 states that a judge should perform the duties of her office impartially and diligently and 'should be patient, dignified and courteous to all litigants, jurors, witnesses, lawyers and other with whom she deals in her official capacity.' Ms. Hubbard was courteous and respectful to the court; she did not invite any sort of rebuke from the court. The court's discourteous reaction

> to Ms. Hubbard conveyed the appearance that the court was an advocate attempting to discredit a defense witness's testimony.

(R. 49-51). The trial court denied the motion for recusal ruling that the motion was legally insufficient. (T. 452-453).

Although the trial court subsequently denied admissibility of the appellant's medical records, the court accepted the fact that Mr. Parker had been diagnosed as being HIV positive. (T. 460). The defense subsequently argued that Mr. Parker's addiction, coupled with his illness and failure to receive drug treatment, were mitigating factors supporting a sentence which did not impose the habitual offender enhancement. (T. 467-470, 472-473). The defense also noted the recommendation of the presentence investigation which recommended a non-habitual sentence, as well as the testimony of the witnesses presented on Mr. Parker's behalf. (T. 470-471, 472-473).

Over defense objection, the trial court sentenced Mr. Parker to consecutive terms of ten years incarceration as a habitual felony offender (R. 45-47, 53-57, T. 482) after initially announcing a single sentence of ten years as a habitual felony offender. (T. 479).

A motion for rehearing was filed following the district court's decision affirming Mr. Parker's convictions but reversing the consecutive habitual offender sentences. The motion alleged that in spite of the district court's order remanding the case to the trial court for resentencing, the court had failed to address the propriety of the trial court's denial of a motion for recusal from the sentencing proceedings. The motion for rehearing was denied.

SUMMARY OF THE ARGUMENT

In *Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, _ U.S. _, 115 S.Ct. 278, 130 L.Ed. 2d 195 (1994), this Court unequivocally held that the imposition of consecutive habitual offender sentences for crimes arising for a single criminal episode are prohibited. Therefore the district's court's certified question should be answered in the affirmative.

Moreover reversal of the respondent's convictions is warranted in the instant case. The prosecution failed to disclose the existence of a rebuttal witness until immediately before the witness was to testify. As the defense had specifically requested disclosure of the evidence before commencement of the trial, and as the prosecution was not surprised by the contents of the defendant's testimony, the non-disclosure was a clear discovery violation. Reversal of respondent's convictions is warranted since the non-disclosure prejudiced respondent's ability to prepare for trial and limited respondent's cross-examination of a critical prosecution witness.

Reversal of the respondent's sentence is also warranted as a result of the trial court's refusal to recuse herself from the sentencing proceedings after stating she was personally offended by the contents of a defense witness' testimony. The trial court's subsequent conduct and statements impinged the neutrality of the court thus supporting disqualification of the judge from further proceedings.

ARGUMENTS

I.

THE STATE'S POSITION THAT *HALE v. STATE*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, _ U.S. _, 115 S.Ct. 278, 130 L. Ed. 2d 195 (1994) "SHOULD BE INTERPRETED TO ONLY PROHIBIT THE IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR EACH OFFENSE COMMITTED DURING THE COURSE OF A SINGLE CRIMINAL EPISODE UNDER SECTION 775.084, FLORIDA STATUES," IS CONTRARY TO THE VERY LANGUAGE OF *HALE*.

As this issue as already been briefed before this Court in State v. Hill, Case No. 84,727 and State v. Champagne, Case No. 85,479, respondent adopts the arguments presented by the respondents in their briefs on the merits. Respondent requests that this Court take judicial notice of its file in those cases and refer to the arguments contained in the briefs filed therein.

Briefly stated, respondent reiterates the fact that this Court's holding in *Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, _ U.S. _, 115 S.Ct. 278, 130 L. Ed. 2d 195 (1994), unequivocally holds that consecutive habitual offender sentences are prohibited for crimes arising from a single criminal episode. This Court's subsequent decisions in *Elder v. State*, 630 So. 2d 528, *Brooks v. State*, 630 So. 2d 527 (Fla. 1993), and *Penton v. State*, 630 So. 2d 526 (Fla. 1993), have reaffirmed the Court's holding in *Hale* by repeatedly rejecting consecutive habitual offender sentences for crimes arising from a single criminal episode. The district court's certified question should thus be answered in the affirmative.

II.

THE TRIAL COURT ABUSED IT'S DISCRETION BY DENYING THE RESPONDENT'S REQUEST FOR A CONTINUANCE AND ALLOWING AN UNLISTED REBUTTAL WITNESS TO TESTIFY WHERE THE STATE'S FAILURE TO DISCLOSE THE EXISTENCE OF THE WITNESS PREJUDICED THE RESPONDENT'S ABILITY TO PREPARE FOR TRIAL AND PRECLUDED A FULL AND FAIR CROSS-EXAMINATION OF THE STATE WITNESS.

Reversal of the respondent's convictions is warranted in the instant case. The trial court incorrectly determined that the state had not violated the rules of discovery by failing to disclose the name of a rebuttal witness until the conclusion of the defendant's testimony. Moreover the trial court's finding that the defense was not prejudiced by state's failure to list the witness was an abuse of discretion warranting the reversal of appellant's trial and remand to the lower court for a new trial.

Pursuant to defense counsel's objection to Dina Dainov's testimony, on the grounds that Ms. Dainov had not been listed as a witness, the trial court held a *Richardson* Hearing. At the conclusion of the *Richardson* Hearing, the trial court ruled that the state had not violated the rules of discovery because the state was under no obligation to disclose the existence of Ms. Dainov's until the state decided to call her as a rebuttal witness to impeach the respondent's testimony. (T. 325).

This Court has emphatically held that there is no impeachment or rebuttal exception to the rules of discovery. *Kilpatrick v. State*, 376 So. 2d 386 (Fla. 1979); *Smith v. State*, 500 So. 2d 125 (Fla. 1986); *Elledge v. State*, 613 So. 2d 434 (Fla. 1993); *Hicks v. State*, 400 So. 2d 955 (Fla. 1981). *See also Ratcliff v. State*, 561 So. 2d 1276 (Fla. 2d DCA 1990). Moreover an accused is entitled to the name of all witnesses who have information relevant to his case, not just the names of those the state intends to call. *Wortman v. State*, 472 So. 2d 762 (Fla. 5th DCA) *rev.*

denied 480 So. 2d 1296 (Fla. 1985); *Fla.R.Crim.P.* 3.220(b)(1)(A). Contrary to the trial court's reasoning, this is not the type of case in which the prosecution is surprised by a defendant's testimony and could not have anticipated calling the witness, thus excusing non-disclosure. *See Baker v. State*, 438 So. 2d 905 (Fla. 2d DCA 1983) *rev. denied* 447 So. 2d 885 (Fla. 1984) (no abuse of discretion to allow unlisted witness to testify that she had received calls from defendant urging her to tell husband to send him money to fix a ticket, thereby contradicting defendant's contention that husband was repaying loan, where state did not become aware of wife's potential as witness until defendant's cross-examination of husband); *Dupree v. State*, 436 So. 2d 317 (Fla. 1st DCA 1983) (no error to allow unlisted rebuttal witness to testify concerning the nature of the relationship between a defense witness and the defendant where the defense witness had not been disclosed prior to trial and the state could not have anticipated the need to call a rebuttal witness).

The record in the present case indicates that the prosecutor had spoken to Ms. Dainov sometime earlier during the day and was aware that Ms. Dainov would testify that John Parker had been in the store previously to purchase merchandise with a credit card. (T. 344-345). Moreover defense counsel explained the defense to the jury and the prosecution during jury selection. (T. 143-151). Thus the nature of the defense, and the contents of Mr. Parker's testimony was a surprise to no one. The prosecution was under a continuing duty to disclose previously undisclosed evidence to the defense. *Brown v. State*, 515 So. 2d 211 (Fla. 1987); *Cumbie v. State*, 345 So. 2d 1061 (Fla. 1977). The state's failure to notify the defense, once the state was aware that there was evidence that the respondent had been in the store the day before the incident and indicated he would return the following day, was a clear violation of the rules of discovery. *Lee v. State*, 538 So. 2d 63 (Fla. 2d DCA 1989).

The state's violation is particularly egregious in the instant case. In spite of the fact that the defense specifically requested disclosure of this type of evidence immediately before commencement of the trial, the state deliberately withheld disclosure of the evidence until the defendant had testified. (T. 182-183). Confirmation of the prosecutor's plan to call Ms. Dainov as a rebuttal witness is evidenced by the fact that the prosecutor had the witness ready to testify and appear before the court within fifteen minutes. *Elledge v. State*, 613 So. 2d 434 (Fla. 1993) (noting that state anticipated testimony of officer since it had disciplinary reports refuting officer's testimony of corrections officer); *James v. State*, 639 So. 2d 688 (Fla. 2d DCA 1994) (although reversed due to trial court's failure to conduct inquiry into state's failure to disclose photograph, appellate court notes that evidence that the state had intended to use the photograph was demonstrated by fact that prosecutor had photograph in the courtroom).

A *Richardson* inquiry is designed to "ferret out procedural prejudice occasioned by a party's discovery violation." *Smith v. State*, 372 So. 2d 86, 88 (Fla. 1979). *Accord*, *Duarte v. State*, 598 So. 2d 270, 272 (Fla. 3d DCA 1992). Reversal of an appellant's conviction is required if the prosecution's non-compliance with the rules of discovery results in harm or prejudice to the defendant's ability to prepare for trial. *Richardson v. State*, 246 So. 2d 771, 774 (Fla. 1971); *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995). It is clear that the state's failure to disclose the existence of Ms. Dainov in the instant case prejudiced appellant's ability to prepare for trial.

Dina Dainov's testimony was devastating to the defendant's case. The state began closing argument by focusing on the fact that Ms. Dainov had impeached the defendant's testimony (T. 369) and repeated references were made to the contents of Dainov's testimony throughout the state's closing argument. (T. 369-371, 377).

The jury requested a copy of her testimony (R. 41, T. 391) and the trial court relied on Dainov's testimony to conclude that Mr. Parker was a "liar". (T. 476-477).

The Rules of Criminal Procedure require that witnesses be disclosed and made available in sufficient time to permit reasonable investigation regarding the proposed testimony. *Hill v. State*, 535 So. 2d 354, 355 (Fla. 5th DCA 1988); *Del Gaudio v. State*, 445 So. 2d 605 (Fla. 3d DCA) *rev. denied*, 453 So. 2d 45 (Fla. 1984). By failing to disclose Ms. Dainov until immediately before she was about to testify, the defense was precluded from preparing a defense to her identification of Parker as the man she had waited on previously. The defense should also have been granted an opportunity to question the store managers previously unknown to the defense. *Anderson v. State*, 314 So. 2d 803 (Fla. 3d DCA 1975) *cert. denied* 330 So. 2d 21 (Fla. 1979). Both managers had information which may have been relevant to test the credibility of Ms. Dainov's identification. *Griffin v. State*, 598 So. 2d 254 (Fla. 1st DCA 1992). Additionally, the defense should have been afforded an opportunity to consult a handwriting expert and view the photograph Dainov had been shown.

Ms. Dainov had expressed a hesitancy in her ability to identify the man she had waited on in court. (T. 336). A legitimate area of cross-examination should thus have been to test the credibility of Ms. Dainov's identification of Mr. Parker. *Salter v. State*, 382 So. 2d 892 (Fla. 4th DCA 1980) (error to unduly restrict appellant's cross-examination of state witness regarding prior identification); *Porter v. State*, 386 So. 2d 1209 (Fla. 3d DCA 1980) (error to limit defendant's cross-examination of identification witness which, if permitted, could have tested and perhaps undermined witness' identification). By denying the defense request for a continuance, the trial court limited the respondent's ability to cross-examine a critical prosecution witness. Accordingly the respondent's convictions should be reversed and remand to the circuit court for a new trial.

III.

THE TRIAL COURT ERRED BY DENYING THE MOTION FOR RECUSAL AFTER THE TRIAL COURT STATED SHE HAD BEEN OFFENDED BY THE CONTENTS OF A DEFENSE WITNESS' TESTIMONY.

"Litigants have a right to seek the disqualification of a presiding judge when they have objective grounds to believe they will not receive a fair consideration at a trial or other judicial proceeding." *Puckett v. State,*, 591 So. 2d 326 (Fla. 5th DCA 1992); §38.10 Fla.Stat.(1993); *Fla.R.Jud.Admin.* 2.160. "[A] party seeking to disqualify a judge need only show a 'well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.' The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than a judge's perception of his [or her] ability to act fairly and impartially." *Livingston v. State,* 441 So. 2d 1083, 1086 (Fla. 1983). In the present case the respondent filed a motion seeking the trial court to recuse herself from any further proceedings. (R. 48-51). The trial court held that the motion was legally insufficient. (T. 453-453). Examination of the motion and record establishes otherwise.

Rule 2.160 of the Rules of Judicial Administration provides in pertinent part that:

> **(c) Motion.** A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.
>
> **(d) Grounds.** A motion to disqualify shall show:
>
> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

Respondent's motion in the instant case was properly sworn to and signed. (T. 453-454). The motion alleged with specificity the facts leading up to the trial court's exchange with Ms. Hubbard. (R. 48-49). The motion also alleged that the "court's reaction and open hostility to the testimony of Ms. Hubbard" lead the respondent to believe that the court could not be fair and impartial in imposing sentence. (R. 50). The facts of the instant case reasonably lead the respondent to question the trial court's fairness and impartiality.

It is clear that a trial court cannot enter the proceedings and become a participant. *Chastine v. Bromme*, 629 So. 2d 293 (Fla. 4th DCA 1993); *Wayland v. Wayland*, 595 So. 2d 234, 235 (Fla. 3d DCA 1992). "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Fla. Code Jud. Conduct, Canon 2A*. The trial court's active participation in an attempt to discredit Ms. Hubbard's testimony and credibility in the instant case clearly transformed the trial court into an advocate, not a neutral magistrate.

Moreover the trial court's statement that she found the content of Ms. Hubbard's testimony "offensive" served to place the defendant on notice that any attempt to present mitigating factors on the respondent's behalf was futile. The entire essence of respondent's presentation during the sentencing hearing was to establish that Mr. Parker's addiction, coupled with his illness and failure to receive drug treatment were mitigating factors supporting a non-habitual sentence. The trial court's announcement, indicating not only a reluctance to listen, but establishing that the court was personally offended by the nature of the testimony, clearly supported the trial court's disqualification. *Gonzalez v. Goldstein*, 633 So. 2d 1183 (Fla. 4th DCA 1994); *Mitchell v. State*, 642 So. 2d 1108 (Fla. 4th DCA September 9, 1994). "No judge under any circumstances is warranted in sitting in the trial of

a cause whose neutrality is shadowed or even questioned." *Livingston v. State*, 441 So. 2d at 1085 *quoting Dickenson v. Parks*, 105 So. 459, 462 (Fla. 1932). The facts of the instant case clearly demonstrate that the trial court's conduct cast such a shadow on the proceedings and warranted disqualification of the court.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent requests that this Court decline to exercise its discretionary authority to review the certified question. Should this Court elect to exercise its discretionary jurisdiction, respondent urges the Court to answer the certified question in the affirmative and reverse the Third District decision affirming the respondents conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 11th day of July, 1995.

Rosa C. Figarola
ROSA C. FIGAROLA
Assistant Public Defender