IN THE SUPREME COURT OF FLORIDA

BRUCE H. BELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,716

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, BRUCE H. BELL, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts, with the following additions, corrections, or qualifications.

Petitioner did not object to the procedures employed by the Court in selecting jurors to hear the case. (T 62-70, 93)

Petitioner did not object to the jury that was empaneled. (T 67, 93)

The record does not show that petitioner was not at the sidebar when juror challenges were discussed. (T 62-70)

Petitioner did not object to Detective Bates' statement regarding the records of the electric company on the grounds that the statement was a discovery violation. (T 138-141)

Petitioner did not ask for a Richardson hearing at the sidebar discussion of that statement. (T 138-141)

SUMMARY OF ARGUMENT

ISSUE I.

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial.

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled law and the issue was not preserved by proper objection in the trial court.

If this Court decides to review this issue, the decision of the lower tribunal should be affirmed as no discovery violation occurred, thus, no hearing was needed. Further, the trial court excluded the evidence acting in a manner consistent with the harshest sanction available for a discovery violation. Finally, if a discovery violation occurred and a hearing should have been held, any error was harmless. Not only was the sanction imposed the harshest available as a discovery violation, the statement made by the officer was not relevant to the guilt of the petitioner. The critical issue was whose drugs were in the apartment not whose apartment were the drugs in. There is no crime in being the lessor of an apartment where drugs are found, the statute requires proof of possession. Therefore, this Court should deny relief.

ISSUE III

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled principles of law and does not warrant this Court's review.

Should this Court review this claim, application of these settled principles mandates affirmance of the lower tribunal. Here the trial court excluded the evidence and gave a curative instruction. There is no evidence that the jury did not follow the instruction and the law presumes that juries follow the instructions of the court.

In any event, the testimony was not inherently prejudicial and in fact was of little evidentiary value as petitioner was caught with the drugs and admitted they were his. In order to be entitled to a mistrial, a defendant must establish that the error vitiated the fundamental fairness of the trial. Under the circumstances, it cannot be said that the trial court decision to deny the motion for mistrial was an abuse of discretion.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

"DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES", THAT IS THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR NOT YET FINAL DURING THE TIME CONEY WAS UNDER CONSIDERATION BUT PRIOR TO THE ISSUANCE OF THE OPINION?"

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the above stated question, therefore, this Court has discretion to exercise jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

The District Court of Appeal, First District of Florida, granted rehearing of its original opinion in order to certify this question. The certified question improperly asks this Court to conduct a rehearing of its decision in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995). In Coney, this Court interpreted rule 3.180(a) F. R. Crim. P. and stated that:

> Our ruling today clarifying this issue is prospective only.

Id. at 1013

In certifying its question, the district court acknowledged that it understood the meaning of the language used by this Court in Coney: prospective means the decision does not apply to cases tried prior to the decision. The decision below questioned how the Coney decision can be reconciled with Smith v. State, 598 So.2d 1063 (Fla. 1992). In order to resolve what it perceived as an unanswered issue, the district court certified the question.

The district court's perception that an issue remains to be resolved is erroneous. Subsequent to the Smith decision, this Court has answered the question of how decisions of this Court are to be applied by the courts of this state. The issue was specifically addressed in Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and

held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The issue was discussed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Thus, the issue of how Smith is to be read has been decided.

Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Therefore, this Court should decline to exercise its jurisdiction to answer the already decided question presented by this case. See Stein.

There is a second reason why this Court should decline to exercise its jurisdiction in this case. As part of its reason to certify the issue, the district court noted that there were

numerous Coney-type cases in the pipeline. This statement misapplies the definition of a pipeline case entitled to obtain the benefit from a new decision. A pipeline case is one in which the issue is properly preserved in an appeal which is not final at the time the change in law occurs. In order to be a pipeline case, an appellant must establish that he is similarly situated and his issue is properly preserved. This was made clear by this Court's holding in Gibson v. State, 661 So.2d 288 (Fla. 1995). There this Court held that issues relating to a defendant's presence during jury voir dire (like other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. The Gibson case presented this Court on appeal with the following issue:

> Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

This Court specifically held that:

> In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on

> appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995)

Gibson at 290-291

Thus, Gibson's attempt to raise for the first time on appeal a Coney issue was rejected because it was not properly preserved. This rule of law operates independently of Coney and applies even to cases where the trial takes place after Coney issued. Likewise, petitioner did not object in the trial court and his case is indistinguishable from Gibson. Indeed, the record does not reflect that petitioner was not at the sidebar during the exercise of peremptory challenges. (T 62)

This Court should discourage the promiscuous certification of irrelevant questions by declining to exercise its discretionary jurisdiction and by instructing the district courts that unpreserved claims cannot be the basis for "an issue of great public importance." Misapplication of the designation "this is an issue of great public importance" when the issue certified

could not provide the defendant with relief is all too common. In fact, this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See Branch v. State, No 87,717, Bell v. State, No. 87,716, Lett v. State, No. 87,541, Lee v. State, No. 87,715, Horn v. State, No. 87,789 Continuation of this practice should be discouraged.

Merits

This Court, if it exercises discretionary review, should answer the certified question in the negative.

This Court specifically answered the question of how its decisions are to be applied in, e.g., Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The Court noted that it had repeatedly held that it had the authority to make new rules prospective and cited a series of cases in which it had dictated that the new rule was to be prospective only.

The issue was again addressed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Petitioner's arguments are based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So.2d 719 (Fla. 1978) Thus, there will be many occasions for this Court's rulings to be prospective only. Adopting a rule akin to the United States Supreme Court rule in Griffin v. Kentucky, 479 U.S. 314 (1987) would be inappropriate given this Court's rulemaking authority and would unduly restrict the Courts ability to modify the rules.

This approach is also appropriate given the subject of this litigation. Like the decision in R.J.A v. Foster, 603 So.2d 1167 (Fla. 1992) where the Court found the procedural rule superseded the statutory juvenile speedy trial provision, rule 3.180 superseded the provisions of § 914.01 Fla. Statutes. See Thomas v. State, 65 So.2d 866, 868(Fla. 1953) Thus, the rule is a procedural mechanism to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So.2d 929 (Fla. 1984) this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom. Likewise, in Jones v. State, 569 So.2d 1234, (Fla. 1990), this Court found no error when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver.

Thus, the Coney interpretation of the term present is not constitutionally mandated but a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See R.J.A.

Reading the rule in this fashion is in accord with federal practice. The United States law regarding this issue was

summarized in United States v. McCoy, 8 F.3d 495, 496 (7th Cir. 1993):

> [2] A defendant's right to be present at trial derives from several sources. First, the defendant has a sixth amendment right to confront witnesses or evidence against him. See United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (per curiam); Verdin v. O'Leary, 972 F.2d 1467, 1481 (7th Cir.1992); United States v. Shukitis, 877 F.2d 1322, 1329 (7th Cir.1989). That right is not implicated here, because no witness or evidence against McCoy was presented at any of the conferences. See Verdin, 972 F.2d at 1481-82.
>
> [3] The defendant also has a due process right to be present " 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.' " Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)). But " 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " Id. (quoting Snyder, 291 U.S. at 107-08, 54 S.Ct. at 333); see also Verdin, 972 F.2d at 1481-82; United States v. Moore, 936 F.2d 1508, 1523 (7th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 607, 116 L.Ed.2d 630 (1991); Shukitis, 877 F.2d at 1329-30. That determination is made in light of the record as a whole. Gagnon, 470 U.S. at 526-27, 105 S.Ct. at 1484.
>
> In Gagnon, the Supreme Court found that defendants' due process rights were not violated when they were excluded from an in camera conference between the judge, defense counsel and a juror regarding the juror's possible bias. The Court based its holding on the fact that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." Id. at 527, 105 S.Ct. at 1485. In Shukitis, we similarly held that a

defendant's due process rights were not implicated when he was excluded from an in camera conference that addressed a separation of witnesses order. We reasoned that the absence did not affect the court's ability to decide the issue or otherwise diminish Shukitis' ability to defend against the charges, and that Shukitis' interests were adequately protected by his counsel's presence at the conference. 877 F.2d at 1330. See also Moore, 936 F.2d at 1523.

As in Gagnon and Shukitis, McCoy's absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial. Indeed, McCoy seems to have conceded this point, having offered no argument to the contrary. Like Shukitis, McCoy's interests were sufficiently protected by his counsel's presence at the conferences. McCoy therefore had no due process right to attend.

[4] Finally, Fed.R.Crim.P. 43 entitles defendants to be present "at every stage of the trial including the impaneling of the jury...." (FN1) This right is broader than the constitutional right (Shukitis, 877 F.2d at 1330), but is waived if the defendant does not assert it. Reversing the Ninth Circuit in Gagnon, the Supreme Court explained:

We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant had voluntarily absented himself under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.... A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

470 U.S. at 528, 105 S.Ct. at 1485; cf. Taylor v. United States, 414 U.S. 17, 18-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174 (1973) (per curiam). A defendant may not assert a Rule 43 right for the first time on appeal. Gagnon, 470 U.S. at 529, 105 S.Ct. at 1485; Shukitis, 877 F.2d at 1330. Because McCoy did

not invoke Rule 43 either during trial or in a post-trial motion, he has waived any right under that rule. (FN2)

Because of the availability of consultation between a lawyer and his client present for trial, there is no due process violation when a defendant is not present at the bench during a sidebar for peremptory challenges. See, McCoy, United States v. Gayles, 1 F.3d 735 (8th Cir. 1993), United States v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991), United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) Therefore, the only legitimate conclusion is that the Coney decision was not one of constitutional magnitude.

In United States v. Gagnon, 470 U.S. 522, 526-530 (1985) the Supreme Court indicated that the right of the defendant to be present under Rule 43 of the Federal Rules of Criminal Procedure (similar to our rule) is broader than the constitutionally based right to be present. In Gagnon, the Court held that such claims must be preserved at trial and that waiver of the benefits of the Rule 43 right to be present may be inferred by a defendant's failure to assert the right at trial. Thus, the United States Supreme Court recognizes that the Rule 43 right must be asserted

at trial by the defendant; our rule should follow the federal rule.

Finally, to state the problem and analysis in a slightly different form. The district court and the petitioner fail to distinguish between the Coney decision and the prospective rule announced in that decision. Coney is applicable to all pipeline cases, including the one at hand. However, Coney by its terms plainly announces that the new procedural rule established therein is only applicable to trials which occur after the announcement of the new rule. By its terms it does not provide relief to any appellant/petitioner whose trial occurred before the Coney decision became final. Not only is it uncontroverted that the issue was not preserved below, it is also uncontroverted that the trial occurred before the issuance of Coney. The district court is simply misapprehending the plain language of Coney in perceiving a conflict with Smith. None exists.

Summary

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an

affirmative answer to the certified question, as he did not raise the issue at trial. Gibson

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONDUCTING A FULL RICHARDSON INQUIRY IN AN ALLEGED DISCOVERY VIOLATION? (Restated)

Petitioner argues that the trial court erred by failing to conduct a Richardson inquiry after being notified that a statement made by the police officer during cross examination had not been disclosed during discovery. His argument raised for the first time in the District Court was not discussed in that court's opinion, it was summarily rejected as having no merit. Therefore, this Court should deny review.

Additionally, petitioner's argument is misguided because there was no discovery violation, and the trial court excluded the contested statement as hearsay. Finally even if there was a violation of discovery, the failure to conduct a full Richardson inquiry was harmless.

Procedural Matters

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." When the Court obtains jurisdiction over a case, it obtains jurisdiction over all issues in the case. The

District Court of Appeal of Florida, First District has certified a question, therefore, this Court has jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question, this Court has the discretion to decide whether it should exercise its jurisdiction and hear the case. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

This Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. This issue contains no legal issue warranting this Court's review.

Preservation

Petitioner's claim raised in this issue was not properly preserved by specific objection in the trial court. Petitioner's initial response to the comment in the trial court was to request to approach the bench. At the bench he moved for a mistrial on the basis of prejudice. In the discussion of his claim, he stated that the statement was hearsay and was not disclosed. The situation was discussed and the trial court indicated that if

counsel made a hearsay objection the court would be inclined to sustain the objection but would not grant a mistrial. (T 138-140) After further discussion, the trial court inquired whether counsel was making a hearsay objection. Counsel stated that he was making a hearsay objection that went to the nature of the answer. (T 140) Counsel never stated that there was a discovery violation or that the information should have been disclosed during discovery. He never objected on the grounds of a discovery violation. Therefore, the claim presented in this issue is not preserved by specific objection and should not be addressed by this Court. Steinhorst v. State, 412 So.2d 432 (Fla. 1982), Matheson v. State, 500 So.2d 1341 (Fla. 1987)

Standards of Review

If this Court decides to review the trial court's ruling, certain standards need discussion. A trial court's has a great deal of discretion in admitting or excluding evidence and its decision in these matters will not be reversed unless the decision amounted to an abuse of discretion. This standard applies to decisions relating to discovery issues.

The seminal case on discovery violations is Richardson v. State, 246 So. 2d 771 (Fla. 1971). However, Richardson is not applicable until a discovery violation is found. Thus, the first

issue in any discovery case is whether the trial court abused its discretion in finding no discovery violation. If the trial court finds a discovery violation and conducts a inquiry then its decision is reviewed under the abuse of discretion standard. This principle is the foundation of Richardson where this Court held, Id. at 775, that a trial court had discretion to determine whether a discovery violation is harmful following an adequate inquiry into the allegation and will be reversed only when that discretion is abused.

Abuse of discretion was defined in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), as:

> Discretion in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way o saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

If a Court abuses its discretion by finding no discovery violation or by refusing to hold a Richardson hearing when a discovery objection is made during trial, then the issue becomes whether such action was harmless error.

In State v. Schopp, 20 F.L.W. S136, S137 (Fla. 1995), this Court stated that the failure to conduct a full Richardson inquiry does not always result in an unfair trial, and that "there are cases ... where a reviewing court can say beyond reasonable doubt that the defense was not prejudiced by the underlying violation and thus the failure to make an adequate inquiry was harmless error." Id. at S138. The supreme court added that application of a harmless error analysis to Richardson violation will result in reversal only "where the record will not support a finding that the unsanctioned discovery violation could not have materially hindered the defense." Id. Hence, the petitioner 's claim that the trial court did not conduct Richardson inquiry is subject to harmless error analysis.

1. The trial court did not abuse its discretion in not conducting a full Richardson inquiry because there was no discovery violation.

Petitioner argues that the trial court committed reversible error because it did not conduct a Richardson inquiry into defense counsel allegation of discovery violation. Petitioner 's argument is without merit because trial counsel never claimed a discovery violation and because a Richardson inquiry is not triggered by any unsubstantiated allegations. In order to

trigger the requirement that a Richardson hearing be held, there must be a substantiated violation of discovery brought to the attention of the trial judge. Wuornos

An examination of the facts in light of Rule 3.220 Fla. R. Crim. P., which delineates the discovery obligations of a party, establishes that no discovery violation occurred. The rule require production of certain information and documents. It does not require the state to provide a running account of the detective's investigation or do petitioner's work for him. Wuornos, Crawford v. State, 257 So.2d 898 (Fla. 1972)

The defendant can find out what he wants to know about the conduct of the investigation through the required reports and a deposition of the officer. The state provided all required information and the names of the officers involved in the arrest. The state updated the discovery as more information became available including expert witness and custodians of the property. (R 15, 23) It was not required to disclose any further information about prior or subsequent actions of the detective.

When an issue came up on the day of trial regarding the updated discovery disclosure of a statement made by petitioner regarding his residence. The trial court conducted a Richardson hearing and found **no discovery violation**. Even though no

violation was found, the state agreed not to elicit the oral statement to avoid continuing the case. (T 86-93) However, the state advised that it would be asking whose apartment it was as the detective had other independent knowledge that was the defendant's apartment. (T 93) Thus, contrary to its assertion, the defense was made aware that the officer had other information relating to ownership of the apartment. No discovery violation occurred. See Craig v. State, 585 So. 2d 278 (Fla. 1991).

On direct examination, the officer testified to a statement made by the petitioner. The officer testified that during the search they found papers on the living room table with petitioner's name on them. (T 103) The officer also testified that after being advised of his rights petitioner was advised what had been found in the apartment. In response, petitioner stated that,"everything in the apartment is mine". (T 127-130)

Later on cross examination after attempting to discredit the officer's conduct of the investigation and his reports, defense counsel (despite the prosecutor's warning about the detective having other information about the apartment) began to probe the detective's knowledge of the ownership of the building. Defense Counsel asked,

> "You don't know who the owner of the building is, do you?"

The answer was

> "No. But I know the Jacksonville Electric Authority and I have access to their files. Mr. Bell is the one who actually obtained electricity for that apartment." (T 138)

This statement of the detective about what he did in the case is simply not a matter which the rule requires to be disclosed in discovery. The officer's action is something he could be questioned about during a deposition but is not an action the discovery rule requires the state to disclose. Wuornos

The state's position is supported by the caselaw discussing discrepancies between pretrial statements and trial testimony. In Street v. State, 636 So. 2d 1297, 1302 (Fla. 1994), a police officer testified differently at trial then in a deposition. At trial he testified that when he went to the jail that the defendant glared and smirked at him; the officer explained that he replied "no" at deposition because he was asked "if he did anything else in the case" rather than "if he had done anything after he left the crime scene." Id. This Court found that the State did not commit a discovery violation by not disclosing this, stating:

> When testimonial discrepancies appear, the witness trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry.

Street, at 1302. (citation omitted)(emphasis added).

Turning to the instant case, during cross examination defense counsel asked Detective Bates "You don't know who the landlord of this building is, do you?" (T 138). Detective Bates responded "[n]o. But I know the Jacksonville Electric Authority, who I have access to their files. Mr. Bell is the one who actually obtained the electricity with apartment." (T 138). At side bar, defense counsel objected and moved for a mistrial, stating "[h]e's testified to something which is hearsay information and which has never been disclosed to the defense in anyway." (T 138-139). After reading back the testimony the trial court struck the statement, finding that it is hearsay, but not a discovery violation because defense counsel opened the door. (T 139). The trial court denied the motion for mistrial and instructed the jury "I'm going to instruct you to disregard the last answer of the witness in deliberating your verdict." (T

139-141). The trial court complied with Richardson in that it properly inquired into the circumstances surrounding the objection; once it determined that there was no objection made regarding a discovery violation, the remainder of the inquiry was not necessary. The trial court properly found that there was no discovery violation, and that defense invited the response. Similar to Street, this Court should find that the statement did not rise to the level of a discovery violation necessary to support a full Richardson inquiry. Therefore, petitioner 's claim of error must be rejected, and his convictions should be affirmed. Craig

2. The failure to conduct a full Richardson inquiry was harmless.

Even if this was a discovery violation that necessitated a Richardson inquiry, the failure to conduct a full Richardson inquiry was harmless because the contested statement was not entered in evidence. Richardson hearings are designed to enforce discovery obligations. Here the state was not introducing evidence. The defense was trying to discredit the detective's investigation and the detective responded and the court struck the testimony. Under Richardson, the ultimate sanction for a

discovery violation is to preclude the use of the testimony. Thus, petitioner received the ultimate benefit that any Richardson hearing could have provided and has shown no error.

In any event, after State v. Schopp, the harmless error analysis is applicable to Richardson inquiries in violation of discovery cases. In Richardson at 773, the supreme court announced that noncompliance with procedures prescribed by the court does not "ipso facto constitute ground for reversal of a conviction." Furthermore, if a trial court determines that there was a violation of Florida Rule of Criminal Procedure 3.220, discovery, it may only apply the pertinent sanction(s) provided in Rule 3.220 (n) which provides in part:

> (1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with a rule or any order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of material not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such order as it deems just under the circumstances.

Turning to the instant case, petitioner is essentially arguing that the trial court's failure to conduct a full

Richardson inquiry into hearsay statement is "ipso facto" ground for reversal, even though the contested statement was stricken from in evidence. The record of the instant case shows that the trial court struck the statement as hearsay and instructed the jury to disregard it. (T 139-141). Nevertheless, petitioner still asks this Court to reverse his convictions because the trial court did not conduct an adequate Richardson inquiry into matters excluded from the evidence. Common sense indicates that the procedures prescribed in Richardson require an inquiry to prevent courts from making arbitrary and capricious rulings in deciding what sanction(s) to apply. In the instant case, one of the harshest sanctions available to the trial court was to prohibit the introduction of the alleged undisclosed statement. By excluding the contested statement from the testimony to be considered by the jury, the Court ensured that petitioner was not harmed. In State v. Schopp, supra at S138, the supreme court said that a Richardson violation will not result in reversal unless the unsanctioned discovery violation could have materially hindered the defense; see also Section 924.33, Fla. Stat. (1993) ("[n]o judgment shall be reversed unless the appellate court is of the opinion ... that error was committed that injuriously affected the substantial rights of the appellant."). Therefore,

If the trial court erred in not conducting a full Richardson hearing into the alleged violation, the error was harmless, and did not injure any of the petitioner's substantive rights. The alleged discovery violation could not have materially hindered petitioner's defense because the defense was on notice prior to the trial beginning that the officer had information relating to petitioner's occupancy of the apartment (R 42) (T 86-93) and asked the question anyway; because the defense was aware of the substantial evidence which linked petitioner to the apartment and the drugs contained in the apartment; and because the trial court excluded the evidence directing the jury to disregard the statement. Therefore, this Court should reject petitioner's claim of error and affirm his convictions.

Summary

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled law and the issue was not preserved by proper objection in the trial court.

If this Court decides to review this issue, the decision of the lower tribunal should be affirmed as no discovery violation occurred, thus, no hearing was needed. Further, the trial court

excluded the evidence acting in a manner consistent with the harshest sanction available for a discovery violation. Finally, if a discovery violation occurred and a hearing should have been held, any error was harmless. Not only was the sanction imposed the harshest available as a discovery violation, the statement made by the officer was not relevant to the guilt of the petitioner. The critical issue was whose drugs were in the apartment not whose apartment were the drugs in for there is no crime in being the lessor of an apartment where drugs are found the statute requires proof of possession. Therefore, this Court should deny relief.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR A MISTRIAL? (Restated)

Petitioner argues that the trial court erred in not granting his motion for a mistrial. He argues that because a curative instruction is useless, the failure to grant a mistrial is reversible error. Petitioner's argument was not specifically addressed in the opinion of the District Court. The lower tribunal rejected this and other claims by describing them as without merit. Since this issue was sufficiently settled to be rejected without discussion, this Court should not accept it for review.

Petitioner's argument is based on the trial court's denial of a mistrial over the statement that according to the files of Jacksonville Electric Authority, petitioner obtained electricity for the apartment. This statement struck by the trial judge was not basis for a mistrial. (T 138).

Procedural Matters

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal

that passes upon a question certified by it to be one of great public importance." When the Court obtains jurisdiction over a case, it obtains jurisdiction over all issues in the case. The District Court of Appeal of Florida, First District has certified a question, therefore, this Court has jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question, this Court has the discretion to decide whether it should exercise its jurisdiction and hear the case. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

This Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. This issue contains no legal issue warranting this Court's review.

Merits

The first problem with appellant's position is his assertion that a jury will ignore a trial judge's curative instruction. The United States Supreme Court has repeatedly stated that a crucial assumption underlying the entire jury system is that a

jury will follow the instructions given them by the trial judge. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) As the Court stated in Parker v. Randolph, 442 U.S. 60, 99 S.Ct. 2132, 60 L.Ed.2d 713 describing the jury system:

> A crucial assumption underlying that system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

Id. 99 S.Ct. at 2139

This principle has been recognized in Florida. Schwarck v. State, 568 So.2d 1326 (Fla. 3rd DCA 1990)

Thus petitioner's argument that curative instructions are useless is without merit. Additionally, there is nothing to indicate that the jury did not follow the trial court's instructions, thus it must be presumed that the jury followed the trial court's order. U.S. v. Simon, 964 So. 2d 1082, 1087 (11th Cir. 1992)[5]

Petitioner's reliance on Geralds v. State, 601 So.2d 1157 (Fla. 1992), is misplaced. Geralds involved a particular type of disclosure that is inherently prejudicial. The disclosure that the defendant had multiple felony convictions. This case does not involve any disclosure of this inherently prejudicial type

and the general rule applies. Therefore, petitioner's argument that he was harmed because curative instructions are useless should be rejected, and his conviction should be affirmed.

Additionally, petitioner's argument that a mistrial should have been granted ignores Florida law on motion for mistrial. In Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979), this Court held that a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge, and that the power to declare a mistrial should exercised "only in cases of absolute necessary. Id. at 750; see also Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982)(finding that "[a] mistrial is a device used to halt a proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile.") This Court has repeated applied this standard in cases such as Johnston v. State, 497 So.2d 863 (Fla. 1986) and Buenoano v. State, 527 So.2d 194 (Fla. 1988). In Buenoano, this Court held a gratuitous comment made by a witness that the defendant had set fire to her home to collect the insurance was error but insufficient to require a mistrial. Like Buenoano, the gratuitous comment made

by the witness in this case is insufficient to require the trial court to grant a mistrial.

Review should not be accepted under the pretext that the district courts are having difficulty in applying this test. In Buckles v. State, 567 So. 2d 41 (Fla. 3rd DCA 1990) the court held that police officer's statement was invited, and that the trial court acted within the bounds of its discretion in denying the motion for mistrial. In Kivett v. State, 629 So. 2d 249, 250 (Fla. 3rd DCA 1993), the court held a mistrial should be granted only in circumstances where "the error committed was so prejudicial as to vitiate the entire trial. Thus, it is evident that the lower courts are applying the test in an appropriate manner.

Turning to the instant case, during cross-examination, defense counsel asked Detective Bates "[y]ou don't know who the landlord of this building is, do you?" (T 138). Detective Bates responded "[n]o. But I know the Jacksonville Electric Authority, who I have access to their files. Mr. Bell is the one who actually obtained electricity in the apartment." (T 138). At side bar, defense counsel objected and moved for a mistrial, stating "[h]e's testified to something which is hearsay information, and which has never been disclosed to the defense

anyway." (T 138-139). After reading back the testimony, the trial court found the answer was hearsay, struck the statement (T 139). The trial court denied petitioner motion for mistrial and gave the jury curative instruction to disregard the statement. (T 139-141). The trial court's decision was certainly reasonable. Defense counsel invited the response in trying to get Officer Bates to say that petitioner did not reside at the apartment; where the officer had information to the contrary, he was entitled to give that response. However, in spite of the fact that the statement was invited, the trial court properly struck the statement as hearsay. Therefore, as in Buckles and Buenoano, this Court should affirm the trial court's finding that the statement was insufficient to warrant a mistrial.

Additionally, the trial court did not abuse its discretion in denying the motion for mistrial because the statement was not so prejudicial and fundamental as to vitiate the entire trial. Petitioner was on trial for violation of Section 893.135(1)(c), Florida Statutes (1993), trafficking in alleged drugs.

Petitioner does not contest the fact that the evidence was sufficient to support the jury verdict. As the trial court noted, the statute does not require proof of residency at the location where the violation occurred. Whether petitioner

resided in the apartment was not essential to prove the elements of the charge. Moreover, petitioner, and personal documents relating to petitioner, were found in the apartment along with the drugs, therefore, the statement was not essential to show his connection to the apartment. Thus, the statement was not so prejudicial or fundamental as to vitiate the entire trial. This is especially true in this case as the detective testified that the defendant gave a statement that all the stuff was his and when the warrant was executed petitioner was in the bathroom where some of the drugs were found.

Summary

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled principles of law and does not warrant this Court's review.

Should this Court review this claim, application of these settled principles mandates affirmance of the lower tribunal. Here the trial court excluded the evidence and gave a curative instruction. There is no evidence that the jury did not follow the instruction and the law presumes that juries follow the instructions of the court.

In any event, the testimony was not inherently prejudicial and in fact was of little evidentiary value as petitioner was caught with the drugs and admitted they were his. In order to be entitled to a mistrial, a defendant must establish that the error vitiated the fundamental fairness of the trial. Under the circumstances, it cannot be said that the trial court decision to deny the motion for mistrial was an abuse of discretion.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, and the judgements and sentences entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Mr. Fred Parker Bingham, II, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 13th day of June, 1996.

Edward C. Hill, Jr.
Assistant Attorney General

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