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IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEVIN W. PENDER and, CLARENCE PENDER,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 89,619

5th D.C.A. Case No. 33-1832; and 33-1942

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONERS

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STATEMENT OF THE CASE AND FACTS

In the trial court, the Petitioners were convicted of capital sexual battery. They took an appeal in the Fifth District Court, and on December 2, **1994,** the District Court issued an Opinion reversing said convictions, on the grounds that the State's discovery violation, (failure to disclose a colposcope photograph taken by a State expert witness), could not be considered harmless error. See, Appendix to this Brief, (hereinafter **"A"),** at **Pp. 10-13)** The decision **of** the Fifth District Court was founded upon a ruling of the Fourth District Court in Schopp v. State, **641** So.2d **141** (Fla. **4** DCA **1994). (A** 11,12) The Schopp case was then pending review in this Court, and this Court took discretionary review in the instant case at the State's petition. See, State v. Pender, Fla. **S.** Ct. Case # **85,042** This Court, on October **12, 1995,** issued its Opinion, which remanded this case to the Fifth District Court for a determination, in accordance with the Supreme Court's ruling in State v. Schopp, **653** So.2d **1016** (Fla. 1995), as to whether the State's discovery violation in the trial court could be called harmless error. **(A 14-17)**

After briefs and oral argument in the Fifth District Court on remand from this Court, the District Court ordered supplementation of the record on appeal with the pre-trial deposition of the State witness who took the colposcope photograph at issue. (A **18)** In that deposition, (A **19-45),** Doctor Tokarski had not revealed to defense counsel the existence of the colposcope photograph.

On October 25, **1996,** the Fifth District Court issued its second Opinion in this case, and found that the error complained of, (the State's failure to disclose the colposcope photo), was harmless error. **(A** 46,47) The District Court found that "the fact that defense counsel did not avail himself of the opportunity, offered by the judge, to question Dr. Tokarski about the photograph confirms the unimportance of what it depicted under the facts of this case." **(A 47)** The District Court also found that the failure to produce the photograph would "only have been harmful error if it could have negated the identity of the defendants [...] or if it could have helped impeach the child victim's credibility." (A **47)**

Petitioners offer the following facts and/or proceedings in the trial court **as** being relevant to this appeal:

At trial below, when defense counsel alleged a discovery violation and requested a Richardson inquiry, the trial court and the prosecution acknowledged that the prosector had been aware **of** the existence of the photograph at issue, **and** that the State's witness who possessed the photo had been served with, but had refused to comply with a defense subpoena to produce the photo. See, Excerpt of trial transcript: (A **4-7)** The trial court refused a specific request for inquiry, outside the presence of the **jury,** to determine the prejudicial effect of the witness' refusal to produce the photograph. **(A** 4,6,8) **As** a part of the side-bar

discussion, the trial court found that it did not have enough facts/evidence upon which to make a decision as to whether the defendant's trial preparation had been prejudiced by the State's failure to make timely disclosure, and refused to conduct a Richardson inquiry. (A 6,8)

SUMMARY OF ARGUMENT

The decisio **of** the District Court in the instant case is in direct and express conflict with the decision **of** this Court in state v. Schopp, 653 So.2d 1016 (Fla. **1995);** as well as the decision of the Fourth District Court of Appeal in Tarrant v. State, 668 So.2d **223** (Fla. **4 DCA** 1996) The conflict lies in the Fifth District Court's finding of harmless error, despite record evidence that the trial court had no basis for making a determination as to the prejudice resulting from the State's discovery violation; and despite record evidence that the discovery violation affected defense counsel's trial preparation. Therefore, in accordance with **Fla.** R. App. Pro. 9.030(a)(2)(A)(iv), this Court **has** discretionary jurisdiction to review the ruling **of** the District Court in the instant case.

ARGUMENT

THE FLORIDA SUPREME COURT H. S DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, AS THE DECISION OF THE DISTRICT COURT IN THIS **CASE IS** IN DIRECT CONFLICT WITH A DECISION OF THE FLORIDA SUPREME COURT, AS WELL AS ANOTHER DISTRICT COURT OF APPEAL,

The decision of this Court in Schopp v. State, **653 So.** 2d 1016 (Fla. 1995), cited in Tarrant, supra, clearly sets forth the long-held principle that in the harmless error analysis, it is the effect of a discovery violation upon the defendant's trial preparation that must be weighed, not the potential impact of the subject undisclosed evidence upon the jury. Schopp, supra, at Pg. 1019 This Court stated that cases in which such error could be found harmless would be rare indeed, and stressed, in Schopp, that ***every conceivable course of action*** the defense might have taken, had there been proper disclosure by the State, ***must be considered*** by the reviewing court in the harmless error analysis. Id. at 1020 Most important, is the requirement dictated by Schopp that it be shown, ***beyond a reasonable doubt*** that defense trial preparation was not prejudiced. Id. at 1021 In the instant case, there was record evidence that the State withheld a photograph from discovery, record evidence that defense counsel would have consulted his own expert regarding the significance of the photograph **had** the State timely disclosed its existence, **(A** 8), and record evidence of the trial court's express finding that it did not have enough evidence upon which it could make a determination as to prejudice, (A 6,8) Despite these record facts, facts constituting prima facia evidence of prejudice, the Fifth District Court somehow concluded that it had been shown beyond a reasonable doubt that the discovery violation at issue was harmless. It is clear that

the Fifth District Court based its ruling upon the potential effect of the colposcope photo on the jury, while ignoring clear evidence of the prejudicial effect of non-disclosure on defense trial preparation, **(A 47)** It is equally clear that since the trial court had no evidence upon which to make a finding as to prejudice, there was insufficient evidence upon which the Fifth District Court could make such a finding. Therein lies the conflict with Schopp, and Tarrant.

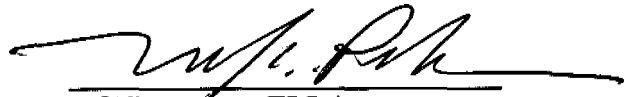
In Tarrant, supra, the trial court had offered defense counsel additional time to review the previously undisclosed evidence. The Fourth District Court ruled that under Schopp, the trial court's offer of additional time to deal with the late disclosure of evidence, on the day of trial, did not constitute proof "beyond a reasonable doubt that [the defendant's] trial preparation or strategy would not have been materially different" if the previously undisclosed evidence had been timely produced by the State. Id, at **226** In the instant case, the Fifth District Court ruled that the trial court's offer to let the defense lawyer question Doctor Tokarski about the undisclosed photograph, ***in the presence of the jury***, was evidence that the error complained of **was** harmless. That particular finding by the District Court *sub judice* conflicts with Schopp, and with Tarrant specifically, which makes it clear that such offers of attempted mitigation in fact do nothing to either reveal for reviewing courts, or to cure in the trial court, the prejudice to trial preparation and strategy that results from the State's failure to timely disclose evidence. The trial court's offer in the instant case was really no offer at all, because questioning **an** expert witness in front of a jury, in a capital case, when the witness' answers regarding a crucial piece of evidence are unknown, would be tantamount to malpractice. Therein lies the conflict with Tarrant, supra.

CONCLUSION

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

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA **BAR** NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy **of** the foregoing **has** been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Kevin **W.** Pender, No. 140449, Hardee *C.* I., Rt. 2, **Box** 215, Bowling Green, FL 33834 and Clarence P. Pender, No. 334268, Hardee *C.* I., Rt. *2,* **Box** 215, Bowling Green, FL 33834 on this 19th day of December, 1996.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

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APPENDIX TO
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