IN THE SUPREME COURT OF FLORIDA

CASE NO. 94673

THE STATE OF FLORIDA,

Petitioner,

-vs-

BERNARD EVANS,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, Bernard Evans, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and a colon to indicate the appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 12 point Courier New type size and style.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeal which reversed the Defendant's conviction and sentence for second degree murder.

> Sylvia Kennedy Green ("Green") was identified by the State as a witness to the incident. Consistent with a statement she gave detectives at the scene of the crime, Green testified in her 1996 deposition that she did not see the defendant shoot the victim and that she did not know anything about the case. At trial, however, Green testified that the night before the victim was shot, defendant commented that he wanted to kill someone. She further testified that she witnessed the defendant shooting at the victim. Defense counsel objected to her testimony. The court sustained the objection and a sidebar conference was held. At sidebar, defense counsel argued that Green changed her testimony since the deposition and the changed testimony had not been disclosed to the defense.
>
> The court permitted the State to continue questioning Green regarding her statements to police. Green testified that when the detectives first took her statement she told them she did not see anything because she was afraid. She explained that she went to the police approximately one year after the deposition and told them that she saw the defendant shoot the victim. Defense counsel again moved for a mistrial on the ground that Green's changed testimony had not been disclosed to the defense and the court denied the motion. At the end of the State's case, defense counsel again renewed his motion for

mistrial based on Green's testimony. The mistrial was denied.

At the close of the defendant's case, defense counsel again moved for a mistrial based on Green's testimony. At this point, a Richardson hearing was held. The court found no discovery violation and denied the motion for mistrial. Defendant was found guilty of second degree murder with a firearm and sentenced to fifteen years with a three year minimum mandatory term for the use of a firearm.

It has long been the law in this State that upon learning of a potential discovery violation the trial court has an obligation to conduct a Richardson hearing. Richardson v. State, 246 So. 2d 771 (Fla. 1971); Jones v. State, 514 So. 2d 432 (Fla. 4th DCA 1987). Moreover, the trial court's obligation is affirmative and a hearing must be conducted even where the defendant does not specifically request a hearing or mention Richardson. Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994).

In the instant case, the trial court failed in this regard. First, it failed to conduct the hearing upon being advised that Green changed her testimony. Then, when the hearing was conducted, it was inadequate. Richardson requires that upon learning of a discovery violation the trial court question 1) whether the violation was inadvertent or wilful; 2) whether the violation was trivial or substantial; and 3) what effect the violation had on the defendant's ability to properly prepare for trial.

Under Florida's criminal discovery rule, the duty to disclose is continuous. Fla. R. Crim. P. 3.220(j); Reese v. State, 694 So. 2d 678

> (Fla. 1997); Jones v. State, 514 So. 2d 432 (Fla. 4th DCA 1987). It is clear that the State was aware that Green had changed her testimony prior to trial, as evidenced by the line of questioning during this aspect of Green's direct examination. We hold that, in failing to disclose the change in testimony to the defense, the State failed to meet its obligations under Rule 3.220(j). Moreover, we find that the violation here was substantial and undeniably had a negative effect on defense counsel's ability to properly prepare for trial. At the time defense counsel was preparing for trial and assessing the evidence against his client, there were no eyewitnesses. Green's changed testimony immediately changed the type of case defense counsel was dealing with. With an eyewitness to the crime, defense counsel's strategy would surely be different. Thus, we hold that the trial court's failure to conduct a timely and adequate Richardson hearing requires reversal.

(App. A). The case was reversed for a new trial. This petition follows.

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH Bush v. State, 461 So. 2d 936 (Fla. 1984)?

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal conflicts with that of Bush v. State, 461 So. 2d 936 (Fla. 1984). The instant case holds that the trial court erroneously failed to conduct a Richardson hearing upon being advised of changed testimony and that changed testimony by a witness is a discovery violation. Bush holds that changed testimony does not support a motion for a Richardson hearing and does not rise to the level of a discovery violation.

ARGUMENT

This Court should accept jurisdiction in this case because the decision of the Third District Court of Appeal expressly and directly conflicts with that of Bush v. State, 461 So. 2d 936 (Fla. 1984). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829 (Fla. 1986).

In the instant case, Green's trial testimony differed from her 1996 deposition and her statement given to detectives at the scene of the crime. The Third District held that where the State failed to disclose the change in Green's testimony, it failed to meet its obligations under Rule 3.220(j), Fla. R. Crim. P. Once the trial court was advised of Green's changed testimony, according to the Third District, the trial court has an obligation to conduct a Richardson[1] hearing. Further, the Third District found that the State committed a discovery violation in failing to disclose the change in testimony. (App. A).

In Bush, an investigator stated in his deposition that Charlotte Grey, a clerk from a nearby convenience store which had been visited by Bush, had not identified any photographs. At

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[1] Richardson v. State, 246 So. 2d 771 (Fla. 1971)

trial, the investigator testified that Grey did identify Bush's photograph during the photo lineup. This Court held that the prosecutor's failure to inform the defense of this change of testimony is not a discovery violation. This Court explained that when testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider in order to discredit the witness and is favorable to the defense. Thus, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry.

Since the Third District's opinion in the instant case directly and expressly conflicts with the majority decision in Bush, this Court should accept jurisdiction. *Reaves*.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that the Court accept jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed to JOHN H. LIPINSKI, Esq., 1455 N.W. 14th Street, Miami, Florida 33125 on this 8th day of January, 1999.

Lara J Edelstein

LARA J. EDELSTEIN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO.

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APPENDIX TO
BRIEF OF PETITIONER ON JURISDICTION

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Lara J. Edelstein

LARA J. EDELSTEIN
Assistant Attorney General

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1998

BERNARD EVANS, **

Appellant, **

vs. ** CASE NO. 97-2080

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 95-25800

Appellee. **

Opinion filed December 9, 1998.

An Appeal from the Circuit Court for Dade County, Arthur Maginnis, Judge.

John H. Lipinski, for appellant.

Robert A. Butterworth, Attorney General, and Lara J. Edelstein, Assistant Attorney General, for appellee.

Before JORGENSON, LEVY and GERSTEN, JJ.

PER CURIAM.

Defendant appeals his judgment of conviction and sentence for second degree murder. We reverse.

Defendant was charged with second degree murder and unlawful possession of a firearm while engaged in a criminal offense.[1] Sylvia Kennedy Green ("Green") was identified by the State as a witness to the incident. Consistent with a statement she gave detectives at the scene of the crime, Green testified in her 1996 deposition that she did not see the defendant shoot the victim and that she did not know anything about the case. At trial, however, Green testified that the night before the victim was shot, defendant commented that he wanted to kill someone. She further testified that she witnessed the defendant shooting at the victim. Defense counsel objected to her testimony. The court sustained the objection and a sidebar conference was held. At sidebar, defense counsel argued that Green changed her testimony since the deposition and the changed testimony had not been disclosed to the defense.

The court permitted the State to continue questioning Green regarding her statements to police. Green testified that when the detectives first took her statement she told them she did not see anything because she was afraid. She explained that she went to the police approximately one year after the deposition and told them that she saw the defendant shoot the victim. Defense counsel again moved for a mistrial on the ground that Green's changed

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[1]The Count for unlawful possession of a firearm while engaged in a criminal act was dismissed at the charge conference.

testimony had not been disclosed to the defense and the court denied the motion. At the end of the State's case, defense counsel again renewed his motion for mistrial based on Green's testimony. The mistrial was denied.

At the close of the defendant's case, defense counsel again moved for a mistrial based on Green's testimony. At this point, a Richardson hearing was held. The court found no discovery violation and denied the motion for mistrial. Defendant was found guilty of second degree murder with a firearm and sentenced to fifteen years with a three year minimum mandatory term for the use of a firearm.

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Accordingly, we reverse and remand this case for a new trial.