IN THE SUPREME COURT OF FLORIDA

CASE NO.94,673

THE STATE OF FLORIDA,

Petitioner,

-versus-

BERNARD EVANS,

Respondent.

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

# AMENDED BRIEF OF APPELLEE, BERNARD EVANS ON THE MERITS

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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. References to Respondent's Appendix will be by the letter "A". References to the Record on Appeal will be by the letter "R". References to the trial transcripts will be by the letter "T". All emphasis is added unless otherwise indicated.

As this Court has exercised its jurisdiction to consider this case on its merits, and as the appellant raised issues below (A. ), that were not considered and ruled upon by the District Court (A. ), these issues are being raised, again, in this Court so that they may be considered and a ruling on their merits finally obtained.

## STATEMENT OF THE CASE AND FACTS

Bernard Evans was charged with the offense of Second Degree Murder and Unlawful Possession of A Firearm during a felony (R. 1).

Mr. Evans proceeded to trial.

During trial, Motions for Recusal (R. 61, 67) were filed, argued, and denied.

At the trial of this cause:

The case came before the trial judge who heard testimony only after another judge had presided over jury selection.

When defense counsel learned of the judge to try the case, they immediately sought his recusal (T. 167) and requested a continuance to file a written motion. Both requests were denied (T. 174, 178).

The first witness was Dr. Barnhart, the medical examiner who testified that the deceased, Thadeus Scott, had died from gunshot wounds (T. 196), had a blood alcohol level of .31 (T. 198), was intoxicated (T. 215) and that a man this intoxicated could "naturally revert back to his primitive aggressive state" (T. 215).

Dr. Barnhart was not allowed to testify as to a tattoo on the deceased's

chest which stated “The world is mine” (T. 213).

Crime scene technician Marie Angrand testified that she went to the scene (T. 217), took photos (T. 220), and that a knife was found in the deceased’s pocket (T. 223).

Sylvia Kennedy testified that she knew Thadeus Scott, Bernard Evans and Brenda Brown (T. 234-5).

Brenda was Thadeus Scott’s girlfriend (T. 245). Scott then went to jail (T. 246). Brenda then became involved with Mr. Evans (T. 246). Mr. Evans treated Ms. Brown well (T. 252).

Scott was released from jail and returned to Brenda Brown (T. 253).

Kennedy saw Mr. Evans the night before Scott was killed. Mr. Evans was drinking and crying. He threatened to kill Scott (T. 277).

The day of the incident, Brenda and Scott fought all day (T. 278, 279, 280). Kennedy heard Brenda crying (T. 281). Brenda said that Scott had been hitting her all day and that she was tired of it (T. 282). During the day Scott had pushed Brenda’s head into a wall, pushed and hit her (T. 283).

Evans pulled up to a store across the street. He asked Brenda why she

was crying. She replied that she and Scott had been fighting and that she could handle it (T. 286, 288).

Mr. Evans left (T. 288).

Brenda told Scott that she wanted him to leave (T. 288). Scott went to the apartment and began to collect his possessions (T. 288).

Mr. Evans returned (T. 289). Scott asked Evans for a ride to Scott's mother's house. Evans agreed (T. 289).

Brenda said that it would not be a good idea to have them both ride in the same car (T. 290). Scott and Brenda again argued (T. 290).

Mr. Evans left (T. 293).

Evans again returned and spoke to Brenda, then left (T. 297).

Scott and "Macaroni" went to the store up the street (T. 297).

Kennedy saw Evans drive up fast in the direction of the store (T. 302).

Kennedy heard two (2) shots (T. 302). She ran to the store. She hid behind a van. She heard another shot (T. 307).

Kennedy came around the van (T. 308).

She saw Evans and Scott backing up (T. 308).

Evans had a gun (T. 309). Evans shot Scott as Scott was backing up (T. 309). With the last shot, Scott fell (T. 311).

The police came (T. 315).

Kennedy told the police that she didn't see anything (T. 315). She was not truthful with the police (T. 325). She did not tell the police that she had seen the shooting (T. 327). In March of 1997 she had told the police that she had seen the shooting (T. 328). On January 26th, 1996, when her deposition was taken, she did not state that she saw the shooting (T. 328). She didn't tell all of the truth at her deposition (T. 330).

Kennedy did not state in her deposition about her conversation with Mr. Evans the night before the incident. She stated that she "really didn't know anything about the case". She "only know what I saw that day" (T. 342). She never told the police about her conversation with Evans the day before the shooting (T. 343).

Detective Garner testified that he interviewed Mr. Evans and that Mr. Evans gave a statement that he shot Scott when Scott approached his car and attached him in his vehicle (T. 383).

Mrs. Evans was found guilty as charged and sentenced to fifteen (15) years imprisonment (R. 8).

Mr. Evans appealed his conviction and sentence to the District Court of

Appeal, Third District.

On appeal, Mr. Evans raised as issues:

I

WHETHER THE TRIAL COURT ERRED IN NOT CONDUCTING A TIMELY *RICHARDSON* HEARING, THEN DECLARING A MISTRIAL, AFTER IT LEARNED THAT THE CRUCIAL STATE WITNESS, SYLVIA KENNEDY, HAD, IN MARCH, 1997, GIVEN A DIFFERENT AND MORE INCULPATORY STATEMENT ABOUT EVANS' ACTIONS TO THE POLICE AND PROSECUTION WHICH STATEMENT WAS NOT DISCLOSED TO THE DEFENSE?

II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL WHEN SYLVIA KENNEDY COMMENTED UPON BRENDA BROWN'S PREGNANCY?

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR RECUSAL?

IV

WHETHER THE COMMENTS OF THE PROSECUTION DURING CLOSING ARGUMENT, WERE SUCH AS TO REQUIRE A MISTRIAL?

(A. 1-25)

After oral argument, the District Court of Appeal, Third District, issued an opinion (A. 26-29) in which on Point I it Reversed Mr. Evans conviction for a New Trial. The District Court did not rule on the other three issues raised and argued by Mr. Evans.

This Petition follows.

## CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that the type size and style of this brief is:

TIMES NEW ROMAN 14

## QUESTIONS PRESENTED

(RESTATED)

I

WHETHER THE TRIAL COURT ERRED IN NOT CONDUCTING A TIMELY RICHARDSON HEARING, THEN DECLARING A MISTRIAL, AFTER IT LEARNED THAT THE CRUCIAL STATE WITNESS, SYLVIA KENNEDY, HAD, IN MARCH, 1997, GIVEN A DIFFERENT AND MORE INCULPATORY STATEMENT ABOUT EVANS' ACTIONS TO THE POLICE AND PROSECUTION WHICH STATEMENT WAS NOT DISCLOSED TO THE DEFENSE?

(ISSUES RAISED BUT NOT DECIDED IN DISTRICT COURT)

II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL WHEN SYLVIA KENNEDY COMMENTED UPON BRENDA BROWN'S PREGNANCY?

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WHETHER THE COMMENTS OF THE PROSECUTION DURING CLOSING ARGUMENT, WERE SUCH AS TO REQUIRE A MISTRIAL?

## SUMMARY OF THE ARGUMENT

A mistrial should have been declared due to the state's failure to disclose both an inculpatory statement allegedly made by Mr. Evans and a new version of its key witness's testimony previously not revealed either to the police or, under oath, at deposition.

The appellant's character was improperly put into question by unsubstantiated testimony that Brenda Brown was pregnant and that he was the father.

The trial court erred in not recusing itself.

The comments of the prosecution during closing argument denied Mr. Evans a fair trial.

## ARGUMENT

### I

THE TRIAL COURT ERRED IN NOT CONDUCTING A TIMELY RICHARDSON HEARING, THEN DECLARING A MISTRIAL, AFTER IT LEARNED THAT THE CRUCIAL STATE WITNESS, SYLVIA KENNEDY, HAD, IN MARCH, 1997, GIVEN A DIFFERENT AND MORE INCULPATORY STATEMENT ABOUT EVANS' ACTIONS TO THE POLICE AND PROSECUTION WHICH STATEMENT WAS NOT DISCLOSED TO THE DEFENSE

Rule 3.220(b)(1)(c) provides that the prosecution shall disclose:

> (c) Any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

The state does not contest the District Court's finding that "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." (p. 2 of District Court opinion; A. 27).

The state also does not contest the District Court finding that "She (Green) explained that she went to the police approximately one (1) year after the deposition and told them that she saw the defendant shoot the victim." (p. 2 of opinion; A. 27).

The state has not contested the District Court finding that "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" (p. 4 of opinion; A. 29).

The State has not explained its non-disclosure of Mr. Evans alleged statement prior to the shooting. It has not disputed the District Court finding that the prosecution was aware of Ms. Green's elicitation to police that Mr. Evans had made such a statement. The State has not argued that such a statement is non-discoverable. Indeed, pursuant to Rule 3.220(b)(1)(c), such a statement must be disclosed.

Rule 3.220(j) provides:

> Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce a the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

As the statement was discoverable and was know to the prosecution long before trial, the State has not explained why this extremely inculpatory statement, allegedly made by Mr. Evans on the night before the incident, was not disclosed to the defense.

The failure of the state to advise the defense of even the existence of this statement, not an alteration or change in it, is a discovery violation that pursuant to a long line of authority, requires Reversal. See, *Martinez v. State*, 528 So.2d 1334 (Fla. 1st DCA 1988); *Rainez v. State*, 596 So.2d 1295 (Fla. 2d DCA 1992); *Brown v. State*, 640 So.2d 106 (Fla. 4h DCA 1994); *McCray v. State*, 640 So.2d 1215 (Fla. 5th DCA 1994); *Holmes v. State*, 642 So.2d 1387 (Fla. 2d DCA 1994); *Evanko v. State*, 681 So.2d 1203 (Fla. 5th DCA 1996).

The non-disclosure of Mr. Evans' statement was more than a change in testimony. It was a violation of Rule 3.220 which, by itself, demanded a

Richardson inquiry. The State has not contested the District Court's finding that:

> 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*2640 So.2d 106 (Fla. 4th DCA 1994).
>
> (p. 3 of opinion; A. 28)

As soon as the trial court became aware that Mr. Evans' statement had not been disclosed to the defense, it was its obligation to conduct a Richardson hearing. It's failure to do so was Reversible Error. See, *Laisell v. State*, 703 So.2d 534 (Fla. 4th DCA 1997); *Delgado v. State*, 706 So.2d 328 (Fla. 1st DCA 1998).

As is clear from the above authorities either the State's failure to disclose Mr. Evan's statement or the trial court failure to fulfill its obligation and hold a prompt Richardson hearing as to such nondisclosure each would, by itself, justify the District Court's Reversal of Mr. Evans' conviction.

The only eyewitness to the incident was Sylvia Kennedy.

When originally questioned by the police, she had told the police that she didn't see anything (T. 315). She did not tell the police that she had seen the shooting (T. 327).

On January 26th, 1996, the defense took her deposition. She did not state that she saw the shooting (T. 328). She did not tell all the truth at her deposition (T. 330).

Additionally, she never told the police about her conversation with Evans the day before the shooting (T. 343). She did not mention this conversation at her deposition. At deposition she stated that she "really didn't know anything about the case" and she "only know what I saw that day" (T. 342).

She stated that it was not until March of 1997, after the defense had taken her deposition, that she told the police that she had seen the shooting (T. 328).

Prior to trial, the defense was never informed either that Kennedy had seen the actual shooting or of her conversation with Evans the night before the shooting.

When Kennedy testified, the defense argued that "she lied to the police

officer and not only lied but we've been blind sighted by her direct testimony, for what he's been talking about for the last hour didn't come up in her deposition" (T. 317-8).

The trial court did not hold a Richardson hearing.

The defense later argued:

> Yes, she has made prior statement. She gave a deposition in "96" and her story now is totally different.
>
> (T. 337)

and,

> We've got a bigger problem here, Judge. We took this lady's deposition in January of '96 and she comes back to this State in March of '97 and tells him, hey I was lying. Here's the truth. The State didn't communicate anything to us about this witness' change of testimony and we think that's prosecutorial misconduct. We're moving for a mistrial based upon that. They had an obligation an affirmative obligation, to come forward, Judge, and tell us that this woman changed her story, knowing that we full well had taken her deposition. We're relying on her testimony. She comes in here now saying I am a witness to the crime, Judge. It's unfair for prosecution to come forward and say this

woman has changed her story. It's unfair, Judge.

(T. 338)

The defense moved for a mistrial (T. 341) which was denied.

The trial court again did not hold a Richardson hearing.

The defense again argued:

> We think it's unfair that this witness has changed her story to prosecution and we were not advised.

(T. 354)

No Richardson hearing was held.

At the close of the state's case, the defense moved for a mistrial (T. 398) on the basis of the non-disclosure of Kennedy's testimony.

No Richardson hearing was held. The motion was denied (T. 399).

Later, the defense again brought up the non-disclosure of Kennedy's testimony (T. 410).

The trial court finally decided a Richardson hearing was appropriate and asked the state to respond (T. 412).

The state responded:

MR. COY: Judge, by way of response, a couple of things, first of all, every time, as many times you have cases, and during the course of cases

you have people who over time say things and then modify what they say as time goes on. I don't believe that the prosecution has an obligation with respect to witnesses over time where those modifications are made to each time there is a modification the prosecution may become aware of let the defense know about that. That would be one response.

The second is, with respect to the discovery rules, we have an obligation where there are recorded statements that the prosecution becomes aware of, and if I can have a second, 3.220 of the discovery rules, subsection (B)(1)(A), excuse me, (B)(1)(B), talks about the prosecution's part to furnish to the defense and talks about statement, and it defines statement, including a written statement, and it defines statement, including a written statement made by the person and signed or otherwise adopted and approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. And this was not, Judge, this was not a statement that was adopted in writing, and this was not a statement that was written. This was not a statement that was recorded.

And this was something - this was something, simply something

that somebody said along the way to the prosecution. And additionally, she could have taken the stand and she could have said something different on the stand beyond that.

(T. 413)

The trial court found that there was no discovery violation (T. 415).

In the instant case, the District Court found that the "trial court failed to conduct the (*Richardson*) hearing upon being advised that Green changed her testimony. Then, when the hearing was conducted, it was inadequate" (p. 3 of opinion; A. 28). The State argues that "the change in Green's testimony did not rise to the level of a discovery violation and did not support a motion for a *Richardson* inquiry" (p. 17 of State brief).

In *Richardson v. State*, 246 So.2d 771 (Fla. 1971), this Court held that the failure of the State to timely comply with discovery requirements might require the reversal of a defendant's conviction. This Court held that such a decision can be made "only after the court has made an adequate inquiry into all of the surrounding circumstances".

The State has not argued that the trial court's inquiry as to the non-disclosure of Mr. Evan's oral statement and the sudden emergence of a previously unknown eyewitness to the shooting was either timely or adequate.

The State had not previously disclosed Mr. Evan's prior oral statement, which it had. The State had not previously disclosed that there was a previously unknown eyewitness which it knew about. As per *Richardson* itself, Mr. Evan's conviction must be Reversed. See, also, *Purvis v. State*, 713 So.2d 1118 (Fla. 1st DCA 1998); *Delgado v. State*, 706 So.2d 328 (Fla. 1st DCA 1998); *Mobley v. State*, 705 So.2d 609 (Fla. 4th DCA 1997); *Loisell v. State*, 703 So.2d 534 (Fla. 4th DCA 1997).

In *Bush v. State*, 461 So.2d 936 (Fla. 1984), this Court considered "testimonial discrepancies". The concealment and utter disregard of Rule 3.220(b)(1)(c) as to the disclosure of Mr. Evan's oral statement is not a "testimonial discrepancy". The concealment of Ms. Green's "perjury" (one wasn't an eyewitness at her deposition but became one at trial is not a "testimonial discrepancy").

In *Reese v. State*, 694 So.2d 678 (Fla. 1997), this Court affirmed that defendant's conviction as it "did not find that the defendant's ability to prepare for trial was compromised." Here, the defense expectations, as per Discovery, went from no inculpatory statement to as damning an oral statement as can be imagined. Here, the defense expectations, as per Discovery, went from no eyewitnesses, to an eyewitness whose testimony could not have been any more

inculpatory to the defendant. If there were any case in which the phrase "trial by ambush" was a proper fit, this was it!!

In *Johnson v. State*, 696 So.2d 326 (Fla. 1997), the witness's testimony went from 80% sure to certain. It did not go from "I didn't see the incident" to "He blew her brains out as I was watching" and "By the way, the night before he said that he was going to kill her".

If Rule 3.220(b)(1)(c) truly means that the oral statements of defendant's must be disclosed, the Reversal must stand.

If the idea that trials should not be "by ambush" with eyewitnesses popping out of the woodwork on the day of trial, the Reversal must stand.

If the dictates of Richardson, that upon learning of a potential discovery violation, the trial court must conduct a timely and adequate inquiry still has validity, the Reversal must stand.

If Rule 3.220(j) really exists and there really is a Continuing Duty Disclose, the Reversal must stand.

If, as found by the District Court he requirements of Rule 3.220, as to Discovery, must be adhered to, the Reversal must stand.

## II

## THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL WHEN SYLVIA KENNEDY COMMENTED UPON BRENDA BROWN'S PREGNANCY

As this is issue was raised in but not ruled upon by the District Court, it is properly before this Court.

During the state's direct examination of Sylvia Kennedy, she testified that "Brenda was pregnant from Bernard" (T. 248).

The defense moved for a mistrial (T. 249) which was denied.

Brenda Brown did not testify. There was no evidence presented to show either that Brenda Brown was pregnant or that Mr. Evans was the father.

Without any predicate to demonstrate the truth of Kennedy testimony and without Mr. Evans' character having been put at issue, the appellant submits that it was Reversible Error for the prosecution to elicit this testimony from Kennedy. See, *Wilt v. State*, 410 So.2d 924 (Fla. 3d DCA 1982); *Carter v. State*, 687 So.2d 327 (Fla. 1st DCA 1997); *Machara v. State*, 272 So.2d 870 (Fla. 4th DCA 1973); *Reeves v. State*, 423 So.2d 1017 (Fla. 4th DCA 1982).

In *Pulido v. State*, 566 So.2d 1388 (Fla. 3d DCA 1990), this Court held that it was not error for a witness to testify that she "lost" her baby because she had testified at trial.

Brenda Brown did not testify in this case. No predicate was laid for testimony as to if she was pregnant (she would be the one to know) or who was the father (again, she alone would know).

Without a proper predicate, this testimony attacking Evans' character was improperly allowed and a mistrial should have been Granted.

See, also, *Killian v. State*, 24 Fla.L.Weekly D792 (Fla. 2d DCA 1999).

Let it not be forgotten that this is the same witness who was untruthful with the police (T. 325) and did not tell all of the truth at her deposition (T. 330).

The Reversal must stand.

## III

## THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR RECUSAL

As this issue was raised in but not ruled upon by the District Court, it is properly before this Court.

The judge who tried this case was different from the judge before whom the jury was selected.

As soon as counsel became aware that the trial judge was one with whom he had had difficulties in the past, he immediately brought his concerns to the court's attention (T. 167). The trial continued.

The defense filed, during trial, written motions to recuse the trial court (R. 61, 67). The motion was argued to the court (T. 272) which denied the motion (T. 276).

A judge's prejudice towards an attorney representing a party may be grounds for recusal. See, *Scussel v. Kelly*, 152 So.2d 767 (Fla. 2d DCA 1963); *Brewton v. Kelly*, 166 So.2d 834 (Fla. 2d DCA 1965)

Mr. Evans submits that the concerns expressed in his Motions for Recusal and argued to the trial court were sufficient to show that he did, indeed, have a reasonable basis to fear that the trial court might be biased or prejudiced against him due to prior encounters between the trial court and defense counsel.

To ensure all appearance of propriety, the trial court should have granted the Motion(s) for Recusal and recused itself in this cause.

## IV

## THE COMMENTS OF THE PROSECUTION DURING CLOSING ARGUMENT, WERE SUCH AS TO REQUIRE A MISTRIAL

As this issue was raised in but not ruled upon by the District Court, it is properly before this Court.

During closing argument in the instant case, the state commented:

(as to Sylvia Kennedy) She was real and her testimony was real and her testimony was true. She testified from the heart. She testified based on what she knew, what she saw. And she told you the truth.

(T. 466)

and,

we know that she is being truthful and we know that that's what she was.

(T. 467)

and, (as to what Evans stated on the day of the shooting):

he said, "I'll kill Thadeus, I'll put an end to this. I'll put an end to this.

(T. 468)

The defense objected, which objection was denied.

Later, the prosecution commented:

The law puts in there the reasonableness standard so if the defendant simply says I thought that he was going to kill me, that's enough.

(T. 469)

The defense objected and the objection was sustained (T. 469-70).

Later, the prosecution again commented on Kennedy's credibility:

She wasn't a liar. She was telling the truth.

(T. 476)

The appellant first submits that it was improper for the state to vouch for the credibility of Sylvia Kennedy, who admitted that she did not tell the truth either to the police or to defense counsel, under oath, at deposition (See, Point 1). See, *McLellan v. State*, 696 So.2d 928 (Fla. 2d DCA 1997); *Fryer v. State*, 693 So.2d 1046 (Fla. 3d DCA 1997), and cases cited therein. The repeated improper bolstering of Kennedy's testimony when she herself admitted that she had previously twice (once under oath!) had not been truthful requires Reversal. See, also, *Lewis v. State*, 711 So.2d 205 (Fla. 3d DCA 1998).

The prosecution's argument (T. 468) as to what Evans said on the date of the incident was incorrect. On that date, he did not say "I'll kill Thadeus". Since this was a statement not previously disclosed to defense counsel (See, Point I), the prosecution should have been extremely careful as to its use. The state's misrepresentation of that previously undisclosed statement was Reversible Error. See, *Garcia v. State*, 622 So.2d 1325 (Fla. 1993); *Jones v. State*, 24 Fla.L.Weekly D704 (Fla. 4th DCA 1999).

The state's comment as to "if the defendant simply says" (T. 469) was an improper comment upon the defendant's failure to testify. Such a comment requires reversal. See, *Stone v. State*, 548 So.2d 307 (Fla. 2d DCA 1989); *Eberhard v. State*, 550 So.2d 102 (Fla. 1st DCA 1989); *Jackson v. State*, 707 So.2d 412 (Fla. 5th DCA 1998); *State v. Hoggins*, 718 So.2d 761 (Fla. 1998).

During closing argument, the state improperly bolstered the credibility of its crucial witness who had admittedly been previously untruthful, misrepresented an inculpatory statement allegedly made by appellant which had not been supplied in discovery and called the jury's attention to the fact that Mr. Evans did not testify.

The cumulative effect of these improper comments was to deny Mr. Evans a fair trial. His conviction should be Reversed. See, *Cochran v. State*, 711 So.2d 1159 (Fla. 4th DCA 1998).

## CONCLUSION

Based upon the above facts, arguments, and authorities, it is respectfully submitted that the effect of the many errors infecting Mr. Evans trial, either separately or cumulatively require that he be afforded a New Trial. The decision of the District Court Reversing this Cause for a New Trial must be Affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Assistant Attorney General, Lara J. Edelstein, at 110 S.E. 6th Street, Ft. Lauderdale, Florida 33301, on this _ day of May, 1999.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 97-02080

BERNARD EVANS,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

---

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

---

# INITIAL BRIEF OF APPELLANT

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Sylvia Kennedy testified that she knew Thadeus Scott, Bernard Evans and Brenda Brown (T. 234-5).

Brenda was Thadeus Scott's girlfriend (T. 245). Scott then went to jail (T. 246). Brenda then became involved with Mr. Evans (T. 246). Mr. Evans treated Ms. Brown well (T. 252).

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Evans pulled up to a store across the street. He asked Brenda why she was crying. She replied that she and Scott had been fighting and that she could handle it (T. 286, 288).

Mr. Evans left (T. 288).

Brenda told Scott that she wanted him to leave (T. 288). Scott went to the apartment and began to collect his possessions (T. 288).

Mr. Evans returned (T. 289). Scott asked Evans for a ride to Scott's mother's house. Evans agreed (T. 289).

Brenda said that it would not be a good idea to have them both ride in the same car (T. 290). Scott and Brenda again argued (T. 290).

Mr. Evans left (T. 293).

Evans again returned and spoke to Brenda, then left (T. 297).

Scott and "Macaroni" went to the store up the street (T. 297).

Kennedy saw Evans drive up fast in the direction of the store (T. 302).

Kennedy heard two (2) shots (T. 302). She ran to the store. She hid behind a van. She heard another shot (T. 307).

Kennedy came around the van (T. 308).

She saw Evans and Scott backing up (T. 308).

Evans had a gun (T. 309). Evans shot Scott as Scott was backing up (T. 309). With the last shot, Scott fell (T. 311).

The police came (T. 315).

Kennedy told the police that she didn't see anything (T. 315). She was not truthful with the police (T. 325). She did not tell the police that she had seen the shooting (T. 327). In March of 1997 she had told the police that she had seen the shooting (T. 328). On January 26th, 1996, when her deposition was taken, she did not state that she saw the shooting (T. 328). She didn't tell all of the truth at her deposition (T. 330).

Kennedy did not state in her deposition about her conversation with Mr. Evans the night before the incident. She stated that she "really didn't know anything about the case". She "only know what I saw that day" (T. 342). She never told the police about her conversation with Evans the day before the shooting (T. 343).

Detective Garner testified that he interviewed Mr. Evans and that Mr. Evans gave a statement that he shot Scott when Scott approached his car and attacked him in his vehicle (T. 383).

This appeal follows.

## POINT(S) ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN NOT CONDUCTING A TIMELY RICHARDSON HEARING, THEN DECLARING A MISTRIAL, AFTER IT LEARNED THAT THE CRUCIAL STATE WITNESS, SYLVIA KENNEDY, HAD, IN MARCH, 1997, GIVEN A DIFFERENT AND MORE INCULPATORY STATEMENT ABOUT EVANS' ACTIONS TO THE POLICE AND PROSECUTION WHICH STATEMENT WAS NOT DISCLOSED TO THE DEFENSE?

II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL WHEN SYLVIA KENNEDY COMMENTED UPON BRENDA BROWN'S PREGNANCY?

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR RECUSAL?

IV

WHETHER THE COMMENTS OF THE PROSECUTION DURING CLOSING ARGUMENT, WERE SUCH AS TO REQUIRE A MISTRIAL?

## SUMMARY OF THE ARGUMENT

A mistrial should have been declared due to the state's failure to disclose both an inculpatory statement allegedly made by Mr. Evans and a new version of its key witness's testimony previously not revealed either to the police or, under oath, at deposition.

The appellant's character was improperly put into question by unsubstantiated testimony that Brenda Brown was pregnant and that he was the father.

The trial court erred in not recusing itself.

The comments of the prosecution during closing argument denied Mr. Evans a fair trial.

## ARGUMENT

### I

### THE TRIAL COURT ERRED IN NOT CONDUCTING A TIMELY RICHARDSON HEARING, THEN DECLARING A MISTRIAL, AFTER IT LEARNED THAT THE CRUCIAL STATE WITNESS, SYLVIA KENNEDY, HAD, IN MARCH, 1997, GIVEN A DIFFERENT AND MORE INCULPATORY STATEMENT ABOUT EVANS' ACTIONS TO THE POLICE AND PROSECUTION WHICH STATEMENT WAS NOT DISCLOSED TO THE DEFENSE

The only eyewitness to the incident was Sylvia Kennedy.

When originally questioned by the police, she had told the police that she didn't see anything (T. 315). She did not tell the police that she had seen the shooting (T. 327).

On January 26th, 1996, the defense took her deposition. She did not state that she saw the shooting (T. 328). She did not tell all the truth at her deposition (T. 330).

Additionally, she never told the police about her conversation with Evans the day before the shooting (T. 343). She did not mention this

conversation at her deposition. At deposition she stated that she "really didn't know anything about the case" and she "only know what I saw that day" (T. 342).

She stated that it was not until March of 1997, after the defense had taken her deposition, that she told the police that she had seen the shooting (T. 328).

Prior to trial, the defense was never informed either that Kennedy had seen the actual shooting or of her conversation with Evans the night before the shooting.

When Kennedy testified, the defense argued that "she lied to the police officer and not only lied but we've been blind sighted by her direct testimony, for what he's been talking about for the last hour didn't come up in her deposition" (T. 317-8).

The trial court did not hold a Richardson hearing.

The defense later argued:

> Yes, she has made prior statement. She gave a deposition in '96 and her story now is totally different.
>
> (T. 337)

and,

We've got a bigger problem here, Judge. We took this lady's deposition in January of '96 and she comes back to this State in March of '97 and tells him, hey I was lying. Here's the truth. The State didn't communicate anything to us about this witness' change of testimony and we think that's prosecutorial misconduct. We're moving for a mistrial based upon that. They had an obligation an affirmative obligation, to come forward, Judge, and tell us that this woman changed her story, knowing that we full well had taken her deposition. We're relying on her testimony. She comes in here now saying I am a witness to the crime, Judge. It's unfair for prosecution to come forward and say this woman has changed her story. It's unfair, Judge.

(T. 338)

The defense moved for a mistrial (T. 341) which was denied.

The trial court again did not hold a Richardson hearing.

The defense again argued:

We think it's unfair that this witness has changed her story to prosecution and we were not advised.

(T. 354)

No Richardson hearing was held.

At the close of the state's case, the defense moved for a mistrial (T. 398) on the basis of the non-disclosure of Kennedy's testimony.

No Richardson hearing was held. The motion was denied (T. 399).

Later, the defense again brought up the non-disclosure of Kennedy's testimony (T. 410).

The trial court finally decided a Richardson hearing was appropriate and asked the state to respond (T. 412).

The state responded:

> Mr. Coy: Judge, by way of response, a couple of things, first of all, every time, as many times you have cases, and during the course of cases you have people who over time say things and then modify what they say as time goes on. I don't believe that the prosecution has an obligation with respect to witnesses over time where those modifications are made to each time there is a modification the prosecution may become aware of let the defense know about that. That would be one response.
>
> The second is, with respect to the discovery rules, we have an obligation where there are recorded statements that the prosecution becomes aware of, and if I can have a second, 3.220 of the discovery rules, subsection (B) (1) (A), excuse me, (B) (1) (B), talks about the

prosecution's part to furnish to the defense and talks about statement, and it defines statement, including a written statement, and it defines statement, including a written statement made by the person and signed or otherwise adopted and approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. And this was not, Judge, this was not a statement that was adopted in writing, and this was not a statement that was written. This was not a statement that was recorded.

And this was something – this was something, simply something that somebody said along the way to the prosecution. And additionally, she could have taken the stand and she could have said something different on the stand beyond that.

(T. 413)

The trial court found that there was no discovery violation (T. 415). The state is charged with constructive possession of all information and evidence in the hands of police officers. See, *Gorham v. State*, 671 So.2d 869 (Fla. 1992); *McArthur v. State*, 671 So.2d 867 (Fla. 4th DCA 1996). When the court is given notice of a discovery violation, the court has

a duty to conduct a Richardson hearing. See, *Rath v. State*, 627 So.2d 24 (Fla. 5th DCA 1993); *Brown v. State*, 640 So.2d 106 (Fla. 4th DCA 1994).

The state was under a continuing obligation to disclose discovery material promptly. See, *Neimeyer v. State*, 378 So.2d 818 (Fla. 2d DCA 1979); *Barrett v. State*, 649 So.2d 219 (Fla. 1994).

In the instant case, it was not disclosed to defense counsel that, the night before the shooting, Evans had allegedly told Kennedy that he was going to kill Scott. That was an important, pertinent statement, about which defense counsel should have been apprised. The failure of the state to promptly advise the defense of the existence of this inculpatory statement by Evans is a discovery violation that requires Reversal. See, *Martinez v. State*, 528 So.2d 1334 (Fla. 1st DCA 1988); *Rainez v. State*, 596 So.2d 1295 (Fla. 2d DCA 1992); *Brown v. State*, 640 So.2d 106 (Fla. 4th DCA 1994); *McCray v. State*, 640 So.2d 1215 (Fla. 5th DCA 1994); *Holmes v. State*, 642 So.2d 1387 (Fla. 2d DCA 1994); *Evanko v. State*, 681 So.2d 1203 (Fla. 5th DCA 1996).

Additionally, once Kennedy changed her testimony from what she had both told the police and had stated, under oath, at deposition, the prosecution was obligated to tell the defense that, suddenly, Kennedy was an eyewitness to the shooting. The failure of the state to inform the defense of

this radical change in Kennedy's testimony was a Discovery Violation which requires Reversal. See, *Jones v. State*, 514 So.2d 432 (Fla. 4th DCA 1987); *Hickey v. State*, 484 So.2d 1271 (Fla. 5th DCA 1986).

The appellant would next submit that reversal is required due to the trial court's inadequate inquiry as to why these two important pieces of evidence (Evan's statement; Kennedy's eyewitness account) were not timely provided to the defense once the prosecution became aware of them. See, *Tarrant v. State*, 668 So.2d 223 (Fla. 4th DCA 1996); *Copeland v. State*, 556 So.2d 856 (Fla. 1st DCA 1990).

For any or all of the above reasons, Mr. Evans conviction must be Reversed.

II

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL WHEN SYLVIA KENNEDY COMMENTED UPON BRENDA BROWN'S PREGNANCY

During the state's direct examination of Sylvia Kennedy, she testified that "Brenda was pregnant from Bernard" (T. 248).

The defense moved for a mistrial (T. 249) which was denied.

Brenda Brown did not testify. There was no evidence presented to show either that Brenda Brown was pregnant or that Mr. Evans was the father.

Without any predicate to demonstrate the truth of Kennedy testimony and without Mr. Evans' character having been put at issue, the appellant submits that it was Reversible Error for the prosecution to elicit this testimony from Kennedy. See, *Wilt v. State*, 410 So.2d 924 (Fla. 3d DCA 1982); *Carter v. State*, 687 So.2d 327 (Fla. 1st DCA 1997); *Machara v. State*, 272 So.2d 870 (Fla. 4th DCA 1973); *Reeves v. State*, 423 So.2d 1017 (Fla. 4th DCA 1982).

In *Pulido v. State*, 566 So.2d 1388 (Fla. 3d DCA 1990), this Court held that it was not error for a witness to testify that she "lost" her baby because she had testified at trial.

Brenda Brown did not testify in this case. No predicate was laid for testimony as to if she was pregnant (she would be the one to know) or who was the father (again, she alone would know).

Without a proper predicate, this testimony attacking Evans' character was improperly allowed and a mistrial should have been Granted.

## III

## THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR RECUSAL

The judge who tried this case was different from the judge before whom the jury was selected.

As soon as counsel became aware that the trial judge was one with whom he had had difficulties in the past, he immediately brought his concerns to the court's attention (T. 167). The trial continued.

The defense filed, during trial, written motions to recuse the trial court (R. 61, 67). The motion was argued to the court (T. 272) which denied the motion (T. 276).

A judge's prejudice towards an attorney representing a party may be grounds for recusal. See, *Scussel v. Kelly*, 152 So.2d 767 (Fla. 2d DCA 1963); *Brewton v. Kelly*, 166 So.2d 834 ?

Mr. Evans submits that the concerns expressed in his Motions for Recusal and argued to the trial court were sufficient to show that he did, indeed, have a reasonable basis to fear that the trial court might be biased or

prejudiced against him due to prior encounters between the trial court and defense counsel.

To ensure all appearance of propriety, the trial court should have granted the Motion(s) for Recusal and recused itself in this cause.

## IV

## THE COMMENTS OF THE PROSECUTION DURING CLOSING ARGUMENT, WERE SUCH AS TO REQUIRE A MISTRIAL

During closing argument in the instant case, the state commented:

(as to Sylvia Kennedy) She was real and her testimony was real and her testimony was true. She testified from the heart. She testified based on what she knew, what she saw. And she told you the truth.

(T. 466)

and,

we know that she is being truthful and we know that that's what she was.

(T. 467)

and, (as to what Evans stated on the day of the shooting):

he said, "I'll kill Thadeus, I'll put an end to this. I'll put an end to this.

(T. 468)

The defense objected, which objection was denied.

Later, the prosecution commented:

The law puts in there the reasonableness standard so if the defendant simply says I thought that he was going to kill me, that's enough.

(T. 469)

The defense objected and the objection was sustained (T. 469-70). Later, the prosecution again commented on Kennedy's credibility:

She wasn't a liar. She was telling the truth.

(T. 476)

The appellant first submits that it was improper for the state to vouch for the credibility of Sylvia Kennedy, who admitted that she did not tell the truth either to the police or to defense counsel, under oath, at deposition (See, Point 1). See, *McLellan v. State*, 696 So.2d 928 (Fla. 2d DCA 1997); *Fryer v. State*, 693 So.2d 1046 (Fla. 3d DCA 1997), and cases cited therein. The repeated improper bolstering of Kennedy's testimony when she herself admitted that she had previously twice (once under oath!) had not been truthful requires Reversal.

The prosecution's argument (T. 468) as to what Evans said on the date of the incident was incorrect. On that date, he did not say "I'll kill Thadeus". Since this was a statement not previously disclosed to defense

counsel (See, Point I), the prosecution should have been extremely careful as to its use. The state's misrepresentation of that previously undisclosed statement was Reversible Error. See, *Garcia v. State*, 622 So.2d 1325 (Fla. 1993).

The state's comment as to "if the defendant simply says" (T. 469) was an improper comment upon the defendant's failure to testify. Such a comment requires reversal. See, *Stone v. State*, 548 So.2d 307 (Fla. 2d DCA 1989); *Eberhard v. State*, 550 So.2d 102 (Fla. 1st DCA 1989).

During closing argument, the state improperly bolstered the credibility of its crucial witness who had admittedly been previously untruthful, misrepresented an inculpatory statement allegedly made by appellant which had not been supplied in discovery and called the jury's attention to the fact that Mr. Evans did not testify.

The cumulative effect of these improper comments was to deny Mr. Evans a fair trial. His conviction should be Reversed.

## CONCLUSION

Based upon the above facts, arguments, and authorities, it is submitted that appellant's conviction and sentence must be Reversed and this cause remanded for appropriate proceedings.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 4 day of May, 1998.

Respectfully submitted,

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OT 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. **

THE STATE OF FLORIDA, **

Appellee. **

CASE NO. 97-2080

LOWER
TRIBUNAL NO. 95-25800

Opinion filed December 9, 1998.

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

John H. Lipinski, for appellant.

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

Before JORGENSON, LEVY and GERSTEN, JJ.

PER CURIAM.

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

D 26

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.



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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



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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.

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



A.29