IN THE SUPREME COURT OF FLORIDA

STEPHEN SCIPIO,

Petitioner,

v. CASE NO. SC04-647

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax (386) 238-4997

COUNSEL FOR RESPONDENT

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STATEMENT OF FACTS

The State rejects Scipio's "Facts re the present issue" set forth on pages 3-13 of the initial brief, and will rely on the following. For the sake of accuracy and clarity, the State has reproduced the exchanges between the witness at issue, Robert Burch, defense counsel, the prosecutor and the trial court, found at pages 1227-57 of the record on appeal.

ROBERT BURCH

was called as a witness and, after having first been duly sworn, testified as follows:

THE COURT: You may inquire.

DIRECT EXAMINATION

MR. HENDERSON:

Q Good morning.

A Good morning.

Q Would you tell the Jury your name, please.

A Robert Burch.

Q And are you employed?

A Yes, sir, I am.

Q And where is that?

A I'm a Forensic Investigator with the Office of the Medical Examiner in Volusia County.

Q And have you had training in forensic examination?

A Yes, sir.

Q How long have you been a Forensic Examiner for the Medical Examiner's Office?

A In Volusia County about three years.

Q And did you have experience prior to that?

A Yes, sir, I did.

Q Can you explain that to the Jury, please?

A I came here from District 14, which is Bay County, Panama City area, where we covered five counties.

Q Now, as an investigator for the Medical Examiner's Office, do you have powers confirmed by Chapter 406 of the Florida Statutes to allow you to investigate?

A Under the auspices of the Medical Examiner as his designee for investigation, yes, sir.

Q Okay. Would it be fair to say that you're not a law enforcement officer?

A No, sir, I'm not a law enforcement officer.

Q You assist the Medical Examiner in recovering evidence to determine the cause and manner of death; is that a fair statement?

A I essentially examine the body at the scene, or I take the death call over the telephone to determine jurisdiction, yes.

Q Mr. Burch, I'd like to call your attention to January 21st, year 2000. Do you recall that day?

A Yes, sir.

Q And were you employed as the Investigator for the Medical Examiner on that date also?

A Yes, sir, I was.

Q Did you respond to the scene at the Southside Inn in Daytona Beach?

A Yes, sir.

Q Do you recall about what time you arrived?

A My notes indicate I arrived around four o'clock in the morning.

Q Okay. Was the area around the Southside Inn secured with crime scene tape?

A Yes, sir, to my recollection.

Q So a perimeter was established when you arrived?

A Yes, sir.

Q Was there a body of a black male individual in the parking lot when you arrived?

A Yes, sir, there was.

Q Do your recall if that body was covered with a sheet when you arrived?

A Yes, sir, it was.

Q Do you recall any auxiliary lighting being present at the scene?

A To my recollection, the Florida Department of Law Enforcement Crime Scene van was at the scene or either the Daytona Beach, one of the crime scene vans had some lights on.

Q So they have spotlights and things they shine?

A Yes, sir.

Q Was the area fairly well illuminated?

A When I arrived, yes, sir. I mean, it wasn't bright daylight. You could see.

Q Did you go inside the Southside Inn?

A Yes, sir.

Q Do you recall seeing any indications of where a shooting may have occurred, and evidence of blood or anything along those lines?

A I was escorted in the room by, into the facility itself by the Florida Department of Law Enforcement staff and law enforcement at the scene. There were some blood drops and spatter leading into a pool room, as I recall.

Q Do you recall seeing some indications of blood at any of the exits to the Southside Inn?

A At the doorway that we made the primary entry into, yes.

Q As part of your duties at a crime scene or a potential crime scene, what do you do to the deceased to preserve evidence?

A Well, it would depend on the scenario. It would depend on the situation of the death.

Q In this particular scene did you bag the decedent's hands?

A I would have to review the scene photos to see if his hands were bagged. Yes.

Q If his hands were bagged is that something you would have done?

A Either I would have or would have assisted the Florida Department of Law Enforcement Crime Scene staff.

Q What is the purpose of bagging a decedent's hands?

A In some cases trauma is obtained to the hands and the skin under the fingernails, gunshot residue, there could be particular hairs or fibers attached to hands as part of a struggle. We use paper bags to preserve that. If the matter does fall off it would fall into the bag and we would still be able to retain some of that evidence.

Q Were you present when the body was removed?

A Yes, sir.

Q And do you recall about what time that was?

A I'd have to review the crime scene log. It was probably around 6:30, quarter to seven.

Q Would it be fair to say around dawn, with the lighting?

A Yes, sir.

Q Had a crowd of people gathered?

A Yes, sir.

Q Do you recall seeing a gun by the body, sir?

THE COURT: I'm sorry, I couldn't hear you.

MR. HENDERSON:

Q Do you recall seeing a firearm?

A I would have to review the scene photos, but, no, sir, I do not.

Q Do you recall having your deposition taken by me?

A After reviewing my deposition this morning with you, yes, sir.

Q And I took your deposition on November 27, 2001; is that correct?

A Based on that form, yes, sir.

Q And I was present and Mr. Davis was present?

A I do not recall who was present, sir.

Q Well, do you remember at any deposition that you're sworn to tell the truth, the whole truth, and nothing but the truth?

A Yes, sir.

Q Do you recall me asking you at the time, this is on Page 6:

"Do you recall seeing a firearm of any kind?"

And your response was: "Yes, sir."

Do you recall I asked you: "What kind did you see?"

You said: "It was an automatic handgun. It was under the body."

I asked you: "Do you know what happened to that firearm?"

And you said: "It was released to law enforcement. I don't know whether FDLE took it or the Daytona Beach Police Department."

Q Do you recall me asking those questions and you giving those answers?

A Upon reviewing my deposition yes, sir, I do.

Q And at that time that was at least closer to the date of incident than today; would you agree with that?

A Yes, sir, I would.

Q And are you saying now you do not recall seeing
the automatic firearm?

A Upon review of the scene photos there is no firearm.

Q Do you recall stating the firearm was under the body?

A Correct.

Q So how would you know by reviewing the crime scene photos if a firearm was under the body?

A Based on the photos that I was shown at deposition there is a pager on one hip, and at that time I made an error assuming that that was a firearm.

Q How do you know that was a pager, sir?

A Because I re-reviewed those photos this morning.

Q Let me see if I get this straight. What happened this morning when you showed up outside the front door?

A You approached me and handed me my deposition.

Q And did I ask you any questions whatsoever?

A Not to my recollections, no, sir.

Q Did I allow you to read your deposition without asking you any questions?

A Yes, sir.

Q And did I ask you afterwards if that’s fairly and accurately what you remember?

A Correct.

Q And did you tell me, yes, it was?

A Yes, sir.

Q And after I left can you tell me what happened?

A I reviewed my scene photos.

Q And how did that come about?

A Because I saw in there I was discussing a weapon. I reviewed my scene photos that I have here in my folder and I did not see a weapon.

Q After I left talking to you and you saying that is what you saw, did Mr. Davis approach you, this man?

A Yes, sir.

Q And what did Mr. Davis tell you?

A He asked me about the weapon.

Q And what did you tell him?

A I told him that I thought there was a photograph of the weapon.

Q And did I ask to accompany you and Mr. Davis into the State Attorney's Office to see, to listen, hear what was going on?

A Yes, sir.

Q And did Mr. Davis permit that?

A No, sir.

Q Did you tell – what did Mr. Davis tell you in reference to the photograph of the pager?

A He showed – I discussed with Mr. Davis that I would have to review the scene photos to determine whether or not there was a weapon. He produced the scene photos, we reviewed the scene photos and I saw that one of the Florida Department Law Enforcement photos indicated that it was a pager, not a firearm.

Q So that's not based on your recollection, that's based on what the Florida Department of Law Enforcement wrote down; is that correct?

A That is based on the scene photographs made available to me, yes, sir. There is not photograph, there no documentation in my notes regarding a weapon.

Q Well, that’s not your responsibility, it’s the responsibility of the Florida Department of Law Enforcement?

A What is? I don’t understand that question.

Q Documenting the scene, the various items that are at the scene; correct?

A Anything touching the body or on the body I would have documented.

Q So the things that are under the body you would have documented?

A Correct.

Q And when I asked you in deposition what you saw and you said it was a firearm, and you –-

A Looking at that photograph, yes, sir.

Q Well, looking at what photograph, sir?

A The photograph you produced at the deposition.

MR. HENDERSON: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

MR. HENDERSON:

Q I show you a copy of the deposition and ask you to find which photograph I showed you during deposition?

A You indicate here you showed me a photograph number two to refresh my recollection. Then you asked me regarding the perimeter, the photographs were still laid out on the table.

MR. HENDERSON: May I approach the witness again, Your Honor?

THE COURT: Yes, sir.

(Mr. Henderson tendering photographs to Mr. Davis.)

MR. HENDERSON:

Q Do you recognize this photograph, sir?

A Yes, sir, I do.

Q And what does that photograph depict?

A That photograph shows the front of the Southside Inn.

Q Does it fairly and accurately depict the Southside Inn as you were there that morning?

A To my recollections, yes, sir.

Q Would you flip the photograph over, please?

A Yes, sir.

Q What number is on the upper corner of that photograph?

A Number two.

Q Is this the photograph that I showed you that morning, sir?

A You had several photographs laying there. You also asked me if the body was covered by a white sheet, which I replied, “Yes, sir. That white sheet right there.”

Q In reference to the firearm, did I show you a photograph during that deposition and say “what is that item, is that item a pager? What is that item?”?

A No, sir. There were several photographs laid out on the table that you had out.

Q When I asked a question concerning the firearm did I refer to any photograph whatsoever and say “Did you see a firearm?”?

A No, sir, you did not refer to any photographs.

MR. HENDERSON: Could I have this marked as Defense Exhibit 1, Your Honor, the photograph.

THE COURT: You moving it into evidence?

MR. HENDERSON: Yes, sir.

THE COURT: Okay. Any objection from the State.

MR. DAVIS: Moving what?

MR. HENDERSON: The photograph in evidence.

MR. DAVIS: No, Your Honor.

THE COURT: Without objection, Madam Clerk, you can mark it.

(Same received and marked as Defense Exhibit 1 in evidence.)

MR. HENDERSON: Nothing further, Your Honor.

THE COURT: Mr. Davis?

MR. DAVIS: Thank you, Your Honor

THEREUPON,

CROSS-EXAMINATION

MR. DAVIS:

Q Mr. Burch?

A Yes.

Q Did you make a mistake?

A Yes, sir.

Q I take it it's not the first mistake you've made?

A No, sir.

Q Approximately how many scenes have, homicide scenes have you gone to in your career, ballpark?

A Probably 75 to 100.

Q And what's your procedure when you go to the scene and begin, as a Medical Examiner Investigator, begin to inspect the body, do you normally do that in conjunction with the crime scene personnel in order to not disturb the scene?

A Correct. Yes, sir.

Q When you arrived was the Florida Department of Law Enforcement and police personnel already present there?

A Yes, sir, they were.

Q In fact, had the body already been covered up at that point?

A Yes, sir.

Q When you arrived and began to move the body, is the procedure that, again, you work in conjunction with the crime scene people to inspect, not just the body, but underneath the body?

A Yes, sir.

Q And did you do so in this case?

A Yes, sir.

Q Had you moved the body and seen a firearm, would you have documented that?

A Absolutely.

Q Did you document it?

A No, sir.

Q You said you arrived at approximately four o’clock in the morning?

A Yes, sir.

Q You stated that Florida Department of Law Enforcement Crime Scene personnel were already there?

A Yes, sir.

Q Do you know who Tom Youngman is from the Daytona Beach Police Department?

A Yes, sir.

Q And what is his duty with them?

A He is the Crime Scene Investigator, he processes the scene, photographs.

Q Was he also there?

A Yes, sir, to my recollection.

Q Would it, in a situation like this with you arriving at four o’clock in the morning, would it be out of the ordinary at all or surprise you that approximately 18 or so law enforcement personnel had arrived there prior to your arrival?

A No, sir, no surprise at all.

Q When I asked you this morning to review all the crime scene photographs, did you do so?

A Yes, sir.

MR. HENDERSON: Objection, that assumes a fact not in evidence that he asked him to review.

THE COURT: You want to lay the predicate?

MR. DAVIS:

Q Did I ask you to review all the crime scene photographs this morning?

A Yes, sir.

Q And did you review all the crime scene photographs?

A Yes, sir.

Q Did you pay particular attention to the crime scene photographs of the body?

A Yes, sir.

Q Are you aware of any documentation, you said, just to make clear –- let me ask you, do you remember this particular scene?

A Not without reviewing my notes or the photographs.

Q So then I guess with regard – you don't remember at all ever seeing a firearm there?

A No, sir, I do not.

Q Is that the purpose of your notes, to assist you in recalling since you handle so many cases?

A Yes, sir.

Q Are you aware, are you personally aware of any documentation at all in this case that reflects a firearm being there at the scene?

A Other than my deposition, no, sir.

Q And you have made it clear at this point that that was a mistake?

A Yes.

Q Have you, on occasion, Mr. Burch, found guns under bodies in your career of responding to homicide scenes?

A Yes, sir.

Q I would like to show you State Exhibit 2, and if you can see this, I am referring you to Photograph A.

A Yes, sir.

Q Do you see a pager in that photograph?

A Yes.

Q Please point to it.

A On the right hip right at the belt.

Q Is it a standard procedure in cases involving a homicide like this that, if possible, some personal items be returned to the family if possible?

A Yes, sir.

Q And does the police department normally take possession of personal items of the victim at some point?

A During the course of the autopsy or while at the scene, it depends on the nature of the event.

Q Are you aware that the crime scene technician from Daytona Beach, Tom Youngman, returned a wallet, a Motorola pager, currency, money and keys on a key chain to the fiancé of the victim in this case?

MR. HENDERSON: Your Honor, I object, that calls for clear hearsay unless he lays a predicate that Mr. Burch was there and saw that happen. He is asking him to testify to some document, it's pure hearsay. There's no predicate.

MR. DAVIS: I'm asking if he's aware of that.

THE COURT: Well, lay a personal knowledge predicate and I think it will set aside the objection.

MR. DAVIS:

Q Are you aware of the personal items of the victim that were turned over to Connie Stokes, his fiancé, after his murder?

A No, sir, I'm not.

Q And, again, just to make clear, would it be standard procedure that the personal effects of the victim would be turned over, if not connected with the investigation, to the family members?

A Yes, sir.

Q And if a firearm were found under the victim, what would be the normal procedure with regard to an item such as that?

A If a weapon were found it would be photographed, documented. I would collect it, law enforcement would make it safe and seize it and protect it as evidence.

Q I take it you consider yourself a professional and do the best job you can?

A Yes, sir, I do.

Q Would you come into a court of law and lie to help anyone or any side?

A Absolutely not.

Q Did I pressure you, or coerce you, or threaten you at all this morning with regard to your testimony?

A No, sir, you did not.

Q Do you know of any procedure or rule that requires any time I talk to a witness to let the Defense Attorney follow along into my office?

A No, sir, I am not an attorney.

MR. DAVIS: Thank you. I have no further questions.

THE COURT: Mr. Henderson.

MR. HENDERSON: Thank you.

THEREUPON, REDIRECT EXAMINATION

MR. HENDERSON:

Q Mr. Burch, would it be fair to say that before going into that office, 10 minutes ago you were telling me that the deposition was accurate and you recall the gun; correct?

A Based on my recollection in reviewing the deposition, yes, sir.

Q And it was a semiautomatic handgun is the question I asked out front, correct, based on the deposition, and you agreed to this, that's what you saw; correct?

A Excuse me, you just asked me three questions. Out front you didn't mention a weapon at all.

Q I did not ask you –

A Not out front here, no, sir.

Q I did not ask you about – I did not tell you the things I was going to ask you?

A You asked me about – you told me you were going to ask me about lighting, the crime scene tape, whether or not the body was covered and some blood.

Q And whether a gun was under the body, I did not tell you that?

A Not to my recollection, no, sir.

Q Was Mr. Davis present at that deposition; do you recall?

A No, sir, I do not.

MR. HENDERSON: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

MR. HENDERSON:

Q Let me show you the front of the deposition. And are you familiar with depositions, sir?

A Yes, sir.

Q Do you recall that the court reporter normally puts down who is present?

A Yes, sir.

Q And you see that it indicates I was present, Mr. Davis was present, Mr. Novas was present?

A Yes, sir.

Q But you have no recollection that Mr. Davis was present?

A I don't read that part of the page when I am reading my deposition. I read my deposition.

Q Let me ask you this, on November 27, 2001, you made this statement under oath about the gun and you were apparently relying on photographs that were on the table somewhere, and you said there was a gun. Do you recall the State Attorney that was present jumping up or grabbing the photograph and saying, no, wait, what's this object? Did that occur?

A Not to my recollection, no.

Q Did the State Attorney that was there even act surprised that you said there was a gun under the body; do you recall?

A Not to my recollection, no.

MR. HENDERSON: Nothing further, Your Honor.

THEREUPON, RECROSS EXAMINATION

MR. DAVIS:

Q Have you done a few depositions with me in the past?

A Yes, sir.

Q And have you ever seen me jump up and yell about anything you've said in a deposition?

A No, sir, I have not.

MR. DAVIS: Nothing further.

THEREUPON, REDIRECT EXAMINATION

MR. HENDERSON:

Q During those depositions, has Mr. Davis ever asked you questioned in return about your testimony?

A I believe he has, yes, sir.

Q Has he ever asked you to clarify your answer or ask additional questions about what it is you say you've
seen at a particular scene?

A He may have, I do not recall. I don't know.

Q Certainly, Mr. Davis would have the opportunity then to ask you those questions. Do you recall – would it be fair to say that Mr. Davis would have that opportunity to ask those questions then?

A Yes, sir.

Q And isn’t that the way a deposition normally works, one side asks questions and the other side asks questions?

A Yes, sir.

Q And those questions are under oath?

A Yes, sir.

MR. HENDERSON: Nothing further, Your Honor.

MR. DAVIS: Nothing further.

THE COURT: Thank you very much, sir, that will be all. You may step down.

Call your next witness.

MR. HENDERSON: Your Honor, we have a matter I would like to put on the record outside the presence of the Jury.

THE COURT: Okay. Can I ask the Jury to step in the Jury room for just a moment, please.

THE BAILIFF: The Jury is out of the presence of the Court, Your Honor.

THE COURT: Okay.

MR. HENDERSON: Your Honor, I believe that the State Attorney knew that this witness had changed his testimony between the time I took his deposition, indeed between the time that I talked to Mr. Burch outside the courtroom, and before he testified. Mr. Davis did not notify me of that change. That is a clear Discovery violation, and I was clearly embarrassed by that and it clearly affected my presentation of this witness’ testimony. And I am essentially asking for sanctions against the State Attorney’s Office.

THE COURT: Let me read the Rule that you’re referring to.

MR. HENDERSON: The Rule is 3.220, the ongoing duty of a State Attorney to disclose statements of witnesses. And that includes after a witness has been deposed and a witness changes their testimony.

THE COURT: All right, let me read it. That's fine. Which one?

MR. HENDERSON: 3.220, Your Honor. The Discovery Rule.

THE COURT: I've got 220, which one now?

MR. HENDERSON: J, little J.

THE COURT: J.

MR. HENDERSON: Little J.

THE COURT: I'm still trying to find what you want me to look at.

MR. HENDERSON: J deals with the prosecutor's continuing duty to disclose, Your Honor, statements of –

THE COURT: Oh, hang on. That J. I was looking at the wrong J, excuse me. Okay, where do you find the prosecutor's duty to disclose the substance of a witness' testimony as opposed to just the identity of the witness and all the physical and tangible items we're talking about?

MR. HENDERSON: It's the change in testimony, Your Honor, and ––

THE COURT: Where is that? I'm not aware of that rule, I'll be honest with you, so I'm getting an education here.

MR. HENDERSON: I believe there is authority, and the legal research aspect of my computer crashed so I can't pull the case out for you, but know the State is aware of this Rule because they have been challenged on this before when the testimony of a witness has changed, they failed to disclose that to

the Defense and allow that witness to be presented. So. . .

THE COURT: Well, I know if there is exculpatory
evidence they have discovered they've got a duty to disclose the exculpatory, just something like this, I'm not familiar with that principle, so I need to get your to specify what you want me to enforce.

MR. HENDERSON: Well, I believe that the State pulled Mr. Burch aside, that's essentially what the testimony was, and took him into, the State took Mr. Burch into their office and thereafter his testimony changed dramatically from when I last talked to him. And I had no notice of that and I believe the State is required to disclose that prior to me calling Mr. Burch as a witness.

THE COURT: I understand your position, I'm looking for what legal authority you have for that position. Maybe Mr. Davis can help us out on it. I'm not saying you're wrong, I'm just saying I'm unfamiliar with that principle. I've never dealt with that issue before to understand that that's the law.

I know he has a continuing duty to disclose the names of witnesses, any physical evidence that is discovered, any exculpatory evidence, any written statements from, like, for instance, yesterday's discussion if a statement had been taken from your client under that procedure he would have a duty –- there is a whole list of things I understand he has a duty to continue to disclose, but I have never dealt with a continuing duty to disclose a witness', substance of their testimony.

I've always understood it to be the duty of the person calling the witness to find out, and to take the deposition. That's why we have updated subsequent depositions because lawyers say I'm afraid the witness' testimony has changed, I need to take their deposition again, and that sort of thing. So I'm just unfamiliar with it. I'm not saying you're wrong, Mr. Henderson, I'm just looking for the authority.

MR. HENDERSON: I believe under Rule 3.220(b), that's little B, and then parenthesis, big B, the State is required to give me "the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein, includes a written statement made by the person and signed or otherwise adopted or approved by a 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."

THE COURT: All right, that's the one I'm familiar with.

MR. HENDERSON: And I believe this is a statement that was made, of the prior deposition, clearly, was a statement made by this witness whose name was provided by the State was a statement under oath. And after that time, after I had notice of that statement, Mr. Davis talked to Investigator Burch and his testimony changed dramatically. They went into an area that was not done during the deposition and I was not told.

THE COURT: Well, I have never seen that. That means that the prosecution is under duty to disclose to you every time they have a conversation with a witness, because, presumably, every conversation will be somewhat different from the deposition. Do you have any case law supporting that?

MR. HENDERSON: I do not have it with me, Your Honor. I respectfully move for a mistrial.

THE COURT: Well, I'll need to get some authority for that. I understand that if he took a written statement he would have a duty to disclose it to you, but having a conversation in the hallway? I've never heard that is a part of their continuing duty to disclose every conversation that a Prosecutor has with every witness. I've just never encountered it, unless it's under one of these other categories, like, for instance, the exculpatory.

Surely, if a witness came up and told him something orally just before he took the stand that was exculpatory, he would have a duty to immediately

tell you. But other than that, I'm not familiar with it, so I need to give you the opportunity to uncrash your computer, if that's the key to –-

MR. HENDERSON: I cannot pull the authority up, Your Honor. I move for a mistrial based on the State's violation of the Discovery Rules. That's my motion.

THE COURT: All right. Mr. Davis?

MR. DAVIS: Judge, we obviously oppose it. There is no basis for that. It's a conversation before he testified in the hallway and that was the extent of it. Defense Counsel deposed him. The statements I provided prior for Investigator Burch didn't deal with this at all. It's not as if I'm providing him a statement and then all of a sudden that statement changes in a drastic fashion. We never provided it anyway, so I just agree, we have no duty based on conversations prior to testimony to apprise the Defense of what they tell us. So I strongly oppose a mistrial.

THE COURT: Well, if you can find case law, bring it to my attention. In the meantime, I'll deny the motion because I don't think that's the law. Not under these facts. I do understand the continuing duty to disclose, but I've never heard of a duty to disclose conversations in the hallway, even if they disclose changes in testimony, unless it, again, falls under one of the other categories.

So are we ready for the next witness? Are we ready for the Jury?

(V14 R 1227-57).

In opening statement, defense counsel stated:

> There are .38 caliber bullets that were taken from Ogard Smith. The way he was shot will be cleared (sic), we can establish that. He was shot four times. The trajectory of the bullets can

> perhaps be established. No gun was recovered.

(V5 R 734).

On direct appeal in the Fifth District Court of Appeal, Scipio raised the following issue:

> THE DEFENDANT (sic) ERRED IN THE DENIAL OF THE DEFENDANT'S MOTION FOR MISTRIAL, AND IN REFUSING TO IMPOSE SANCTIONS FOR THE STATE'S DISCOVERY VIOLATIONS.

The district court determined that the state committed a discovery violation, but concluded that the defense was not procedurally prejudiced and affirmed Scipio's conviction. *Scipio v. State,* 867 So. 2d 427 (Fla. 5th DCA 2004).

SUMMARY OF ARGUMENT

The State first contends that the claims raised by Scipio have not been preserved for review. Even if preserved, no discovery violation occurred. All discovery provided by the State and all evidence presented by the State indicated that no gun was recovered from the crime scene. There was no discovery violation in failing to tell the defense that Investigator Burch had made a mistake in his deposition and would be testifying consistent with his written report and all other discovery provided by the State. Error, if any, is harmless.

ARGUMENT

THE INSTANT CLAIMS WERE NOT PRESERVED FOR REVIEW; NO DISCOVERY VIOLATION OCCURRED AND EVEN IF IT DID ANY ERROR IS HARMLESS.

Scipio claims that the State committed a discovery violation when the prosecutor failed to disclose that a defense witness would testify differently than he did in his discovery deposition. He also seems to claim that the State violated the rule of sequestration, and states that this Court may want to reach that issue here. He further states, on at least six occasions (IB 10, 13, 18, 21, 22, 23), that the trial court failed to conduct an inquiry pursuant to *Richardson v. State,* 246 So. 2d 771 (Fla. 1971), and specifically states that on direct appeal, he argued that the trial court failed to conduct any *Richardson* inquiry (IB 13). He claims that had the judge conducted a hearing, he could have cured the prejudice by giving a curative instruction and granting the defense opening and closing segments of closing argument, but this was not done because the judge saw nothing wrong.

There was never any claim in either the trial court or the district court that the State violated the rule of sequestration. In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. *Bertolotti v.*

Dugger, 514 So. 2d 1095 (Fla. 1987). This claim is clearly not preserved. Further, despite Scipio's claim to the contrary, a review of his initial brief filed in the district court reveals he never claimed that the trial court did not conduct a *Richardson* inquiry, and in fact, his argument does not even contain a citation to *Richardson*. Consequently, the district court never addressed this issue. In any event, the record demonstrates that the trial court conducted a thorough inquiry, and despite at least four requests for authority to support Scipio's position and an offer to let counsel find that authority, none was forthcoming.

After Investigator Burch testified, defense counsel stated that he had a matter to put on the record outside the presence of the jury (V14 R 1249-50). Counsel alleged a discovery violation, and stated that he believed there was authority for his position, but "the legal research aspect of my computer crashed", so he could not pull the case (V14 R 1252). The court stated that he was not familiar with the principle being asserted, and told counsel, "I need to get you to specify what you want me to enforce" (V14 R 1252). Defense counsel explained his position, and the trial court responded "I understand your position, I'm looking for what legal authority you have for that position" (V14 R 1253). After further discussion, the trial

court again asked, "Do you have any case law supporting that?" (V14 R 1255). Defense counsel responded that he did not have it with him, and moved for a mistrial (V14 R 1255).

The trial court responded that he would need to get some authority (V14 R 1255). The court had never heard that it is part of the prosecution's duty to disclose every conversation that a prosecutor has with every witness (V14 R 1255). The trial court stated:

> Surely, if a witness came up and told him something orally just before he took the stand that was exculpatory, he would have a duty to immediately tell you. But other than that, I'm not familiar with it, so I need to give you the opportunity to uncrash your computer, if that's the key to –

(V14 R 1255-56). Defense counsel interrupted, saying "I cannot pull the authority up, Your Honor. I move for a mistrial based on the State's violation of the Discovery Rules. That's my motion" (V14 R 1256). The trial court concluded:

> Well, if you can find case law, bring it to my attention. In the mean time, I'll deny the motion because I don't think that's the law. Not under these facts. I do understand the continuing duty to disclose, but I've never heard of a duty to disclose conversations in the hallway, even if they disclose changes in testimony, unless it, again, falls under one of the other categories.

(V14 R 1256-57). The State submits that the trial court should not be found to have erred when he gave Scipio every opportunity to present authority in support of his position, and Scipio never did.

Even if this Court determines that the discovery violation issue has been preserved for appellate review, relief is not warranted. This case presents a unique situation. Generally, an alleged discovery violation arises where a party has failed to disclose a witness or evidence in discovery, or the evidence or testimony of a witness during trial differs from that originally provided in discovery. Here, all discovery provided by the State was consistent with all the evidence presented by the State during trial. The alleged "change in testimony" arose during a defense discovery deposition. Thus, the threshold question in this case is whether there was in fact a discovery violation. The trial court found that there was not, and the State contends that the trial court was correct.

To begin the analysis, it is of the utmost importance to review the facts set forth in the record, as neither Scipio nor the district court accurately related them. The most significant fact is that no gun was recovered from the crime scene. The report written by the witness at issue, Investigator Burch, and provided to the defense in discovery, made no mention

of a gun being seen or recovered at the scene. No other report, statement or photograph provided by the State to the defense indicated that a gun was recovered. At trial, no witness, including crime scene personnel and police officers connected with the case testified that a gun was recovered, and no gun was admitted in evidence. In sum, as defense counsel himself stated in opening, "No gun was recovered" (V5 R 734).

Further, there is no direct evidence that "[j]ust before presenting Burch as a witness, defense counsel properly confirmed that Burch recalled *seeing* a firearm under the victim's body" (IB 15). On direct examination, Investigator Burch agreed that he had read the deposition that morning, and responded affirmatively when asked if that was "fairly and accurately what you remember?" (V14 R 1235). On redirect, Burch testified that defense counsel "didn't mention a weapon at all" (V14 R 1246). He further told defense counsel, "[y]ou asked me about – you told me you were going to ask me about lighting, the crime scene tape, whether or not the body was covered and some blood" (V14 R 1246-47). Defense counsel then asked, "[a]nd whether there was a gun under the body, I did not tell you that?", and Burch responded, "[n]ot to my recollection, no, sir" (V14 R 1247).

Further, Scipio's statement that "[a]fter defense counsel left, this prosecutor approached Burch and discussed his testimony" (IB 15) is somewhat misleading. It is apparent that defense counsel was well aware of the fact that the prosecutor was talking to this witness, because he asked if he could accompany the prosecutor and the witness into the prosecutor's office to hear what was going on (V14 R 1235). Similarly, there is no record support for the district court's statement that the defense was not permitted to question Burch prior to trial. *Scipio v. State,* 867 So. 2d 427, 430 (Fla. 5th DCA 2004).[1] Defense counsel did indeed talk to Burch prior to his testimony, and there is nothing to show that he ever attempted to talk to the witness after the witness had talked to the prosecutor, much less that he was precluded from doing so.

There is also no evidence that the prosecutor "affirmatively, privately and improperly caused the conversion in [Burch's] testimony" (IB 15), "unethically converted" the witness (IB 20), or "destroyed exculpatory evidence" (IB 20). Investigator Burch testified that after defense counsel finished talking to him, the prosecutor approached and **asked** him about a

[1] The district court on at least six occasions stated that this incident occurred prior to trial. Actually, this occurred near the end of trial, after the State had rested and before the defense opened it case.

weapon (V14 R 1235). Burch responded that he thought there was a photograph of a weapon (V14 R 1235). **He** (Burch) told the prosecutor that he would have to review the crime scene photos to determine whether or not there was a weapon (V14 R 1236). The prosecutor produced the crime scene photos, they reviewed the photos, and **Burch saw** that one of the FDLE photos indicated that it was a pager, not a firearm (V14 R 1236). Burch stated "[t]here no [sic] documentation in my notes regarding a weapon" (V14 R 1236). He further stated that "anything touching the body or on the body I would have documented" (V14 R 1236). If he had moved the body and seen a firearm, he "absolutely" would have documented it (RV14 R 1241). Burch agreed that the prosecutor did not pressure, coerce or threaten him with regard to his testimony (V14 R 1245). As Burch acknowledged, he made a mistake (V14 R 1239-40).

In light of these facts, the State contends that there was no discovery violation. Where a trial court rules there was no discovery violation, the reviewing court must determine whether the trial court abused its discretion. *Consalvo v. State,* 697 So. 2d 805 (Fla. 1996). The State contends that the trial court did not abuse its discretion, and that the district court misapplied this Court's holdings in finding that there was a discovery violation.

All discovery provided by the State and all evidence presented by the State indicated that no gun was recovered at the crime scene. The only reference to a gun throughout this entire case was made by Investigator Burch (who is an investigator for the medical examiner's office and not a law enforcement officer) at a defense deposition eight months prior to trial. The State submits that if there was ever a possibility to cry discovery violation in this case, that would have been the time to do it. Here was a witness saying that a gun had been recovered, yet no other discovery provided by the State indicated such. Generally, the recovery of a gun from the scene of a death by shooting is a significant factor and worthy of further investigation. Likewise, if a gun had indeed been recovered and the state failed to disclose it, an investigation would most likely be warranted. To this date, Scipio has never alleged that the State failed to disclose in discovery that a gun was found at the scene. The defense had eight months to investigate this new revelation, and any discrepancies could have been addressed during that time and resolved well before trial commenced in this case. As stated, the discovery provided by the State was consistent throughout these proceedings, up to and including its trial presentation, so there was no discovery violation in failing to tell the defense that Burch made a

mistake in his deposition and would be testifying consistently with his report.

The State should not be held responsible for a statement in a defense deposition where the State does not call that witness to testify, and all evidence presented by the State is consistent with all discovery provided by the State. If the defense discovers a discrepancy and intends to rely on that discrepancy, the defense should be required to live with the consequences of its strategy. As Justice Wells stated in ***Reese v. State,*** 694 So. 2d 678, 686 (Fla. 1997) (Wells, J, concurring in part and dissenting in part):

> The continuing duty to disclose pursuant to Florida Rule of Criminal Procedure 3.220(j) has to be afforded a reading which takes into account the right to depositions under our criminal procedures. The right to depositions has to have the concomitant obligation that in the deposition the party taking the deposition will seek information which is available at the time of the deposition. Otherwise, the omission of questions about which information was available at the time of deposition can be used as a strategic depository of discovery violations.

In this respect, the State would point out that a prosecutor may not even attend a defense discovery deposition. If the defense uncovers a discrepancy between a witness's deposition and his

written report that was provided by the State in discovery (as well as all other discovery provided by the State), that is the time to resolve the issue, and if one elects not to do so, one should be prepared for the consequences. A defendant should not be permitted to sit back and wait until trial, then claim a discovery violation based on the fact that a witness's testimony is entirely consistent with his written report and all other discovery provided by the state. The discovery rule was designed to furnish a defendant with information that would assist him in his defense; it was never intended to furnish a defendant a procedural device to escape justice. *Richardson, supra*. Likewise, the purpose of the discovery rules is to facilitate a truthful fact-finding process, and they are designed to prevent surprise by either the prosecution or defense. *State v. Evans,* 770 So. 2d 1174 (Fla. 2000).

Even if this Court determines that the State is responsible for statements made in a defense discovery deposition, and a later retraction of those statements, which is entirely consistent with all discovery provided by the state, would constitute "changed testimony", there is still no discovery violation. The district court relied on this Court's opinion in *Evans, supra*, but completely overlooked the *Evans* Court's analysis of *Bush v. State,* 461 So.2d 936 (Fla. 1984).

In *Bush,* an investigator testified in a pretrial deposition that a store clerk did not identify any photographs of the defendant in a photo lineup. However, at trial the investigator testified that the clerk did identify the defendant's photograph. This Court held that the failure of the prosecutor to inform the defense of the change in the investigator's testimony was not a discovery violation. This Court specifically stated that "...unlike [the] 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." *Id.* at 938.

In *Evans,* the **state** provided the defense with a statement from a witness in which she stated that she did not see anything pertaining to the charged crime, and she testified similarly in deposition. It was only on the stand the witness changed her testimony, and admitted that she had told the prosecutor of this changed testimony about a month before trial. The *Evans* Court found it necessary to clarify statements in *Bush,* yet still found:

> Specifically, although the changed testimony at issue in this case differs significantly in nature and degree from the changed testimony considered in *Bush*, **those differences do not negate this Court's statement in *Bush* that "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."**

Evans at 1178. The Court further clarified *Bush:*

> To the extent that our determination here may be interpreted as being inconsistent with our "changed testimony" statements in *Bush*, we clarify that our statements in *Bush* do not control in situations where the State provides the defendant with a witness's "statement" - as that term is defined in rule 3.220(b)(1)(B) - and thereafter fails to disclose to the defendant that the witness intends to change that statement to such an extent that the witness is transformed from a witness who "didn't see anything" into an eyewitness who observed material aspects of the crime charged.

Id. at 1184. That is clearly not the case here, so *Bush* remains applicable. As has been repeatedly stated, the State never provided a statement or report to the defendant that was later changed at trial.

The State would also point out that only written or sworn statements of witnesses must be disclosed in discovery. Courts construing rule 3.220(b)(1)(B) have determined that the State is not required to disclose to the defendant a witness's oral statement when such statement has not been reduced to writing or recorded in a manner

prescribed by the rule. *See, e.g., Olson v. State*, 705 So. 2d 687, 690-91 (Fla. 5th DCA 1998) (stating that the clear implication of rule 3.220(b)(1)(B) is that witness statements "if not written or recorded, are not discoverable"); *Johnson v. State*, 545 So. 2d 411, 412 (Fla. 3d DCA 1989)(determining that State was not required to disclose to the defendant an oral, unrecorded statement made by a state witness to the prosecutor); *Whitfield v. State*, 479 So. 2d 208, 215-16 (Fla. 4th DCA 1985) (determining that witness's oral statements to prosecutor after suppression hearing were not discoverable, in part because such statements were not written or recorded). While courts, including *Evans, supra,* have determined that the State must, in some instances, disclose to the defendant a witness's oral statement, this is limited to circumstances where the oral statement materially alters a prior written or recorded statement **previously provided by the State to the defendant**. As stated, this is not what occurred here.

Even if this Court finds that the State committed a discovery violation, the State contends that any error is harmless. The district court set forth the proper analysis as follows:

> A violation is harmful if the defense is procedurally prejudiced. *Pender v. State,* 700 So. 2d 664, 666 (Fla. 1997); *State v. Schopp,* 653 So. 2d 1016 (Fla. 1995). The defense is procedurally prejudiced if there is a reasonable possibility that

> the defendant's *trial preparation or strategy* would have been materially altered had the violation not occurred. *Pender; Schopp.* Trial preparation or strategy will be materially different if it reasonably could have benefitted the defendant. *Id.* If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense, the error must be considered harmful. *Id.* Put another way, if the appellate court can say, beyond a reasonable doubt, that the defense was not procedurally prejudiced by the discovery violation, then the error is harmless. *Id.*

Scipio v. State, 867 So. 2d 427, 430 (Fla. 5th DCA 2004). Scipio claims that the decision to call Burch as a defense witness was a matter of trial preparation and strategy, and that decision was necessarily based on information obtained through discovery. Again, it certainly was not based on any discovery that had been provided by the prosecutor. Scipio consistently faults the prosecutor for not telling him something that he clearly should have known, and apparently did, because he stated in opening that no gun was recovered. He therefore should have been prepared to address it. Suppose the prosecutor had not come to the realization of what had happened prior to the witness testifying, and the witness had testified consistent with his deposition. He no doubt would have been seriously

impeached with his prior statement and crime scene photographs, admitted on the stand that he had made a mistake, and the outcome would have been exactly the same.

It is interesting to note that both Scipio and the district court all seem to know what the prosecutor was thinking in this case and are willing to attribute evil intent and motives, despite any record evidence to support such accusations. Everyone conveniently overlooks the fact that at the heart of this issue is the fact that the defense wanted to present inaccurate testimony.[2] The district court was also apparently able to read defense counsel's mind, because it found that the defense was completely surprised by Burch's trial testimony. *Scipio* at 430. The defense certainly should not have been surprised by Burch's testimony, given all of the discovery in this case, the evidence already presented by the State, defense counsel's statement in opening that no gun was recovered, and the fact that defense counsel knew the prosecutor had spoken to Burch prior to his testimony. Let us not forget that both discovery and trial are truth seeking processes, and the result sought by Scipio flies in the face of this. In short, he is claiming that he is entitled to a new trial because he was

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[2] As the district court stated, "[t]he defense in this case was deprived of possibly being able to establish the existence of another shooter in the parking lot, **based on a mistake**." *Scipio* 867 So. 2d at 430 (emphasis supplied).

unable to present inaccurate testimony. Significantly, Scipio has never alleged that the State failed to disclose the existence of a gun in discovery. If this Court were to rule in Scipio's favor, it would be the first time that a discovery violation has been found where a witness's testimony and all evidence was consistent with the discovery provided by the State. This has never been, nor should it ever be the law in the State of Florida.

CONCLUSION

Based on the arguments and authorities presented herein, the State requests this Court to find that no discovery violation occurred.

Respectfully submitted,

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by U.S. Mail to Larry B. Henderson, Assistant Public Defender, 101 Second Street, Holly Hill, FL 32115, and by delivery via the Public Defender's mailbox at the Fifth District Court of Appeal to Noel Pelella, Assistant Public Defender, this ____ day of October, 2004.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
Kellie A. Nielan
ASSISTANT ATTORNEY GENERAL