IN THE SUPREME COURT OF FLORIDA

STEPHEN SCIPIO,

Appellant/Petitioner

Case # SC04-647
Fifth DCA Case # 5D 02-2240

versus

STATE OF FLORIDA,

Appellee/Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS
(Amended)

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SEVENTH CIRCUIT

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("R Vol.") refers to the record on appeal.
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STATEMENT OF THE CASE AND FACTS

The State of Florida charged 18-year old Stephen Scipio with the first-degree premeditated murder of 28-year old Ogard Smith. (R. Vol. I, p. 99). The facts of the offense, accurately summarized by the Fifth District Court of Appeal, are repeated here verbatim, with respective record cites added by the undersigned in footnote form:

> At Scipio's trial, four witnesses identified him as Smith's assailant, but there was no[1] physical evidence connecting Scipio to the crime. Smith was shot four times, and two projectiles were recovered from his body.[2] They were possibly fired from the same pistol, most likely a revolver,[3] but the gun was never recovered.[4]
>
> The testimony adduced at trial was that immediately prior to his death, Smith was shooting pool with Miles Garey in the pool room of the Southside Inn,[5] a Daytona Beach nightclub, which is located in a high crime area.[6] Garey testified[7] that he and Smith had been at the Southside Inn only a short while, and that he was bending over shooting pool, when he heard Smith say "Oh, s--t, he's got a gun."[8] Garey felt a bullet whiz by his ear and he ran outside the bar.

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[1] (T. Vol. V, pp.774-776)

[2] (T. Vol. VII, pp.1064-1072).

[3] (T. Vol. VII, p.1077; T. Vol. VIII, pp.1111-1112)

[4] (T. Vol. V, p.774; Vol. VIII, pp. 1112-1118)

[5] (T. Vol. VI, pp.822-238)

[6] (T. Vol. VI, pp.877-878; T. Vol. V, pp.740-741)

[7] (T. Vol. VI, pp.823-840)

[8] (T. Vol. VI, p.826; T. Vol. VI, p.840)

> Garey could not identify the shooter.[9]
>
> When police arrived, Smith was lying in the parking lot and bystanders were trying to help him.[10] Smith was pronounced dead at the scene.[11] Although police questioned potential witnesses at that time, no one claimed to have seen what happened.[12] Scipio was not questioned by police because he was not in the area.[13] However, three people (Harper,[14] White[15] and Gaines[16]) subsequently gave police information about the crime, and testified at Scipio's trial that they saw him shoot Smith. A fourth witness testified that Scipio admitted shooting Smith to him.[17]
>
> The state's theory of the case[18] was that Smith's murder was in retaliation for his testimony against an individual named Robert Allen. Smith had been the victim of a robbery perpetrated by Allen about a year earlier. Allen had been convicted of the robbery and sentenced to fifteen years imprisonment, based in part on Smith's testimony.[19]

Scipio v. State, 867 So.2d 427, 428 (Fla. 5th DCA 2004)(Appendix "A").

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[9] (T. Vol. VI, pp.826-827)

[10] (T. Vol. V, p.742; T. Vol. V, p.757)

[11] (T. Vol. V, p.744)

[12] (T. Vol. V, p.745)

[13] (T. Vol. V, p.758)

[14] (T. Vol. VI, pp.845-913)(Testimony of Andrew Harper)

[15] (T. Vol. VI, pp.915-940; T. Vol VII, pp.951-976)(Testimony of White)

[16] (T. Vol. VII, pp.976-1014)(Testimony of Robert Gaines)

[17] (T. Vol. VII, pp.1022-1057)(Testimony of Richard Hogan).

[18] (T. Vol. V, pp.701-702)

[19] (T. Vol. VII, pp. 1058-1064)

Facts re the present[20] issue: Scipio's jury trial was held in the Circuit Court of Volusia County, the Honorable C. McFerrin Smith, III, presiding. The State was represented by lead counsel Edwin Davis, Esq., and co-counsel, Phil Bonamo, Esq.. (T. Vol. I, p.34). The "Rule of Sequestration" was invoked prior to opening statements, and the jury told:

> Trial Court: Basically, Ladies and Gentlemen, the "Rule", that's a shorthand version, it's called the Rule of Sequestration of Witnesses. It basically means that unlike what you probably see on television or in the movies, the witnesses don't sit in the courtroom during trial and have the opportunity to jump and yell things at dramatic moments. That's all Hollywood. Witnesses never sit in during the trial. They always are excluded from the courtroom and not permitted to discuss the case or their testimony with anybody but the lawyers.

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[20] The Fifth District ruled that four issues did not warrant discussion. ***Scipio v. State***, 867 So.2d 427, 428 (Fla. 5th DCA 2004). Point I concerned the denial of a continuance. Point III challenged allowing the prosecutor to testify for the State while actively prosecuting Scipio's case. (Scipio argued on appeal that allowing the prosecutor to testify against Scipio was unethical and that it would enhance the credibility of the prosecutors. (T Vol. VII, pp.1015-1021). Over objection, Mr. Bonamo testified that he prosecuted Robert Allen for robbing Smith, that Allen was found guilty and sentenced to prison. (T Vol. VII, pp. 1053-1058)). Point IV challenged the trial court's summary refusal, prior to jury selection, to rule on defense objections, including a discovery violation where prosecutor Davis authorized a meeting between the lead detective and Scipio at the jail the weekend before trial started and did not disclose that meeting to the defense. (T Vol. I, pp. 20-23; T Vol. VIII, pp.1120-25; Supplemental Record pp. 696-697. Point V challenged the trial court's denial of Motions for Judgment of Acquittal. (T Vol. VIII, pp 1195-96; 1200; 1203).

> They're certainly permitted to talk to the lawyers, like I said before, that's kind of part of the lawyers' trial preparation. But at this point forward they are not permitted to talk about the case or their testimony with anybody but the lawyers. And if they violate the Rule, there is sanctions, there's consequences, and variety of kinds, and they should be aware of that.

(T. Vol. V, pp. 696-697).

At the conclusion of the State's case, after hearing and denying defense motions for judgment of acquittal, court recessed for the evening. (T. Vol. VIII, pp.1192-1208). When court reconvened the next morning, the defense called two witnesses. First, Damien Doughtry testified that when he was arriving at the bar he saw Ogard Smith crawl out. (T. Vol. IX, pp. 1220-1221). Doughtry assisted Smith until the police arrived. (T. Vol. IX, pp. 1223-1224). Doughtry did not see anyone follow Smith outside the bar or shoot Smith as he crawled. Doughtry did not recall seeing any of the State's witnesses (Harper, Gaines and/or White) at the scene. (T. Vol. IX, pp. 1225-1227).

The State did not cross-examine Doughtry and, without a break in the proceedings, the defense called Robert Burch. (T. Vol. IX, p. 1227). Burch, listed by the State as a "Category A" witness (R. Vol. 1, pp.104-105, #14), was an experienced forensic investigator employed by the Volusia County

Medical Examiner's Office. (T. Vol IX, p.1228). He testified that he responded to the Southside Inn and entered the well-lit crime scene. (T. Vol. IX, 1229-1231). A crowd had gathered, and Smith's hands were "bagged" to preserve any potential evidence. (T. Vol. IX, p.1231-1232). The investigator was present when the body was removed. (T. Vol. IX, p.1232). When asked if he recalled seeing a firearm, Burch testified, "I would have to review the scene photos, but, no, sir, I do not." (T. Vol. IX, p.1232).

Investigator Burch agreed that, when previously deposed with prosecutor Davis present,[21] he had stated under oath that he saw an automatic firearm under Smith's body, and that firearm had been released to either F.D.L.E. or the Daytona Beach Police Department. (T. Vol. IX, p. 1233-1234). Burch then testified before the jury as follows:

> Q: (Defense counsel) And are you saying now you do not recall seeing the automatic firearm?
>
> A: (Investigator Burch) Upon review of the scene photos there is no firearm.
>
> Q: Do you recall stating the firearm was under the body?

[21] When asked whether Assistant State Attorney Davis was present during that deposition, Investigator Burch replied that he did not recall. (T. Vol. IX, p.1235. He agreed that his deposition showed that prosecutor Davis and defense attorneys Henderson and Novas were present. (T. Vol. IX, p.1247).

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 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 recollection, 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 of 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 no photograph, there is no documentation in my notes regarding a weapon.

(T. Vol. IX, pp.1234-1236). Burch clarified that during his deposition (with prosecutor Davis attending) he was shown one photograph by the defense (Def. Exh. 1; T Vol. IX, pp.1237-1239) that depicted the front of the Southside Inn. Burch explained that other photographs were on a table and from one of those he erroneously assumed that he saw an automatic firearm under Smith's body that was turned over to law enforcement. (T. Vol. IX, pp. 1234-1239).

On cross-examination, Burch testified that he had not been pressured, coerced or threatened at all by prosecutor Davis that morning and that he made a mistake. (T. Vol. IX, p.1245). Burch further answered that he did not know of any rule or procedure that required a prosecutor to allow the defense attorney access to the state attorney's office when the prosecutor

talked to a witness. (T. Vol. IX, pp.1245-1246). On re-direct, when asked if "it would 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," Burch replied, "Based on my recollection in reviewing the deposition, yes, sir." (T. Vol. IX, p. 1246).

At the conclusion of Burch's testimony and outside the presence of the jury, defense counsel stated that he was completely embarrassed by the sudden change in Burch's testimony, argued that there had been a discovery violation and asked for sanctions against the State based on the violation of the duty to disclose the material change in testimony. (T. Vol. IX, pp.1250-1252). Defense counsel notified the Court that this prosecutor had, in a different case, been admonished by a judge for failing to disclose that a defense witness changed her testimony after discussing it with the same prosecutor before trial. (T. Vol. IX, p. 1252).

As grounds for sanctions the defense argued, "I believe that the State pulled Mr. Burch aside, that's essentially what his 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. 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." (T. Vol. IX, pp. 1252-1253). Defense counsel moved for a mistrial. (T. Vol. IX, p.1254-1255).

The trial judge did not conduct a ***Richardson***[22] inquiry nor address what occurred between the prosecutor and the witness in the privacy of the State Attorney's Office. Instead the Court reasoned, "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." (T. Vol. IX, p.1255).

The prosecutor argued that the motion for a mistrial was baseless and erroneously[23] characterized his conduct as, "It's a conversation before he

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

[23] Investigator Burch testified that he accompanied Assistant State Attorney Davis into the State Attorney's Office after Davis asked about the firearm, and "discussed with Mr. Davis that I would have to review the scene photos to determine whether or not there was a weapon. He [Davis] produced the scene photos, we reviewed the scene photos and I saw that one of the FDLE photos indicated that it was a pager, not a firearm." (T. Vol IX, p.1236). The prosecutor never provided his version of what transpired with Burch in the State Attorney's Office, but during cross examination prosecutor Davis asked Burch if he knew "of any procedure or rule that requires that any time I talk to a witness to let the Defense Attorney follow along to my office." (T. Vol. IX, p. 1245).

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." (T. Vol. IX, p.1256).

Judge Smith denied the motion for mistrial, specifically ruling, "I'll deny the motion for mistrial 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 these other categories." (T. Vol. IX, p.1257). The motion for mistrial was renewed and again denied at the conclusion of the case. (T. Vol IX, p.1260-61).

The prosecutor had the opening and closing portions of closing argument because the defense called Doughtry and Burch as witnesses. In the first portion of his argument, the prosecutor did not mention Burch's testimony. (T Vol. IX, pp.1293-1322). During the final, and thus un-rebutted, section of closing argument, Assistant State Attorney Davis argued that the credibility of the defense was exemplified by a desperate defense counsel knowingly calling a witness to present "mistaken" testimony so he could thereby create "imaginary things that might have happened" in order to mislead the jury as follows:

(Prosecutor Davis): And, Ladies and Gentlemen, that is not a reasonable doubt. Again, consistencies and the common thread are so apparent that they hit you right in the face. I think what really illustrates the defense, let's be frank, it's tough to think of a defense when you're confronted with three eyewitnesses who knew the defendant and saw what happened, so perhaps all that's left is to just speculate and think of imaginary things that might have happened.

This gun this morning is an example of that, if I understand the Medical Examiner Investigator, he was mistaken. There was no gun underneath the body, but he said at one point there was. Hey, there's a reasonable doubt. Acquit this defendant, set him free for committing murder because the Medical Examiner Investigator made a mistake and said at one point there was a gun underneath the body.

You heard his testimony, he made a mistake. He's human. There wasn't a gun there, there was never any evidence there was a gun. He didn't write it in his report. There is no photograph of it. You saw these photographs. He saw what he thought was a gun. He didn't remember what had happened. He didn't remember specifically the scene and said, well, it turned out it was a pager, I was mistaken, and that's that.

But what illustrates about defense's thinking about that, just think a little bit more about that. Again, there is no gun, there never was a gun and we all know that. But what's the Defense trying to say? There was a gun there? Are they trying to say that there was some big shoot-out in the bar or something? There is no evidence of that whatsoever. That's just something to throw out and say, well, maybe this is something that's possible because Investigator Burch made a mistake we should all go home and that will teach him a lesson.

T. Vol. IX, pp. 1346-1348).

Scipio was thereafter found guilty of first-degree murder and sentenced to life imprisonment without parole. (R. Vol. IV, p.654; R. Vol.

IV, pp.671-676). On timely direct appeal Scipio argued that the trial court erred in denying the motion for mistrial, failing to conduct any ***Richardson*** inquiry and refusing to impose any sanction for the State's misconduct and failure to disclose the changed testimony. (Point II, Initial Brief).

The Fifth District Court of Appeal found that a discovery violation occurred but, applying a substantive-based analysis focusing on the sufficiency of evidence showing guilt, held that, even though there was no physical evidence tying Scipio to the shooting, the "dirty pool" played by this prosecutor was "harmless" in light of three eye-witnesses, and in conclusion warned, "in a different case where the evidence is less overwhelming, or a recanting witness more material, we would be compelled to reverse for a new trial." ***Scipio v. State***, 867 So.2d 427, 431 (Fla. 5th DCA 2004).

Discretionary review was timely sought by Scipio and granted by this Court based on express conflict with ***Pender v. State***, 700 So.2d 663 (Fla. 1997), ***State v. Schopp***, 653 So.2d 1016 (Fla. 1995), and ***Williams v. State***, 863 So.2d 1189 (Fla. 2003). This Amended Initial Brief on the Merits follows.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly concluded that a discovery violation occurred where, after the rule of sequestration was invoked, an experienced prosecutor actively, privately and improperly caused an eye-witness to recant minutes before he was to testify for the defense, and then failed to inform defense counsel that the expected testimony had materially changed. Respectfully, the appellate court performed the wrong legal analysis by concluding that it was only "harmless" error under these facts for the prosecutor to fail to disclose that material change in testimony. Specifically, while not *per se* reversible error, the law is yet clear that the State must show beyond a reasonable doubt that its discovery violation did not adversely influence the trial strategy or preparation of the defendant. If that heavy burden cannot be met, a new trial is properly awarded because the first trial was not fairly conducted. A new trial is warranted here because the defense trial strategy was adversely impacted when the prosecutor privately and improperly caused a defense eye-witness to recant, failed to inform defense counsel, and then argued to the jury that the defense presented the witness to create "imaginary things" to mislead the jury.

ISSUE: WHETHER A DISCOVERY VIOLATION THAT PROCEDURALLY PREJUDICED THE DEFENSE AND DENIED DUE PROCESS CAN FAIRLY BE DEEMED "HARMLESS ERROR?"

Burch was listed by the State as a Category "A" witness. When deposed in the presence of this prosecutor, Burch stated under oath that he *saw* an automatic pistol under the victim. Just before presenting Burch as a witness, defense counsel properly[24] confirmed that Burch recalled *seeing* a firearm under the victim's body. After defense counsel left, this prosecutor approached Burch and discussed his testimony. The prosecutor then took Burch into the privacy of the State Attorney's Office to address Burch's belief that a photograph showed the firearm he had seen. The prosecutor showed the witness photographs taken by the police, and Burch recanted. Burch's prior sworn statement that he *saw* a firearm under the victim was no longer the "truth." The prosecutor, who affirmatively, privately and improperly caused the conversion in testimony, knew this. Defense counsel did not.

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[24] Attorneys may talk to witnesses during trial about their anticipated testimony. However, it is not proper for lawyers to intentionally influence the content of testimony. See ***State v. Herrera***, 866 So.2d 151 (Fla. 4th DCA 2004) (dismissal with prejudice appropriate where prosecutor intentionally violated the rule of sequestration to influence eye-witness identification of defendant).

The interplay between the prosecutor and the witness occurred after the "Rule of Sequestration" was invoked and just after defense counsel confirmed that Burch had personally *seen* a firearm under the victim. It is ethical and proper for any attorney to discuss anticipated testimony with a witness. It is unethical for a lawyer, much more an assistant state attorney, to attempt to *influence* that testimony.[25] This Court may wish to reach that issue here. If not, a reversal of the conviction is none-the-less required if only because this prosecutor, after actively and improperly causing and therefore necessarily knowing about the recantation, did not disclose it to the defense before the witness was called to testify.

The Fifth District Court of Appeal correctly found that a discovery violation occurred under these facts, where "the State actively procured the defense witness's recantation of his earlier deposition testimony, knowing

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[25] This Court has long noted that coaching of witnesses is unethical. See ***Thompson v. State***, 507 So.2d 1074, 1076 (Fla. 1987) (right of attorney to consult with client while testifying can be accommodated "without violating the ethical rule against coaching a witness."); ***Amos v. State***, 618 So.2d 157, 161 (Fla. 1993) (same). Yet, "coaching" of witnesses by the prosecution seems to be a prevalent practice in Florida. E.g., ***Cardona v. State***, 826 So.2d 968, 981 (Fla. 2002)(change in testimony after meeting with prosecutor suggested coaching of witness by prosecutor); ***Rogers v. State***, 782 So.2d 373 (Fla. 2001) (State's chief witness received pretrial coaching from the prosecution in an apparent attempt to bring his testimony in line with other State witnesses); ***Herrera***, *supra*.

that defense counsel intended to rely on that deposition." ***Scipio***, *supra* at 430. Clearly, attorneys participating in discovery have a continuing duty to timely disclose known material changes in the sworn statements of eye-witnesses whose names and statements have been provided through discovery. See ***State v. Evans***, 770 So.2d 1174, 1182 (Fla. 2000); Rules 3.220(b)(1)(B) & (j), Florida Rules of Criminal Procedure. This is especially so where the material change in testimony is directly caused by, and thus necessarily known to, the attorney who attended the deposition.

In finding the error "harmless," the appellate court identified the correct legal analysis set forth in ***Schopp v. State***, 653 So.2d 1016 (Fla. 1995) but incorrectly reasoned, "[t]he defense in this case was deprived of possibly being able to establish the existence of an alternative shooter in the parking lot, based on a mistake." ***Scipio***, 867 So.2d at 430. Any doubt that an incorrect analysis was used to find that the error was harmless is removed by the court's concluding admonition, "In a different case, where the evidence is less overwhelming, or a recanting witness more material, we would be compelled to reverse for a new trial." ***Scipio***, 867 So.2d at 431. Using the correct analysis, it is evident that a new trial is warranted and necessary.

Specifically, ***State v. Schopp***, 653 So.2d 1016 (Fla. 1995), sets forth the legal analysis to be used by appellate courts to determine whether the failure to conduct a "***Richardson***" hearing following an objection to a discovery violation is reversible error:

> In determining whether a *Richardson* violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

Schopp, 653 So.2d at 1020-21.

Respectfully, the Fifth District Court has once again misapplied this analysis by examining what evidence supports a defendant's guilt rather than focusing solely upon *procedural* prejudice to the defense. See ***Pender v. State***, 700 So.2d 663 (Fla. 1997). The confusion as to how to apply the

Schopp analysis may come from the statement, "Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant." ***Schopp***, 653 So.2d at 1022. While at first blush this language appears to invite an appellate court to determine *substantively* how the use of the respective information might[26] have impacted on the determination of guilt or innocence, the context of that sentence makes clear that the proper question is *solely* whether trial preparation or trial strategy was adversely influenced.

The question of whether "there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred" does not involve the *verdict*. The requirement that, "In making this determination every conceivable course of action must be considered," ***Id***, makes clear that the scrutiny is not on the verdict but instead on trial preparation and strategies that could have been

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[26] An appellate court is in no position to accurately assess the credibility of witnesses in the first instance. See ***Williams v. State***, 863 So.2d 1189 (Fla. 2003). Scipio, on trial for his life, is entitled to a fair *jury* determination of the credibility of the State's main witnesses who all have classic problems with credibility, *viz*, Harper, Gaines and Hogan are likely suspects and multiple-time convicted felons looking to make a deal in their own cases, and White was Gaines's girlfriend.

adversely influenced by the discovery violation. If the record shows that timely disclosure reasonably might have prevented counsel from making a disadvantageous strategical decision at trial, a reversal is required because the arena for the jury to perform its critical Sixth Amendment function of determining credibility of the evidence was rendered fundamentally unfair.

Here, the prosecutor *knew* that a defense eyewitness was NOT going to testify as he had in deposition. This prosecutor *knew* this because he unethically caused it. Neutrally discussing testimony with the witness was proper. Showing him photographs in private to prove that FDLE did not recover a firearm was not. That conduct can only be viewed as a deliberate, intentional effort to privately convince the eyewitness that the firearm *seen* under the victim was only a pager. Instead of being an eye-witness who *saw* a firearm underneath the victim, Burch was unethically converted into someone who unequivocally testified that "upon review of the scene photos there is no firearm." By altering the testimony in this ex parte manner, this prosecutor destroyed exculpatory evidence and denied Due Process. See ***Illinois v. Fisher***, 540 U.S. 544, 124 S.Ct. 1200, 1202 (2004) (reaffirming that due process is violated when material exculpatory evidence is suppressed regardless of whether it was done in good or bad faith).

The decision of calling Burch as a defense witness was a matter of trial preparation and strategy. That decision was necessarily based on the information obtained through discovery. The State's deliberate failure to disclose Burch's recantation assured that Burch would be called by the defense, whereas Burch surely would *not* have been called had the change in testimony been disclosed. The presentation of Burch's altered testimony was disadvantageous to the defense for several reasons.

First, had the State timely disclosed the recantation, which occurred prior to the defense presenting its case, an informed decision could have been made as to whether to put on any evidence and thereby retain the opening and closing portions of closing argument. Had the trial court timely conducted a ***Richardson*** inquiry and properly ruled that a discovery violation had occurred, the defense could yet have been given the opening and concluding portions of closing argument as an appropriate sanction for the deliberate misconduct by the State. That course of action was precluded when the trial court ruled that there was no need for sanctions for failing to disclose "a conversation in the hallway."

Had the State timely and properly disclosed that Burch was no longer an eye-witness who actually saw a firearm underneath the victim's body, the

defense clearly would not have put on any evidence. The only defense witness presented besides Burch was Damien Doughtry, who arrived after the shooting. His testimony was that he did not recall seeing the three State witnesses outside the Southside Inn after the shooting. This testimony suggests but does not establish that the State witnesses were not present. That information alone would not have been presented by the defense at the expense of losing opening and closing portions of closing argument, where credibility of the witnesses was essentially the key issue[27] for the jury to decide.

The failure of the court to conduct a full inquiry and sanction the State for its misconduct was reversible error. Under ***Richardson***, *supra*, a trial judge can fashion an appropriate remedy based on (1) whether the violation was inadvertent or willful, (2) whether it was trivial or substantial, and (3) whether noncompliance has prejudiced the opposing party's ability to properly prepare for trial. E.g., ***State v. Tascarella***, 580 So.2d 154 (Fla.

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[27] As pointed out to the Fifth District Court of Appeal, the credibility of each of the State's main witnesses was highly questionable, where Gaines was a convicted felon and possible suspect of the shooting, White was Gaines's girlfriend, and Hogan and Harper were both convicted felons many times over seeking to make a deal. See Initial Brief of Appellant, pp.8-11).

1991) (discretionary for trial court to totally exclude testimony of witness as sanction for State's wilful violation of discovery). Had the trial judge conducted a ***Richardson*** hearing, he could have cured the prejudice by giving a curative instruction and granting the defense opening and closing segments of the closing argument. This was not done because the trial judge saw nothing wrong with failing to disclose a conversation between a witness and the prosecutor that occurred in the hallway. The record, however, supports the Fifth District Court of Appeals' determination that, "the state actively procured the defense witness's recantation of his earlier deposition testimony, knowing that defense counsel intended to rely on that deposition." ***Scipio***, 867 So.2d at 430.

When the objection was made, sanctions were in order for this prosecutor escorting the defense witness into the privacy of the State Attorney's Office and producing photographs taken by *other* witnesses to show Burch that he was wrong and that he really did not see a firearm under the body. Burch was thus privately converted from an eye-witness who swore he *saw* a firearm under the victim and turned it over to law enforcement, into a witness who conclusively testified that, based on *photographs*, there was no gun underneath the victim. This prosecutor's

conduct violated Section 90.616, Florida Statutes. See ***State v. Herrera***, 866 So.2d 151 (Fla. 2004). The defense strategy was adversely impacted when Burch was presented in the belief he would say something that was exculpatory, but instead said something advantageous to the State.

The defense was procedurally prejudiced by presenting the witness who did not testify as anticipated. The defense was embarrassed by changed testimony and lost credibility with the jurors. This prosecutor took the fullest advantage of his "dirty pool" tactics by affirmatively using Burch's recantation during the State's final closing argument, without rebuttal, to discredit the entire theory of defense and impugn the integrity and credibility of defense counsel for attempting to fabricate a reasonable doubt based on "imaginary" things not founded in the evidence.

Specifically, this prosecutor argued as follows:

> (Prosecutor Davis): And, Ladies and Gentlemen, that is not a reasonable doubt. Again, consistencies and the common thread are so apparent that they hit you right in the face. I think what really illustrates the defense, let's be frank, *it's tough to think of a defense* when you're confronted with three eyewitnesses who knew the defendant and saw what happened, so perhaps *all that's left is to just speculate and think of imaginary things that might have happened*.
>
> *This gun this morning is an example of that*, if I understand the Medical Examiner Investigator, he was

> mistaken. *There was no gun underneath the body, but he said at one point there was. Hey, there's a reasonable doubt. Acquit this defendant, set him free for committing murder because the Medical Examiner Investigator made a mistake and said at one point there was a gun underneath the body*.
>
> *You heard his testimony, he made a mistake. He's human. There wasn't a gun there, there was never any evidence there was a gun*. He didn't write it in his report. There is no photograph of it. You saw these photographs. He saw what he thought was a gun. He didn't remember what had happened. He didn't remember specifically the scene and said, well, it turned out it was a pager, I was mistaken, and that's that.
>
> But what illustrates about defense's thinking about that, just think a little bit more about that. Again, there is no gun, there never was a gun and we all know that. But what's the Defense trying to say? There was a gun there? Are they trying to say that there was some big shoot-out in the bar or something? *There is no evidence of that whatsoever. That's just something to throw out and say, well, maybe this is something that's possible because Investigator Burch made a mistake we should all go home and that will teach him a lesson*.

T. Vol. IX, pp. 1346-1348) (emphasis added).

The legal standard used to determine whether a discovery violation was harmless is not properly based an appellate court's analysis of the sufficiency of evidence supporting guilt or innocence, but instead solely on whether the discovery violation caused procedural prejudice:

> In determining whether a *Richardson* violation is harmless, the appellate court must consider whether there is a

> reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense *is* procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

Schopp, 653 So.2d at 1020-21 (emphasis added).

It cannot be doubted that, had the defense known that Burch did not see a firearm under Smith's body, the defense *would not* have called him to testify. There can be no doubt that the prosecutor's deliberate procurement of and later failure to disclose the material change in testimony adversely impacted the defense strategy. As long as Burch was going to testify that he had personally seen a firearm under the victim, he was an extremely important defense witness who cast doubt on the version of the shooting related by the three State "eye-witnesses" who all suffered from severe credibility problems. When Burch was converted into someone who did

not see a firearm under the victim, he lost all value to the defense.

As a strategical matter, he never would have been called had the prosecutor met his ethical duty to disclose the fact that Burch was no longer an eye-witness to anything exculpatory. The decision to put on a case hinged on Burch's testimony that he personally saw a firearm under Smith. Putting on a case cost the defense opening and closing portions of closing argument. Burch's changed testimony subjected the defense to un-rebutted final argument that impugned the integrity and the credibility of defense counsel, who put on a "mistaken" witness so he could argue "imaginary" things because there was nothing else to do. Certainly, that was the false impression created when the State failed to inform counsel that the anticipated testimony, confirmed by defense counsel minutes before it was presented, had changed diametrically.

Assistant State Attorneys are representatives of the State of Florida who set examples for all attorneys. They, as well as every ethical attorney, ought to walk a path well-within the boundaries of ethical conduct. There is no proscription that bars attorneys from talking to witnesses. In fact, assuring what a witness will say before they are presented as a witness is so important that it is neither unusual nor suspect to see an attorney talking with

a witness before testimony is presented, because an ethical attorney will never attempt to alter the testimony of any witness. If a change in the testimony is inadvertently caused while talking to a witness, an ethical attorney should immediately notify the opposing side in the interest of fairness.

An experienced prosecutor who, after the Rule of Sequestration has been invoked and testimony confirmed by defense counsel, escorts the witness into the sanctity and privacy of the State Attorney's Office and who then produces photographs taken by *other* witnesses to convince the witness that he is mistaken about what he believes he saw crosses the line of ethical conduct by a substantial margin. To then deliberately fail to disclose the materially changed testimony is unethical and a discovery violation. To then affirmatively use the wrongfully obtained recantation in closing argument to secure a conviction in a weak case is reprehensible.

There have been far too many innocent people found guilty after an overzealous prosecutor exceeded the boundaries of ethics and fairness in order to "win." This conviction rests solely on the suspect credibility of witnesses. There is no physical evidence tying Mr. Scipio to this homicide. A reversal and remand for a new trial is compelled under these facts because

a fair trial has yet to occur.

CONCLUSION

A new trial is warranted where this prosecutor improperly caused a crucial defense eye-witness to recant material testimony, deliberately failed to disclose the recantation to the defense and then affirmatively used the gaff during the final, un-rebutted portion of the State's closing argument to impugn defense counsel and demean the theory of defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent by U.S. Mail to the Honorable Richard E. Doran, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, this 22nd day of September, 2004.

_____
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CERTIFICATE OF FONT

I CERTIFY that the size and style of type used in this document is proportionally spaced 14 pt. Times New Roman.

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