

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 67,772 & 67,773

EDWARD SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED QUESTION

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BRIEF OF RESPONDENT ON THE MERITS

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## INTRODUCTION

The Petitioner, Edward Smith, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District, The Respondent, the State of Florida, was the prosecution in the trial court and appellee in the District Court of Appeal. Both parties have herein filed notices to invoke the discretionary review jurisdiction of this Court. In this brief, the Petitioner will be referred to as the Defendant and the Respondent as the State. The symbol "R" will be used to designate the record on appeal; the symbol "SR" will be used to designate the supplemental record on appeal; the symbol "T" will be used to designate the transcripts of the trial court proceedings; and the symbol "A" will be used to designate the Appendix to this brief.

## STATEMENT OF THE CASE

The State accepts the Defendant's Statement of the Case.

## STATEMENT OF THE FACTS

The State accepts the Defendant's Statement of the Facts, subject to the additions, modifications or

corrections set forth herein, and in the argument section of this brief.

After the completion of the voir dire questioning of the prospective jurors, the attorneys approached the bench for selection of the jurors. (T.69). Defense counsel inquired whether the Defendant could be present at the bench and the Court denied the request. (T.69). Prior to the acceptance or striking of any prospective jurors, the Court asked if defense counsel wanted to confer with the Defendant. (T.69). After a tentative panel had been selected, the judge again inquired whether defense counsel wanted to confer with his client. (T.72, lines 13-14). The transcript reflects that at this point in time defense counsel had exercised one peremptory challenge. (prospective juror Gerber, T.71, line 16). The transcript, however, is inconsistent with the minutes of the clerk. The minutes reflect that defense counsel had previously exercised a peremptory challenge of prospective juror Trowbridge (R.4), but the transcript indicates that Trowbridge was challenged by the State. (T.72, lines 4-5). Thus, when the judge inquired for the second time whether defense counsel wanted to confer with his client (T.72), defense counsel had exercised either one or two peremptories, and the Court was permitting backstriking. (T.70). The attorneys proceeded to accept and strike further prospective jurors, and upon

completion, and prior to selection of the alternate, the judge again asked if defense counsel wanted to confer with his client. (T.74). Each party had one peremptory challenge for the alternate. After selection of the alternate, defense counsel objected to the selection process and the judge noted for the record that the Defendant "was before the Court and jury at all times." (T.75). Defense counsel agreed with the Court's statement, and objected that his "client was not present during the actual discussion of who we are going to keep and disregard." (T.75). Defense conceded that he had had time to talk to his client. (T.75). The motion to strike the panel was denied and the jury was then sworn in. (T.75, 77). During arguments on post-trial motions concerning the jury selection process, the trial judge reiterated:

. . .but he [the Defendant] was at all times in the courtroom with the jury panel, one looking at the other, and that's the reason at the time that we went side bar and I indicated to you that you had the privilege at any time, every time if you still wished to walk back and forth to your client to discuss a particular juror with him. . ."

(T.253).

Detective Rene Heinzen testified, on direct examination, during the State's case-in-chief, as follows:

Q. Did you ever have occasion to speak with the Defendant in this case, Edward Smith?

A. Yes, I did.

Q. When was that?

A. It was on January 3rd.

Q. What year was that?

A. 1983.

\* \* \*

Q. What, specifically, did you ask the Defendant in this case?

A. I asked him if he had ever been around that house recently, the last month or so, and he indicated he had not.

Q. I have nothing further.

Mr. Landau: I have an objection and would like to go side-bar.

(T.114-115).

After lengthy arguments, the Court ruled that the jury should be instructed to disregard the statement because of insufficient Miranda warnings. (T.131, 133-134). Defense counsel had further argued that he had not previously been furnished with that particular statement, and that there was a discovery violation requiring a Richardson hearing. (T.116, 119-121). Defense counsel admitted that he knew that the Defendant gave a statement on January 3:

Mr. Landau: No. The only statement I was aware of was whether this particular person admitted the alleged burglary, and his response to that was no.

The question proffered to the officer of the deposition was did you ever read him his rights and what did he tell you. Yes, I read him his rights and I asked him if he committed the crime.

This happened at the station, nothing else. Nothing else. What I'm saying was that this particular statement came out at the station. I'm not denying that I knew there was a statement.

(T.120).

Defense counsel further stated:

I know that a statement was made, but the statement I was made aware of, through the police reports that I received, and through the discovery deposition, is what I informed the Court.

(T.121).

Defense counsel then read from Detective Heinzen's deposition concerning the January 3 conversation:

Q. What did he [Defendant] say?

A. The same thing, none.

Q. Did he say anything else or did you ask him anything else? Did you ask him?

A. No. They both denied having anything to do with it. That was all.

(T.127-28).

The Defendant subsequently testified that he had gone to the burglarized house a few days before the burglary to check a boat for a friend. (T.152-53). The State then recalled Detective Heinzen for rebuttal and she testified that the Defendant told her, on January 3, 1983, that he had not been to the house in the last month or so. (T.157-58). Defense counsel then cross-examined Detective Heinzen concerning that statement:

Q. However, isn't it true that nowhere within your police report-- the only thing you mentioned regarding the substance of your conversation with him, was that he denied being involved in the burglary? And please refer to it if you need to refresh your memory. I believe it's on the last page.

My question to you was:  
Isn't it true that the only thing you listed in your report regarding the conversation you had with Mr. Smith, as to what he might have told you, is that he had no involvement in this particular burglary.

A. I did put that in my report. However, I do recall the conversation.

Q. But you didn't think it was important enough to put it in your report?

A. Sir, in an investigation there are so many things to go into it that you can't possibly write everything.

(T.161-62).

The police report had been prepared 17 days after the conversation of January 3. (T.162).

Additional facts will be set forth in the argument section of the brief.

## QUESTIONS PRESENTED

### I

A. WHETHER A NEW TRIAL IS REQUIRED WHEN THE TRIAL COURT'S FAILURE TO CONDUCT A RICHARDSON INQUIRY IS, IN THE OPINION OF THE REVIEWING COURT, HARMLESS ERROR.

B. WHETHER THE STATE COMPLIED WITH THE DISCOVERY RULES BY FURNISHING THE DEFENDANT WITH THE SUBSTANCE OF ALL ORAL STATEMENTS MADE BY THE DEFENDANT.

C. WHETHER AN ADEQUATE RICHARDSON HEARING WAS CONDUCTED BY THE TRIAL COURT.

### II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO BE PRESENT A SIDEBAR CONFERENCE DURING THE EXERCISE PEREMPTORY CHALLENGES, WHEN THE DEFENDANT WAS PRESENT IN THE COURTROOM AT ALL TIMES, HAD HEARD THE ENTIRE VOIR DIRE QUESTIONING OF PROSPECTIVE JURORS, AND DEFENSE COUNSEL WAS ABLE TO CONSULT WITH THE DEFENDANT BOTH PRIOR TO AND DURING THE EXERCISE OF THE PEREMPTORY CHALLENGES.

## SUMMARY OF ARGUMENT

I. The District Court of Appeal certified the following question:

IS A NEW TRIAL REQUIRED WHEN THE TRIAL COURT'S FAILURE TO CONDUCT A RICHARDSON INQUIRY IS, IN THE OPINION OF THE REVIEWING COURT, HARMLESS ERROR?

The question should be answered in the negative. A review of the facts will show that the record conclusively demonstrates the harmless nature of the statement in the instant case. The issue concerns an oral statement made by the Defendant. The fact that the oral statement was made, was disclosed prior to trial. A police officer's rebuttal testimony referred to the oral statement with greater specificity than in the pre-trial summary. The Defendant initially learned of the further details of the statement during the State's case-in-chief. After it was stricken, as inadmissible, at that time (due to Miranda problems), the Defendant paved the path for its use on rebuttal by needlessly testifying about an irrelevant point that in no way aided his defense.

Sound reasons exist for receding from the per se rule of reversal. Recent cases have established a trend away from per se rules of reversal, and have acknowledged the

consistency of per se rules of reversal in the context of errors which are not fundamental. The harmless error rule promotes the effective administration of justice. The instant case further reveals that the trial record, in and of itself, is capable of demonstrating the lack of prejudice, at least when a defendant learns of information at an early stage in a trial, before it is detrimentally used against him, under circumstances where he thereafter possesses the ability to preclude its use by refraining from giving unnecessary testimony.

The State further maintains that there was no discovery violation, as the substance of the oral statement was disclosed prior to trial. When oral statements are not transcribed, any requirement which approaches verbatim disclosure is unreasonable, especially where any significance of certain portions may not become apparent until a defendant testifies.

Moreover, although the colloquy between court and counsel was not designated a Richardson hearing, the nature of the arguments presented suggests that it was tantamount to a Richardson hearing.

II. The Defendant's non-presence at a sidebar conference during which counsel announced whether they were

accepting or peremptorily striking prospective jurors is not cause for reversal. The Defendant heard all of the voir dire questioning; he was sitting in the courtroom at all times; and the trial court permitted counsel to consult with his client at all times, both before and during the peremptory strike phase. The case differs from Francis v. State, 413 So.2d 1175 (Fla. 1982), in which there were impediments to consultation between counsel and client during the exercise of peremptory strikes, and this Court's decision concentrated on the inability to consult.

ARGUMENT

I

A. A NEW TRIAL SHOULD NOT BE  
REQUIRED WHEN THE TRIAL COURT'S  
FAILURE TO CONDUCT A RICHARDSON  
INQUIRY IS, IN THE OPINION OF THE  
REVIEWING COURT, HARMLESS ERROR.

The issue certified by the District Court of Appeal is whether the per se rule of reversal of Cumbe v. State, 345 So.2d 1061 (Fla. 1977), precludes a finding of harmless error by a reviewing court in the absence of a Richardson inquiry by the trial court.

In the instant case, the defense, prior to trial, was made aware of the fact that the Defendant had made a statement to the police officer. The statement was referred to in the police report, which had been furnished to defense counsel, and which summarized the statement as a denial by the Defendant of any involvement in the burglary. (T.120, 121, 161-162). The officer's testimony at trial was that the Defendant stated that he had not been to the burglarized house in the last month or so. (T.157-158).

The purpose of a Richardson inquiry is "to determine whether the non-compliance would result in harm or prejudice to the defendant...." Richardson v. State, 246 So.2d

771, 775 (Fla. 1971). The scope of the inquiry extends to "whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." Id., quoting from Ramirez v. State, 241 So.2d 744, (Fla. 4th DCA 1970). Cumbie, supra, in a case involving a denial by the State as to the existence of statements by the defendant, which statements did, in fact, exist, held:

No appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules, as Richardson indicates. Especially is this so in cases such as this, where a false response is given to a request for discovery.

345 So.2d at 1062.

Thus, the per se rule of reversal derives from a case involving a false response to a discovery request, as opposed to a case which questions the adequacy of a pre-trial summary of a defendant's oral statement

The notion of prejudice vis-a-vis the Richardson inquiry was elaborated upon in Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1979):

The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive, prejudice. In deciding whether this type of prejudice exists in a given case, a trial judge must be cognizant of two separate but interrelated aspects. First, the trial judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. In this case, had petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the very least, advance knowledge would have given petitioner time to gather rebuttal evidence. On the other hand, close scrutiny might have revealed that the statement had no bearing on petitioner's defense. Without a Richardson inquiry, the trial court was in no position to make an accurate judgment as to these possibilities.

The second aspect of procedural prejudice deals with the proper sanction to invoke for a discovery violation....

A review of the record in the instant case will reveal that the principles of procedural prejudice, as outlined in Wilcox, can be applied in the instant case, to show clearly that the Defendant was not prejudiced, without the need for any further Richardson inquiry.

The nature of the defense was that the Defendant's fingerprints ended up on the interior surface of a glass jalousie window, which was found outside the burglarized

home, when the Defendant had visited the prior tenants of the home over one month prior to the Defendant's January 3 statement. (T.98, 152-153). During the State's case-in-chief, the officer had referred to the Defendant's statement that he denied being at the burglarized house within the prior month. This was more specific than the pre-trial summary that the Defendant denied having anything to do with the burglary. The admissibility of the statement was rejected during the State's case-in-chief due to inadequate Miranda warnings. (T.131).

The Defendant subsequently testified that he had gone to the burglarized house, a few days before the burglary (T.152, 155), to look at a boat which he believed to be there. In so testifying, the Defendant subjected himself to rebuttal by the police officer. A review of the evidence, however, will show that the Defendant's testimony, about going to look at the boat, in no way related to or aided the defense theory. Thus, the defense chose to give unnecessary testimony, after clearly knowing of the ability of the State to rebut that testimony. Had the Defendant not given unnecessary, irrelevant testimony, the State would not have had any opportunity to rebut with the officer's rebuttal testimony. As the Defendant had the knowledge and ability to preclude the only possible use of the evidence in question, prior to any possible detrimental use of such

evidence, the record clearly reflects that any discovery violation did not impair the Defendant's ability to prepare for trial.

As the foregoing argument is predicated on the notion that the Defendant paved the path for rebuttal, after learning of the possible rebuttal testimony, by needlessly interjecting an irrelevant statement into his own testimony, a careful review of the facts and defense theory is warranted. Any inconsistency over whether the Defendant went to look at a boat outside the house, a few days before the burglary, had no direct bearing on the issue of guilt. As the evidence of guilt was the fingerprint found on the smooth, interior surface of the jalousie window which was found in the yard after the burglary, the Defendant's testimony that he had been outside the house, to look at a boat, a few days prior to the burglary, would in no way exonerate the Defendant, as it did not present any theory to explain how his fingerprint ended up on the interior surface of the jalousie. That could only be explained by testimony that he had been inside the house, in order to have his fingerprint end up on the window's interior surface. As Mrs. Gordon, the the mother of the owner of the house, had observed everything in order the day before the burglary, with the jalousie door intact, the Defendant's statement that he was outside the house a few days before the burglary

had no substantive significance. (T.97-98). Thus, the Defendant's assertion that he was outside the house a few days prior to the burglary, and the State's attempted refutation of that assertion, add nothing to any substantive ability of the jury to reach a finding of guilt or innocence. It is therefore clear that no prejudice was suffered by the Defendant and that any failure to conduct a Richardson hearing was not reversible error.

As the issue had no real substantive bearing on guilt or innocence, the Defendant can only attempt to argue prejudice by suggesting that rebuttal by the officer based on the statement in question undermined the Defendant's general credibility. That, however, is not what the notion of "prejudice" contemplates. Prejudice refers to an adverse effect on a defendant's ability to prepare for trial. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971); Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983). As the in-court testimony of the Defendant that he was outside the house two days prior to the burglary had no bearing on the issue of guilt or innocence, and the only possible adverse effect of the State's attempted rebuttal could come from the use of the rebuttal testimony to generally undermine the Defendant's credibility, the only effect that foreknowledge of the rebuttal statement would have on the Defendant would be to determine whether the Defendant should

testify that he was outside the house two days prior to the burglary. If the Defendant does not so testify on that point, then the rebuttal testimony would in no way have contradicted anything that the Defendant said in Court. As the Defendant clearly became aware of this specific statement during the State's case-in-chief, prior the Defendant's testimony (T.115, et. seq.), the Defendant was in a position to determine whether to testify that he was outside the house two days prior to the burglary. As set forth above, this statement by the Defendant in no way added anything to his defense, and therefore, at the time defense counsel chose to submit such testimony, defense counsel did so unnecessarily, with knowledge that it opened up a possible attack on credibility. Defense counsel could have anticipated this and avoided testimony about whether the Defendant was outside the premises two days prior to the burglary. As such testimony did not contribute to any viable defense, avoidance of such testimony would not have been detrimental to the defense, and would have avoided rebuttal on the particular point as well as any attempt by the State to so attack the Defendant's general credibility. (It should be noted that the heart of the defense was that the Defendant had been inside the burglarized house, socializing with the tenants, before they moved out, and the tenants had moved out over a month before the January 3 statement). (T.98, 152-53). Thus, the Defendant cannot be said to have been "prejudiced" in the sense contemplated by Richardson. As

far as any possible use of the rebuttal testimony, it should be noted that the defendant admitted having five prior felony convictions (T.153), and his general credibility was already subject to strong attack. Refutation of his testimony on an irrelevant point would not appreciably diminish the Defendant's already assaulted credibility.

Thus, as the Defendant had the knowledge and ability to preclude the only possible use of the rebuttal testimony, the ability to prepare for trial was not impaired. (It should be noted that even though the jury heard the officer's testimony during the case-in-chief, before the Miranda ruling [T.115], not only did the judge instruct that the testimony be disregarded [T.133-134], but there is no possibility for arguing that the statement harmed the defendant at that time. The Defendant cannot even attempt to make such an argument until he needlessly opens himself up to rebuttal by virtue of his own voluntary, irrelevant testimony.).

The relation between Richardson and the harmless error rule must further be viewed in light of recent pronouncements, concerning the harmless error rule in other contexts. This Court, in State v. Murray, 443 So.2d 955 (Fla. 1984), agreed with the analysis of the harmless error doctrine in United States v. Hastings, 401 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983):

The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference of judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of the appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

443 So.2d 956.

The adoption of the foregoing doctrine reflected the concern that when courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality. Hastings, supra, 461 U.S. at 509, 103 S.Ct. at 1980. See also, Davis v. State, 461 So.2d 67 (Fla. 1984).

Other recent cases denote a clear trend away from per se rules of reversal in favor of a harmless error test. The State submits that after a review of the different contexts in which harmless error has supplanted automatic reversal, it will be clear that it is time to recede from the automatic reversal rule of Cumbe.

In State v. Marshall, 10 FLW 445 (Fla. Aug. 30, 1985), the harmless error rule was extended to comments on the defendant's right to remain silent. The Court's reasons were the following:

Although in past cases we have adopted the per se reversal rule, there is no longer much need or reason to retain. First, comments on silence are no longer considered to be fundamental error. Clark v. State, 363 So.2d 331 (Fla. 1978). See also Chapman. Second, the United States Supreme Court has held that the harmless error rule is consistent with the federal constitution. Hasting, Chapman. Third, the harmless error rule is a preferred method of promoting the administration of justice. It makes no sense to order a new trial, because of a nonfundamental error at trial, when we know beyond a reasonable doubt that the defendant will be convicted again. Our trial courts are already excessively burdened. An additional and unnecessary trial in such an instance might affect the rights of others to a fair and expeditious trial. Finally, we should consider legislative intent. Section 924.33, Florida Statutes (1983), adopts the harmless error rule for appeals for criminal convictions...

The arguments utilized in Marshall are equally applicable in the instant case. Discovery violations are not fundamental error. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Grimett v. State, 383 So.2d 698, 700 (Fla. 4th DCA 1980); Yost v. State, 243 So.2d 469, 471 (Fla. 3d DCA 1971). Moreover, discovery violations are not even of a constitutional dimension, as there is no constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977).

In Bova v. State, 410 So.2d 1343 (Fla. 1982), this Court again expressed dissatisfaction with per se rules of reversal. The issue in Bova was whether a violation of the constitutional right of attorney/client consultation during the course of a criminal trial was subject to the harmless error doctrine. Although error was found with the trial court's restriction of consultation, the harmless error rule was applied.

In Tucker v. State, 459 So.2d 306 (Fla. 1984), this Court receded from State v. Black, 385 So.2d 1372 (Fla. 1980), which held that venue was an essential element of the crime charged. Thus, an indictment which failed to allege venue was deemed by Black to be so fundamentally defective as to be insufficient to sustain a conviction. Tucker, however, concluded that such a defect would not render the charging instrument void absent a showing of prejudice to the defendant. In so holding, this Court rejected the automatic reversal rule and required the defendant to show prejudice by establishing that venue was laid in the wrong county or that the defect caused misunderstanding of the nature and cause of the accusation against him.

The trend away from per se rules of reversal is further manifested in amendments to Rule 3.191, Florida Rules of Criminal Procedure . The Florida Bar re: Amendment to Rules of Criminal Procedure, 462 So.2d 386 (Fla. 1984).

Pursuant to Rule 3.191(i)(4), automatic discharge is no longer mandated when a motion for discharge is timely filed.

It should be further noted that this Court has held that the harmless error rule can be applied when a Richardson inquiry is not conducted in probation revocation proceedings. Cuciak v. State, 410 So.2d 916 (Fla. 1982). Similar holdings have been reached with respect to Richardson violations in the context of pre-trial suppression hearings. Taylor v. State, 386 So.2d 825 (Fla. 3d DCA 1980); Cauley v. State, 444 So.2d 964 (Fla. 1st DCA 1983).

In accordance with the foregoing analysis, the State urges this Court to recede from the per se rule of reversal and apply a harmless error rule in the instant case.

B. THE STATE COMPLIED WITH THE  
DISCOVERY RULES BY FURNISHING THE  
DEFENDANT WITH THE SUBSTANCE OF ALL  
ORAL STATEMENTS MADE BY THE DEFEN-  
DANT.

After written demand for discovery, Rule 3.220(a)(i)(iii), Florida Rules of Criminal Procedure requires the State to furnish the defendant with "the substance of any oral statements made by the accused . . ." Neither the rule nor the case law require the State to furnish a verbatim recitation of the entire statement. In the instant case, the defense was made aware of the statement through the

police report and deposition of Detective Heinzen, and the defense was apprised of the substance of the statement. The Defendant is improperly advocating a position which, in effect, states that every sentence in a conversation constitutes a separate and distinct oral statement.

The requirement of conducting a Richardson hearing is predicated upon a prior conclusion that there had been a discovery violation. If there is no discovery violation, there is no need for a Richardson hearing. Huffman v. State, 10 FLW 970 (Fla. 1st DCA April 15, 1985); Grant v. State, 10 FLW 1390 (Fla. 1st DCA June 7, 1985). In the instant case, the Defendant knew of the oral statement and knew that the Defendant had denied committing the offense during the statement. As to the officer's testimony that the Defendant had denied being at the burglarized house within the prior month, this response would fairly fall within the substantive summary that the Defendant denied committing the offense. Indeed, the real significance of that response does not even become apparent until after the Defendant's testimony: (the Defendant testified that he had gone to the burglarized house a few days before the burglary (T.15, 155), to look at a boat which he believed to be here). As the significance of the response that he had not been at the house during the prior month does not become clear until after the Defendant's testimony, the police officer's summary of the conversation in the police report

and deposition, as a denial of commission of the offense, must be viewed as compliance with the State's obligation to furnish the substance of any oral statements.

Thus, it should be concluded that the substance of the oral statement was disclosed and that there was no discovery violation. This is especially true where the Defendant was able to, and did, depose the officer, and question the officer about the the statement.

C. AN ADEQUATE RICHARDSON HEARING  
WAS CONDUCTED.

Finally, the State submits that even though the term Richardson hearing was not specifically used, the lengthy colloquy between Court and counsel was tantamount to a Richardson hearing. (T.115-134). During that discussion, the Court carefully considered what the officer had previously represented during the deposition and police report. Defense counsel was permitted to argue that his client was prejudiced (T.125, lines 13-14; T.126, lines 12-14), and defense counsel was clearly permitted to present any argument he desired. The court in no way attempted to curtail defense counsel's arguments. What the record reflects, is that defense counsel merely chose to assert, as a conclusion, that his client had been prejudiced, without any effort to embellish upon the nature of the prejudice. Defense counsel never undertook to show how the ability to

prepare for trial had been impaired. Had he attempted to do so, it is evident from the lengthy discussion that the trial judge would have listened to his argument, as the trial judge thoroughly did with all of defense counsel's arguments. Therefore, the court met the requirements of a Richardson hearing.

## ARGUMENT

### II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO ALLOW THE DEFENDANT TO BE PRESENT AT A SIDEBAR CONFERENCE DURING THE EXERCISE OF PEREMPTORY CHALLENGES, WHEN THE DEFENDANT WAS PRESENT IN THE COURTROOM AT ALL TIMES, HAD HEARD THE ENTIRE VOIR DIRE QUESTIONING OF PROSPECTIVE JURORS, AND DEFENSE COUNSEL WAS ABLE TO CONSULT WITH THE DEFENDANT BOTH PRIOR TO AND DURING THE EXERCISE OF THE PEREMPTORY CHALLENGES.

The Defendant has attacked the jury selection process on the basis of the due process clauses of the state and Federal constitutions as well as Rule 3.180, Florida Rules of Criminal Procedure. This case does not present any constitutional issues. The right to peremptory challenges is purely statutory. There is no constitutional right to peremptory challenges. United States v. Washington, 705 F.2d 489, 497-98 at n.5 (D.C. Cir. 1983); United States v. Alessandrello, 637 F.2d 131, 137 at n.9 (3rd Cir. 1980); Boone v. United States, 483 A.2d 1135 (D.C. Ct. of App. 1984). As there is no constitutionally recognized right to peremptory challenges, non-presence during the exercise of those challenges could not constitute constitutional error. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), which involved a similar issue, concerned rights

existing under a state statute, not any constitutional rights.

Thus, the only issue involved is whether there has been any violation of Rule 3.180, Florida Rules of Criminal Procedure. Francis v. State, 413 So.2d 1175 (Fla. 1982), which is the principal basis for the Defendant's arguments, is based on Rule 3.180, and does not hold that there was any constitutional due process violation. In Francis, the defendant was present throughout the voir dire questioning of the prospective jurors. He then left to go to the restroom, while jury selection then proceeded. After selection commenced, the defendant returned to the courtroom, but the judge, attorneys and court reporter went into the jury room, for additional space, while the defendant remained in the courtroom. During the selection process, defense counsel did not consult with his client, nor did he attempt to consult with his client. There is no record of any pronouncement by the Court in which the Court inquires whether defense counsel wanted to consult with his client. Indeed, while the defendant was in the restroom, defense counsel could not consult with him. This Court applied a harmless error analysis to the case. In so doing, the Court observed that "we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." 413 So.2d at 1179. Thus, the ability to

consult with counsel during the exercising of peremptory challenges goes to the heart of this Court's decision. When compared to the instant case, it is readily seen that the Defendant herein was present in the courtroom at all times; the Defendant saw the entire voir dire questioning; prior to and during the peremptory challenges, the judge made it clear that defense counsel could walk back and forth between the judge's bench and the defendant's table to consult with his client. The only conduct which occurred at the bench was the announcement by counsel of which venire members were accepted or stricken. None of the prospective jurors were questioned at that time. Defense counsel could communicate the acceptances and strikes to the Defendant without the Defendant being prejudiced in any manner. The ability to physically hear counsel state "accept" or "strike" would not enhance the Defendant's rights in any capacity. The key to Francis, therefore, is the ready ability or nonability of counsel to consult with his client during the exercise of peremptory challenges. Cf., Morgan v. State, 10 FLW 1574 (Fla. 3d DCA June 25, 1985). Given the facts of the instant case, the trial court did not commit reversible error.

Several cases have considered similar issues. In United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980), a limited portion of the voir dire questioning was conducted in an anteroom, without the defendants. This questioning of

jurors focused on the pre-trial publicity aspect of the case. Although the defendants had the right to observe the voir dire questioning under Rule 43(a), Federal Rules of Criminal Procedure, the Appellate Court found the error to be harmless, as the defendants had heard all but that limited portion of the questioning, and as the trial judge had told the attorneys that they could consult with their clients as often as they wished during the challenges. Id. at 134-135, 141-42. Clearly, the right to observe voir dire questioning of prospective jurors is of greater importance than the right to hear counsel announce "accept" or "strike." It is the observation of the jurors and the hearing of their responses that enables a defendant to furnish relevant information to the defense counsel. Thus, Justice Cardozo stated in Snyder v. Massachussetts, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 74 L.Ed.2d 674, 678 (1934):

. . . defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.

Once the relevant information from the prospective jurors has been fully obtained, as in the instant case, a defendant's rights cannot be prejudiced if there is a ready

ability to consult with counsel during the announcement of selections. While the demeanor and voice of prospective jurors may provide a defendant with useful information, the demeanor of counsel while announcing selections will not. Facile communication of such announcements between defense counsel and defendant, coupled with an ability to consult throughout, furnishes adequate safeguards during the selection stage, and eliminates any possibility of prejudice.

A similar situation occurred in United States v. Chrisco, 493 F.2d 232 (8th Cir. 1974), in which the defendants were not in the courtroom when the attorneys made their peremptory strikes and gave a list of the strikes to the court. When court reconvened after a noon recess, the list of strikes was read by the clerk, in open court, with the defendants present. The court held that the defendants were sufficiently present, "since they both observed the strikes being read off and registered their opinion of the venire with their counsel." Id. at 237. The appellate court found that "the trial court had a responsibility to make sure that the defendants are given an ample opportunity to confer with their counsel during all phases of the jury selection process including the exercise of peremptory strikes." Id.

Multiple defendants argued that they were denied their right to be present when their lawyers conferred outside the courtroom before exercising peremptory strikes, in United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984). The selection system enabled the six defendants to collectively exercise 15 peremptory strikes after consultation. The court observed that "[n]othing prevented counsel from speaking with their clients after they had conferred informally among themselves, before they made their strikes." Id. at 1349. Thus, the right to be present during the peremptory strike phase of jury selection, under Federal Rule of Criminal Procedure 43(a), was not denied. Relevant factors included the defendants' presence in court during all voir dire questioning and when the strikes were read by the clerk; and their opportunity to consult with counsel during or immediately following the impanelling process. While no objection was raised at the time, the decision is not premised on the failure to object.

A brief absence of the defendant during voir dire questioning did not require reversal in United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983):

Appellant was present in the courtroom during the entire time, and while out of hearing of the bench voir dire, had sufficient time to confer with counsel regarding

jurors' responses at the bench. Consequently, she was able to compensate effectively for this brief absence from voir dire.

See also Green v. State, 430 A.2d 1122, (Md.App. 1981) (defendant not at bench conferences during which there were discussions concerning the striking of particular jurors); State v. Marks, 647 P.2d 1292, 1297 (Kan. 1982) (no error where defendant not at bench conference for exercise of peremptory challenges).

When the defendant views the entire voir dire questioning, but is not at a bench conference for the exercise of peremptory strikes, the common thread running through all of the cases, Francis included, is whether the defendant had ample and convenient opportunity to consult with counsel. The Supreme Court of the United States has recognized that "one of the defendant's primary advantages of being present at the trial," is "his ability to communicate with his counsel . . ." Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 1061 (1970).

None of the other Florida cases relied on by the Defendant are inconsistent with this principle. In Shaw v. State, 422 So.2d 20 (Fla. 2d DCA 1982), the entire voir dire questioning occurred in the defendant's absence, precluding

the defendant from observing the demeanor of the prospective jurors and hearing their responses which might have triggered reactions based on subjective information possessed by the defendant, but not by counsel. As more fully set forth above, non-presence during questioning is obviously a more serious situation than non-presence during announcement of peremptory strikes. In Walker v. State, 438 So.2d 969 (Fla. 2d DCA 1983), the peremptory challenges were exercised in a different room, thus rendering it less likely that counsel would go back and forth to the defendant. The State would further submit that the decision in Walker, based on the foregoing analysis, should not be followed. Finally, in Lane v. State, 459 So.2d 1145 (Fla. 3d DCA 1984), the peremptory challenges were exercised in the hallway, again increasing the distance and barriers between counsel and client, and rendering communications between them less likely and more difficult. Indeed, Lane contains no discussion of any consultative efforts. Most importantly, in none of the foregoing cases did the trial judge remind defense counsel of his right to consult with his client, before and during the strike phase, as meticulously and thoroughly as in the instant case.

Accordingly, the inability of the Defendant to hear the sidebar conference at which peremptory challenges were exercised does not constitute reversible error.

CONCLUSION

Based upon the points and the authorities contained herein, the State respectfully requests that this Court answer the certified question in the negative, quash the decision of the Third District as to the Richardson issue, approve the portion of the decision concerning the presence of the Defendant during the exercise of peremptory challenges, and reinstate the trial court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33128, on this 3rd day of December, 1985.



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