

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,845

THE STATE OF FLORIDA,

Petitioner,

vs.

KENNETH WARD,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTIONS

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
List of Citations and Authorities	ii
Introduction	1
Statement of the Case and Facts	2
Summary of the Argument	6
Argument	7
Conclusion	10
Certificate of Service	10

LIST OF CITATIONS AND AUTHORITIES

	<u>PAGE</u>
Carnivale v. State, 271 So.2d 793 (Fla. 3d DCA, 1973)	8
Cumbie v. State, 345 So.2d 1061 (Fla. 1977)	6,7,8
Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985)	8

INTRODUCTION

The Petitioner, the State of Florida, was the appellee in the District Court and the prosecution in the trial court. The Respondent, Kenneth Ward, was the appellant in the District Court and the defendant below. In this brief, the parties will be referred to as they stand before this Court. The letters "Tr" will be used to refer to the trial transcript.

STATEMENT OF THE CASE AND FACTS

The petitioner's statement of the case and facts is acceptable to the respondent with the following additions:

The respondent Ward testified that Gary Patterson was his best friend. He got into trouble on a drug deal, and Patterson hired a lawyer for him. Patterson was going to do a drug deal to pay for the lawyer (Tr. 498). Patterson was planning a drug deal with Larry Hogue but Ward had nothing to do with it. He never had any intentions to rip off Patterson. On the morning of the murder Patterson and Hogue were to consummate the drug deal (Tr. 504). He and Patterson went to Jimmy Mays' house. Mays and Hogue were there. Hogue asked Ward to go out to the Winnebago and bring in some cocaine (Tr. 505). Mays came out with Patterson's keys and said they would do the deal somewhere else. Ward testified that he drove to the Ramada Inn with Mays. Mays told Ward to go up to the second floor and wait. Nobody came up. Ward walked to the parking lot and saw Hogue, Mays and Darden at the Winnebago. He was told to go back into the motel. Later the four of them went up to a motel room. Ward asked what was going on and Hogue said he had some kind of trouble with Patterson and that he had shot Patterson twice (Tr. 510). Ward thought they would try to kill him next. He was told to stay at the room, and he did until the following night. Mays and his wife then picked him up and they went to Mays' house (Tr. 512). Ward was told to drive Patterson's car out on Tamiami Trail and Mays and an unknown black male followed. Ward was signalled to stop and Mays got in the car and drove it off the road. Mays poured gasoline

inside the car and then he lit it on fire (Tr. 514). Ward testified that Larry Hogue's testimony was a lie. Ward was driving to Frostproof later and was arrested. He gave the police a statement (Tr. 517). He denied having anything to do with the robbery of Patterson (Tr. 519).

Gail Beard testified that she lived a block away from Gary Patterson's house and that she had known him for ten years. He would never let anyone else drive his car (Tr. 583). On the day Patterson's body was found she saw the defendant driving Patterson's car (Tr. 584). On cross, she testified that Patterson's sister called her to come to court and testify (Tr. 587).

After the respondent Ward testified and rested his case, and before the petitioner called Gail Beard, the surprise rebuttal witness, the following colloquy transpired in the trial court:

"MR. GELBER: Your Honor, it has come to my attention that this witness that Mr. Waksman intends to call is a witness he has known about for a great length of time and she is not on the witness list.

THE COURT: It is a rebuttal witness.

MR. GELBER: Yes, but the State has been aware of her -- I have the case that Mr. Waksman is basing his feelings, that the Court should allow the witness in. However, she is not on the list. We haven't been able to take her deposition. In addition to that, her testimony would merely muddle the weight of all she is going to testify to. Her testimony would not be that specific, but I think, based on the case law, the fact that we have

been told she is going to be called as a rebuttal witness, he has a duty to tell us. We'd be requesting that the Court exclude her as a witness.

MR. MAYS: I adopt that argument. In addition thereto, it is well established case law that the prosecutor cannot sand-bag the defense; that is to say by putting on some sort of rebuttal and not making that witness known to the defense.

In addition thereto, the name is conspicuously left off from the witness list. I don't have the name of the witness on the list. I think it is prejudicial, unfair and the Court would be committing error in allowing that testimony to come in.

MR. WAKSMAN: First of all, rebuttal is different. I didn't know who the defense was going to put on. When they put on Mr. Ward, that was brand new to me. However, when Stephen Parr, lead detective in this case gave a 173 page deposition in June of 1983, almost two years ago, on page 23, he tells the attorneys all about what Gail Beard told him, who lives next door to Mr. Patterson. I have some cases I would like to cite into the record that say if they knew about it from the deposition or any other mention of it -- one is Sireci versus State, 1982, 399 So.2d 964, page 699: 'Even though the State failed to provide the defendant with the name of a witness, pursuant to discovery demand, the trial court did not grant the motion to exclude. The witness' name was listed in three places where the attorney had knowledge of it, they knew about it, or could have known about it.'

I don't have to make this argument with regard to rebuttal.

THE COURT: As far as I am concerned, that is the law.
Objection overruled.

MR. GELBER: I would be requesting a Richardson hearing
on this matter.

THE COURT: Denied."

SUMMARY OF THE ARGUMENT

For the Court to agree with petitioner's argument would necessitate this Court receding from its holding in Cumbe v. State, 345 So.2d 1061 (Fla. 1977), that the failure of a trial court to conduct a Richardson hearing is reversible error as a matter of law. Such a recession would permit the petitioner to engage at will in trial by ambush and would result in defeating the purpose of our rules of criminal procedure, which is "to provide for the just determination of every criminal proceeding." R.Cr.P. 3.020.

The District Court's finding of harmless error was erroneous as a matter of law and fact.

ARGUMENT

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 District Court was mistaken for three reasons in holding that the trial court's failure to conduct a Richardson inquiry was harmless error. First of all, the holding is contrary to this Court's following reasoning in Cumbe, supra:

"It is clear that the trial court's investigation of the question of prejudice was not the full inquiry Richardson requires. 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. The mere fact that alleged statements are attributed to the petitioner cannot relieve the state of its duty to disclose; that is precisely the situation contemplated by Rule 3.220(a)(1)(iii).

The trial court erred in admitting into evidence the testimony concerning the alleged statement of the petitioner without conducting an inquiry into the question of prejudice, and this error is reversible as a matter of law."

Secondly, the holding is contrary to the facts brought out at the trial. As previously stated in this brief, respondent testified at trial that he only drove the victim's car the night after the homicide. The surprise rebuttal witness, Gail Beard, said she saw the defendant driving the victim's car on the day of the homicide. Her testimony seriously affected the credi-

bility of the respondent, and therefore, the failure of the trial court to conduct a Richardson hearing was far from harmless.

Thirdly, the District Court's finding of harmless error is contrary to a prior holding of the same District Court in Carnivale v. State, 271 So.2d 793 (Fla. 3d DCA, 1973), where the Court said:

"Under the rationale contained in Richardson v. State, supra, it is not a function of the appellate court to determine whether prejudice had resulted to defendant in this cause by the State's failure to list DeLoug as a witness. It was incumbent upon the trial judge to determine if any prejudice had resulted by such failure. The trial judge having failed to make proper inquiry, this cause must be reversed."

In Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985), the District Court followed the wisdom of this Court's holdings in Richardson and Cumbie by setting forth the following applicable principles of law:

"The unresolved issue in this case is whether the trial court was obligated to conduct a Richardson hearing before determining whether the state could use undisclosed evidence to impeach the defendant's credibility. To answer this question, we consider the purpose and reach of the rule announced in Richardson v. State, 246 So.2d 771 (Fla. 1971). First, the rule: If, during the course of a trial, it is brought to the attention of the court that a party has failed to comply with Rule 3.220, Fla.R.Crim.P., the court should conduct an inquiry which, at a minimum, should include 'such questions as whether the 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 [other party] to properly prepare for trial' Id, at 775, see also Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983); McDonnough v. State, 402 So.2d 1233 (Fla. 5th DCA 1981).

The rule's immediate purpose is to ensure the development of a factual predicate in the record and, thus, enable the court to exercise its discretion in a considered, deliberate fashion. The rule's ultimate purpose is to ensure a fair trial by preventing 'the use of surprise, trickery, bluff and legal gymnastics.' Dodson v. Persell, 390 So.2d 704, 707 (Fla. 1980). To achieve these goals, the rule has been given the broadest possible reach. It applies to both parties, Bradford v. State, 278 So.2d 624 (Fla. 1973), and to all phases of the trial - rebuttal as well as the case-in-chief. Hicks v. State, 400 So.2d 955 (Fla. 1981). Moreover, the failure to conduct a Richardson hearing is per se reversible error."

A rejection by this Court of the foregoing principle would not only clear the way for trial by ambush, it would also prevent prosecutors and defense attorneys from performing their primary function which is to assist juries in finding the truth.

CONCLUSION

Based on the foregoing argument and authorities cited, this Court should answer the certified question in the affirmative and affirm the Third District Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Mark J. Berkowitz, Asst. Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128 this 20th day of December, 1985.

By N. Joseph Durant, Esq.
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