IN THE SUPREME COURT OF FLORIDA

FRANK LEE SMITH,

Appellant,

vs.

Case No. 78,199

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, FRANK LEE SMITH, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the original trial record will be by the symbol "R," reference to the record and supplemental record from the original 3.850 appeal will be by the symbol "PCR" and "PCSR," reference to the record from the evidentiary hearing upon remand will be by the symbol "PCR2," and reference to the supplemental transcripts from the relinquishment will be by the symbols "RLNQ" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on May 9, 1985, for the first-degree murder of Shandra Whitehead, the capital sexual battery of Shandra Whitehead, an eight-year-old girl, and the burglary of Dorothy McGriff's home with an assault. (R 1446). The jury convicted Appellant on all counts and recommended a sentence of death by a vote of twelve to zero. (R 1505-07, 1527). After an independent review of the evidence, the trial court imposed a sentence of death, finding five aggravating factors: "under sentence of imprisonment," 'prior violent felony," "felony murder," HAC, and CCP. It found nothing in mitigation. (R 1552-61).

On appeal to this Court, the following historical facts were established:

> The victim, an eight-year-old female, was raped, sodomized, and beaten severely by a blunt instrument in her home at approximately 11 p.m. on April 14, 1985. She later died from the injuries. A rock used in the beating was found outside the room where the beating occurred. Two witnesses identified appellant as a man they had encountered in the street outside the home approximately thirty minutes before the crime. One of the witnesses testified that appellant made a homosexual solicitation to him and, when rebuffed, stated he would have to masturbate. The mother of the victim identified appellant as a man she saw leaning into the window when she returned home at approximately 11:30 p.m. and discovered the crime. Apparently as part of a burglary, a television set had been moved to

> the window where the appellant was seen. Appellant was arrested based on a composite drawing and identification by one of the witnesses after he returned to the neighborhood attempting to sell a television set. He waived his rights to remain silent and to have a lawyer present and denied he committed the crimes or had been in the neighborhood for months. However, when falsely told that the victim's younger brother had seen him commit the crimes, appellant replied that the brother could not have seen him because it was too dark. The identifications were strenuously challenged by the defense, but the jury returned guilty verdicts on first-degree murder, sexual battery by a person eighteen years of age or older on a person eleven years of age or younger, and burglary with an assault. The jury recommended death by a vote of twelve to zero. The trial judge imposed a death sentence on the murder count, a life sentence with a twenty-five year minimum mandatory on the sexual battery conviction, and life imprisonment on the burglary charge. All sentences-are consecutive.

Smit v. State, 515 So. 2d 182, 183 (Fla. 1987).

Appellant raised the following issues on appeal, all of which were denied: a discovery violation by the state, prosecutorial misconduct, calling a court witness at the request of the state, insufficient evidence to support the convictions, improper departure sentence for the burglary, insufficient evidence to support the HAC aggravating factor, rejection of mitigation, use of a juvenile manslaughter conviction as impeachment, and denigration of the jury's role in sentencing. Id. at 183-85. This Court did,

however, strike the CCP aggravating factor, but nevertheless affirmed the sentence given the lack of mitigation and four remaining aggravators. Id. at 185. The Unites States Supreme Court also denied certiorari. Smith v. Florida, 485 U.S. 971 (1988) .

On October 18, 1989, Governor Martinez signed a warrant for Appellant's execution. Appellant then filed a motion for postconviction relief, raising 25 claims, and an application for stay. (PCR 95-259) . Following the State's response (PCR 266-95), the trial court held a hearing on the motion (PCR 1-94), but ultimately denied the claims without taking evidence, and denied the application for stay. (PCR 326-27). It also denied Appellant's motion for rehearing. (PCR 331-53, 354-55). The following day, Appellant filed a Motion for Reconsideration of Rehearing and attached an affidavit from Chiquita Lowe, claiming she misidentified Appellant and claiming Eddie Lee Mosley was the perpetrator. (PCSR 1-7). Before the trial court could rule on the motion, Appellant filed a notice of appeal. (PCR 356-57).

On appeal, this Court affirmed the trial court's rulings on all of the issues except the one alleging newly discovered evidence. Smith v. Dugger, 565 So. 2d 1293, 1294-96 (Fla. 1990). As to this issue, it quoted Chiquita Lowe's entire affidavit, then concluded that 'the trial court erred in failing to conduct an

evidentiary hearing to evaluate this newly discovered evidence." Id. at 1296-97. As a result, it granted an indefinite stay, and remanded the case to the trial court to conduct an evidentiary hearing on this issue within 60 days. Id. at 1297,

As ordered, the trial court held an evidentiary hearing on this claim on March 7, 1991. At the beginning of the hearing, Appellant sought to call an optometrist, and the State objected that such testimony was beyond the scope of the hearing. The trial court agreed to hear the proffer at the conclusion of the hearing. (PCR2 8-14). Appellant also sought to introduce numerous reports, affidavits, and offense reports relating to Eddie Lee Mosley. The State objected because it had never seen the documents before and could not cross-examine the declarants. The trial court sustained the State's objections. (PCR2 26-47).

Thereafter, Chiquita Lowe testified as follows: She was driving to a friend's house in Lauderhill when a man flagged her down and asked her for fifty cents. She told him she did not have it and drove off. She saw his face "[j]ust for an instant." The man was "very delirious." (PCR2 49-50). In 1989, an investigator named Jeffrey Walsh from the Office of the Capital Collateral Representative came to her home and showed her a photograph of Eddie Lee Mosley. Walsh asked her if she had ever seen the man, and she told him that he was the man that had flagged her down.

(PCR2 50-52, 72). She knew it was the same man because "[a] warm feeling came over [her] ." (PCR2 52). She is Very, very, very certain" it is the same man. (PCR2 52).

On cross-examination, Ms. Lowe admitted that she gave a sworn statement to Detective Amabile five days after the murder. The detectives showed her different sets of photographs, but she did not remember identifying Appellant as the man she had seen. She only remembered describing the man she had seen to a sketch artist, after which a composite sketch was drawn. (PCR2 53-58). She did not remember identifying the man in the second photograph as the man she had seen, but admitted that her signature appeared two times in relation to that photo. (PCR2 59-60). She claimed, however, that after Appellant was arrested she was under a lot of pressure from Detectives Amabile and Scheff, and denied that she had consistently identified Appellant until her meeting with Walsh. (PCR2 64, 70-71). She testified that she had had doubts about her identification of Appellant because the perpetrator was 'muscular, big, and [Appellant] was not." (PCR2 65). Nevertheless, she admitted that she identified Appellant at trial as the man she had seen. (PCR2 65). When she disclaimed any knowledge of giving a pretrial deposition, the State admitted it into evidence. (PCR2 67). She then admitted that, although she had been shown other photographs, she had never identified anyone else. She denied,

however, that she was ever shown a photograph of Eddie Lee Mosley. (PCR2 69-70). She also denied that she identified Appellant as the man she had seen; rather she identified him as having hair similar to the man she had seen. (PCR2 71). She did not remember testifying three times previously that she was positive Appellant was the man she had seen, and she denied testifying that she had not been pressured or threatened to make that identification. (PCR2 71). At the time of trial, she was 20 years old. She has been convicted of theft since then. (PCR2 73).

On redirect, Ms. Lowe testified that she did not know the victim's family, but knew she (Lowe) was an important witness. The police kept saying that Appellant **was** dangerous and needed to be off the street. She only told the police that the hair of the person in the second photograph looked the same, but the police kept asking if he was the man. She also felt pressure from the community wanting **a** conviction. She was "confused" at the time of trial and had doubts about her identification of Appellant. she knows Mosley is the real perpetrator. (PCR2 77-84).

Following Ms. Lowe's testimony, Appellant proffered the testimony of Walter Hathaway, an optometrist who had reviewed Appellant's eye exam records from Lake Butler in 1988. According to Mr. Hathaway, Appellant is "extremely nearsighted or myopic. Without wearing glasses, he's - functionally he's blind." (PCR2

94). His eyesight is worse than 20/400. (PCR2 98). Therefore, in his opinion, Appellant would not have been able to leave the scene of the crime by running out and jumping a fence without his glasses. (PCR2 98). And the lighting conditions at the scene would not have made a difference. (PCR2 103). The trial court sustained the State's objection to this testimony as outside the scope of the remand. (PCR2 103-07).

Thereafter, the State called the victim's mother, Dorothy McGriff, as a witness. Ms. McGriff had testified at trial that she saw a man standing next to her house, leaning in the window when she drove up. (PCR2 112-13). The man ran away when she got out of the car. (PCR2 122). The police showed her sets of photographs two or three times, and Eddie Lee Mosley was in one of those groups. (PCR2 113). Mosley was her cousin, who lived several streets away, but she knew the man she saw was not Mosley. She told the detectives as much. (PCR2 114, 121). She and Mosley were not 'close" in 1984 because she knew he was involved in an unrelated murder. (PCR2 124-25). She picked Appellant out of a book of photos right after the murder; the police did not pick him out for her. (PCR2 118-20). She did not remember if the man she saw had glasses on or if the photo showed the man with glasses on. She did not see a scar. (PCR2 121).

Next, Detective Scheff testified that he was the lead detective in Appellant's case. Gerald Davis called his office and said he had information. (PCR2 126). He described the person he saw walking in the area of the murder and told him that Chiquita Lowe may have information also. (PCR2 127). He saw the person speak to Lowe as she was driving down the street. (PCR2 127). Shortly after the murder, Scheff and his partner made contact with Ms. Lowe. She was young, attractive, articulate and seemed intelligent. (PCR2 128). They took her first statement on April 16th--a day and a half after the murder. (PCR2 128-29). During their investigation, they showed Dorothy McGriff, Gerald Davis, and Chiquita Lowe three photo arrays. Eddie Lee Mosley was in one of the groups. Mosley was "notorious in the northwest Fort Lauderdale area" and had become a natural suspect. (PCR2 132-35). Ms. McGriff identified Mosley as her cousin, but no one, including McGriff, identified Mosley as the suspect. (PCR2 135). Ms. Lowe identified Appellant in the third array on April 19, 1985. (PCR2 132). They took their second statement from her on that day. She was very cooperative and a credible witness. They did not pressure her to identify Appellant. They only asked her to be truthful and sure. (PCR2 136-38). She never expressed doubt about her identification. (PCR2 138). She also worked with them on another murder two or three years later. (PCR2 137-38).

Detective Scheff further testified that Gerald Davis was equivocal in his identification, which the detective noted. (PCR2 139). Besides the photo identification, they knew that Mosley's fingerprints did not match those at the scene. (PCR2 139-40). Detective Scheff had testified at trial that they eliminated Mosley as a suspect. He had arrested Mosley before for murder and had investigated his cases. Mosley would not engage in sex indoors or in cars; he had to be outside. (PCR2 141-42). Moreover, Mosley killed by manual strangulation, unlike in this case where the victim had been strangled with a ligature and bludgeoned with a rock. (PCR2 143). Mosley also killed black prostitutes. (PCR2 143).

On cross-examination, Detective Scheff testified that Mosley was eliminated based on the lack of fingerprints or an identification. (PCR2 145). He also testified that Mosley had very short hair in 1984, unlike that depicted in the photograph shown to Ms. Lowe by the CCR investigator. (PCR2 147-48). Mosley lived within walking distance of the crime and was the first suspect because of other cases in the area. (PCR2 149, 153-54). Chiquita Lowe called him sometime later and told him that the man she had seen had come to her house selling a television in a shopping cart. (PCR2 154-55). Detective Scheff was not aware that Mosley sold goods from a shopping cart. (PCR2 155). Each of the

three witnesses were shown three photo arrays. Ms. McGriff was also shown a book containing approximately 150 photos. (PCR2 158-59).

The State's next witness was William Dimitrouleas, a current circuit court judge, who took over the prosecution of Appellant's case about a month before the trial in 1985. (PCR2 167-68). Mr. Dimitroleas testified that although he did not remember any specific conversation with Chiquita Lowe he would never pressure a witness. He did not remember her ever saying that she was uncertain about her identification of Appellant. (PCR2 169-70). He also testified there was a letter in the file from another prosecutor who indicated that Appellant's family believed a man named John Shaw committed the murder. A notation on the letter indicated that he referred the information to Detectives Amabile and Scheff. (PCR2 172-73). Appellant's family also gave him the name of Gregory Redick, who had committed a similar crime in Pompano. But Mr. Dimitroleas believed that Redick **was** in California at the time of the crime. (PCR2 174-75).

Following Mr. Dimitroleas' testimony, Appellant recalled Detective Scheff, who admitted that he testified at trial that of all the suspects only a man named Freeman was included in the photo arrays given to Gerald Davis, Dorothy McGriff, and Chiquita Lowe. (PCR2 179-81). Thereafter, Detective Amabile testified that he

discovered that Eddie Mosley was related to Dorothy McGriff when McGriff revealed her relation to Mosley during a photo lineup at her home. (PCR2 183, 195-96). Detective Amabile also testified that he was present when Chiquita Lowe gave both statements to Detective Scheff. At no time did either of them pressure her into testifying by telling her Appellant was a dangerous man that needed to be off the street. (PCR2 184). In his opinion, Ms. Lowe was "a bright, articulate person. [He] liked her. [He] thought she was credible and [he] believed her." (PCR2 184). She never indicated any hesitation or doubt about her identification of Appellant, nor did she qualify her identification in any way. (PCR2 184).

On cross-examination, Detective Amabile testified that he remembered Eddie Mosley being included in a photo lineup because Dorothy McGriff pointed to the picture and remarked that Mosley was her cousin. They asked her if he was the man she saw and she said he was not. He also remembered that they then showed the same array to Chiquita Lowe. (PCR2 186, 189, 191). Several names surfaced during their investigation as possible suspects. (PCR2 187). Eddie Mosley was not identified by anyone as the perpetrator. (PCR2 191). Detective Amabile also remembered that Mosley had short hair at the time because he was present when Detective Scheff interviewed Mosley in relation to other murders in

the area. (PCR2 192). He did not remember that Mosley had a habit of changing his appearance often. (PCR2 193-94).

Thereafter, the State rested its case, and the trial court took judicial notice of the original trial transcripts and a defense pleading which listed Appellant's eyeglasses as potential evidence at the trial. (PCR2 199-200). The trial court also ordered the parties to submit legal memoranda within 30 days and said, "[T]hen we'll proceed as we previously discussed." Appellant's counsel responded, 'Yes, Your Honor." (PCR2 205).

Two months later, Appellant moved to disqualify Judge Tyson, alleging an ex *parte* communication between the judge and the prosecutor. Specifically, Appellant claimed that the prosecutor had called Appellant's counsel and told him that Judge Tyson had called him (the prosecutor) and asked him to draft an order denying relief. The prosecutor had faxed **a** copy of the proposed order to Appellant's counsel with a cover letter that indicated arrangements had been made previously regarding preparation of the order and that any objections to the proposed order had to be made by May 10. (PCR2 265-68).

Appellant's counsel objected to the proposed order on May 8, 1991. (PCR2 279-80). The motion to disqualify **was** denied as legally insufficient on June 6, 1991, and the motion for postconviction relief was denied the following day. (PCR2 283,

284-87). In its written order denying relief, the trial court stated that Ms. Lowe did not seem "confused" at the trial, but rather was "direct, forthright, and certain in her demeanor." On the other hand, she was "extremely hesitant, slow, and evasive" at the evidentiary hearing. (PCR2 285). The court also found 'significant" Ms. Lowe's "unhesitating, positive identifications under oath" during two statements to the police immediately after the murder, her deposition by defense counsel without the presence of the state, and her 'unequivocal, sworn testimony in front of the jury at the defendant's trial." (PCR2 285) . In addition, Ms. Lowe, who has been convicted of theft since the trial, had recanted only after a defense investigator approached her at her home four years after the trial and showed her a single picture of Eddie Mosley. (PCR2 285-86). Ultimately, the trial court found that Ms. Lowe's recantation and testimony at the evidentiary hearing "not to be credible," but her testimony at trial, which was consistent with her pretrial statements, "was credible." (PCR2 286) (emphasis in original). In addition, the trial court found no credible evidence to support Appellant's claim that Mosley **was** the actual perpetrator. All of the key witnesses were shown Mosley's photograph, and none identified him as a suspect. Moreover, Dorothy McGriff, who had no reason to lie, specifically excluded Mosley, her cousin, as the man she had seen leaning in her bedroom

window the night of the murder. (PCR2 286). Finally, the trial court rejected Ms. Lowe's claim that she was pressured by the police or prosecutors to testify in any particular manner. (PCR2 287).

On appeal, Appellant claimed that the trial court engaged in ex *parte* conduct with the prosecutor regarding preparation of the order denying relief. **Corrected initial brief** at 13-23.[1] As a result, the State moved to relinquish the **case** to the trial court to determine the facts surrounding the alleged *ex parte* communication. This Court granted the State's motion on October 30, 1992. While on relinquishment, Appellant's counsel issued a deposition subpoena to Judge Tyson. The State's motion to quash the subpoena was denied, and the State obtained a stay from this Court pending review of the matter. Because the identical issue of deposing judges was being litigated in State v. Lewis, 656 So. 2d 1248 (Fla. 1994), this Court consolidated Appellant's case with Lewis' case. Ultimately, this Court authorized limited discovery in postconviction proceedings and remanded both cases for additional proceedings. Id.

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[1] Appellant filed an initial brief on September 11, 1992, which this Court returned because it failed to "comply with type standards." (Order dated 9/29/92). Appellant then filed a corrected initial brief on October 2, 1992. He has also filed **a** supplemental brief, dated February 24, 1997, pursuant to this Court's order following relinquishment.

On August 7 and 8, 1996, the trial court held a hearing to determine the facts surrounding the alleged ex *parte* communication. Initially, the State called Judge Robert Tyson as a witness. Judge Tyson, who presided over Appellant's 3.850 proceedings, testified that prior to the start of the evidentiary hearing in 1991 he invited the parties in his chambers to meet them. Although he could not remember the attorney's name, Appellant's counsel sat to the left of Judge Tyson and Paul Zacks, the prosecutor, sat to his right. After socializing, Judge Tyson asked the parties if he could contact the prevailing party and have them prepare an order. (RLNQ 9-11). Appellant's attorney did not respond, other than to request that he receive a copy of the proposed order. (RLNQ 12). Judge Tyson assured Appellant's attorney that the party preparing the order would be required to provide opposing counsel with a copy. (RLNQ 12). When they returned to the courtroom, another CCR attorney was in the courtroom and they immediately began the hearing. (RLNQ 12). After the hearing, Judge Tyson considered the evidence, reviewed his notes, and wrote a rough draft of the order. He then called the prosecutor and dictated the order to him. (RLNQ 13). The decision to deny relief was made before he called the prosecutor. (RLNQ 14). The reference on page 205 of the evidentiary hearing transcripts to their "previous discussion" was

to the agreement in chambers about preparation of the order.[2] (RLNQ 15). After he reviewed the proposed order, he received a motion to disqualify based on alleged ex *parte* communications. As a result, he called the prosecutor to remind him of the agreement reached in chambers, and he and the prosecutor discussed the agreement later in Judge Tyson's office. (RLNQ 22-24).

Next, Paul Zacks testified that Tom Dunn and Leslie Delk from CCR represented Appellant during the original 3.850 proceedings in **1989.** Prior to a hearing on the 3.850 motion, Judge Tyson called the parties into his chambers to meet Appellant's attorneys. (RLNQ 31, 34-35). Following some questions by Judge Tyson into the backgrounds of Appellant's attorneys, Judge Tyson outlined how they were going to proceed during the hearing. He then asked the parties if he could contact the prevailing party and ask them to prepare the order. Mr. Zacks and Ms. Delk agreed to the procedure. (RLNQ 35). However, Judge Tyson made his ruling from the bench at the end of the hearing and then filed a form order denying relief based on the findings made at the hearing. (RLNQ **50).**

In 1991, Tom Dunn was called to duty for Operation Desert Storm, so Martin McClain from CCR represented Appellant at the evidentiary hearing. (RLNQ 33). Mr. Zacks did not remember having

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[2] At the conclusion of the evidentiary hearing, Judge Tyson requested legal memoranda from both parties and said, "[T]hen we'll proceed as we previously discussed." (PCR2 205).

a meeting in chambers with McClain prior to the hearing. (RLNQ 38). After the hearing, Judge Tyson called him and dictated the order he wanted Mr. Zacks to prepare. There **was** no discussion as to the findings; Mr. Zacks simply wrote down what Judge Tyson read, and the **call** ended. (RLNQ 36-37, 47). Mr. Zacks had the order typed and faxed to CCR **along** with **a** cover letter which mentioned their "prior understanding reached at the evidentiary hearing" and a due date for any objections or counterproposals. (RLNQ 39, 41, 43) . Mr. Zacks assumed Tom Dunn had related their agreement made prior to the 1989 hearing regarding preparation of the order. (RLNQ 42). When Mr. Zacks received the motion to disqualify for alleged ex *parte* communication, he was angry and felt "sandbagged." (RLNQ 44). As a result, he wrote a letter to Mr. McClain regarding their agreement relating to preparation of the order. (PCR2 49) . He wrote another letter to Mr. McClain a year later when he learned that CCR was raising the issue on appeal. (RLNQ 57). He did not remember having any discussion with Judge Tyson or his judicial assistant regarding the motion to disqualify. (RLNQ 53-54).

Following Mr. **Zacks'** testimony, Appellant called Martin McClain **as** a witness. Mr. McClain testified that he began representing Appellant just prior to the 1991 evidentiary hearing because Ms. Delk had left the office and Mr. Dunn was on military **leave.** (RLNQ 64, 80). He had not been involved in Appellant's

case previously, had not spoken to Delk or Dunn about the case, and was not aware of any prior agreement regarding the preparation of orders in this case. (RLNQ 70-71, 80-81). Prior to the evidentiary hearing, he and Paul Zacks went into Judge Tyson's chambers while his co-counsel stayed in the courtroom with Appellant. During the course of their discussion, Judge Tyson asked if he could contact the prevailing party and have them draft the order. According to Mr. McClain, he objected to the procedure and suggested a telephonic hearing, but Judge Tyson indicated he did not like such hearings. (RLNQ 71). Mr. McClain did not object on the record to the judge's suggestion **because** he did not believe that any ex *parte* communication would occur. (RLNQ 74). About a month after the parties filed legal memoranda, Mr. McClain received a phone call from Mr. **Zacks,** who indicated that Judge Tyson had called and had directed Mr. **Zacks** to draft the order denying relief, which Mr. Zacks was about to fax to him. (RLNQ 64-65) . When he received the faxed order, he immediately filed an objection to the procedure for preparing the order and a motion to disqualify Judge Tyson. (RLNQ 65). He did not object to the procedure with Mr. Zacks because he was too shocked, nor did he object to the substance of the order. (RLNQ 85-89). In a subsequent phone call, Mr. Zacks indicated that he had reviewed some notes with Judge Tyson regarding an agreement between them to prepare the order this

way, then he claimed the agreement was with Tom Dunn and Leslie Delk. (RLNQ 75). He had contacted Leslie Delk, however, and she said there had been no such agreement. (RLNQ 93-94).

Finally, Thomas Dunn testified that he and Leslie Delk sat out in the hallway talking with Paul Zacks prior to the 1989 hearing. The bailiff came to get them and the hearing began. They never met in chambers with the judge. (RLNQ 100). During a recess, he and Mr. Zacks talked off the record to the judge about each party filing proposed orders, but Mr. Dunn objected to the procedure, so Judge Tyson decided to make findings on the record and file a form order, which he did. (RLNQ 102-03, 105-06).

Although the parties to the relinquishment had originally believed that no findings of fact needed to be made, the State asked Judge Speiser to make factual findings at a hearing on August 19, 1996. Appellant's attorney objected, and the judge declined to make findings, believing the proceeding was only to gather facts relating to the alleged ex *parte* communication.[3] This appeal, which encompasses the denial of relief after the evidentiary hearing, follows.

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[3] Appellant did not make this hearing a part of the record.

SUMMARY OF ARGUMENT

Issue I - Collateral counsel agreed to allow the trial court to call the prevailing party to have the order prepared. Regardless, Appellant was given adequate notice and an opportunity to object to the proposed order. Thus, his due process rights were not violated. Moreover, Appellant cannot show that any of the ex ***parte*** communications between the trial court and the State prejudiced him under the facts of this case.

The trial court was not asked to consider a list of victims and a newspaper article as substantive evidence at the evidentiary hearing and, even if it were, such documents would not be admissible under the rules of evidence. Dr. Hathaway's testimony was properly excluded as outside the scope of the remand. Documents relating to Eddie Lee Mosley were likewise properly prohibited since they related to a claim previously rejected by the trial court and this Court, and were not admissible under the evidence code.

Issue II - The trial court properly exercised its discretion in finding that Chiquita Lowe's recanted testimony was not credible, that the police did not coerce her to identify Appellant prior to and during the trial, and that the recanted testimony would probably not produce an acquittal on retrial.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ENGAGED IN UNAUTHORIZED *EX PARTE* CONTACT WITH THE STATE REGARDING PREPARATION OF THE ORDER DENYING RELIEF AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE EVIDENTIARY HEARING TO TESTIMONY FROM CHIQUITA LOWE (Restated).

A. Alleged ex *parte* communication

In his original initial brief, Appellant alleged that Judge Tyson, who presided over Appellant's trial and postconviction proceedings, and Paul Zacks, the prosecutor, engaged in ex *parte* communications regarding preparation of the order denying postconviction relief. **Corrected initial brief** at 13-23. Upon motion by the State, this Court relinquished this case to the trial court to ascertain the facts surrounding Appellant's *ex parte* claim. At the hearing on relinquishment, Judge Tyson testified that, prior to the evidentiary hearing in 1991, he called the parties into his chambers to meet Appellant's attorneys. (RLNQ 9-11). Although he could not remember the attorney's name, Appellant's counsel sat to the left of him and Paul Zacks, the prosecutor, sat to his right. (RLNQ 10-11). Appellant's attorney indicated that his colleague was parking the car.[4] (RLNQ 12).

[4] The evidentiary hearing transcripts reflect that Appellant **was** represented by Martin McClain and John Sommer. (PCR2 5). Judge Tyson recollected that two men represented Appellant at this hearing. (RLNQ 18).

After socializing, Judge Tyson asked the parties if, at the conclusion of the proceedings, he could contact the prevailing party and have them prepare the order. (RLNQ 11). Curiously, Appellant's attorney did not respond, other than to request that he receive a copy of the proposed order, apparently presupposing that he would not prevail. (RLNQ 11-12). Judge Tyson assured the attorney that the party preparing the order would be required to provide opposing counsel with a copy. (RLNQ 12).

Judge Tyson further testified that, when they returned to the courtroom, the second defense attorney had returned to the courtroom, and they immediately began the hearing. (RLNQ 12). At the conclusion of the hearing that day, the parties agreed to submit memoranda within 30 days, and Judge Tyson replied, "Thank you very much and then we'll proceed as we previously discussed." Appellant's attorney responded, 'Yes, Your Honor." (PCR2 205) (emphasis added). According to Judge Tyson, this reference was to their prior agreement in chambers as to preparation of the order by the prevailing party. (RLNQ 15).[5]

Judge Tyson also testified that, after the evidentiary hearing, he considered the evidence, reviewed his notes, and wrote

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[5] Post-hearing memoranda were, in fact, filed by the parties on April 4, 1991 (the State's), and April 8, 1991 (Appellant's). (PCR2 231-36, 237-64). Appellant's motion to disqualify was filed a month later on May 8, 1991. (PCR2 265-68).

a rough draft of the order. (RLNQ 13). He then called the prosecutor and related what he wanted in the order. (RLNQ 13). He had firmly decided to deny Appellant's motion for postconviction relief prior to calling Mr. Zacks. (RLNQ 14). He believed that after he reviewed the order prepared by the prosecutor he "called him up to have something deleted," and the prosecutor changed his mind, so he left it in, but he was not sure.[6] (RLNQ 16). He was surprised when he received a motion to disqualify based on alleged ex *parte* communications. (RLNQ 15). He would not have had the order prepared by the opposing party if Appellant's attorney had not agreed. (RLNQ 17). So when he got the motion, he called the prosecutor to remind him of the agreement reached in chambers, and he and the prosecutor discussed the agreement the next day in his office. (RLNQ 22). He suggested that the prosecutor call Appellant's attorney and remind him of their agreement in chambers. (RLNQ 24).

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[6] Judge Tyson's exact testimony **was** as follows:

> Thereafter, the order came down, and I believe I looked at the order. It appeared to be all okay, but I think there might [have been] one question about it that I wanted to have something deleted.
>
> I called him -- I think I called him up to have something deleted. He changed my mind. I left it in, I think; but in any event, that was it.

(RLNQ 16) (emphasis added).

Although the prosecutor testified that the agreement regarding preparation of the order occurred during a meeting in chambers before the original nonevidentiary hearing in 1989 when Tom Dunn and Leslie Delk represented Appellant (RLNQ 34-35), Martin McClain testified that the subject came up during a meeting in chambers prior to the evidentiary hearing in 1991.[7] (RLNQ 71-72). Mr. McClain testified, however, that when Judge Tyson broached the subject he objected and suggested that the judge have a telephonic hearing wherein he could relate his findings on the record, but Judge Tyson did not like telephonic hearings. (RLNQ 71-72). He assumed no ex parte communication would occur because he had objected, and the ethical rules prohibited it. (RLNQ 72-74).

As for the preparation of the order, Mr. Zacks testified that, after the evidentiary hearing in 1991, Judge Tyson called him and dictated the order he wanted Mr. Zacks to prepare. There was no discussion as to the findings; Mr. Zacks simply wrote down what Judge Tyson read, and the call ended. (RLNQ 36-37, 47). Mr. Zacks had the order typed and faxed to CCR along with a cover letter which mentioned their 'prior understanding reached at the

[7] Thomas Dunn, one of Appellant's attorneys at the original 3.850 hearing, testified that there was no meeting in chambers prior to the 1989 hearing. The only off-the-record discussion related to both parties submitting proposed orders to the court, without communication from the court, but Mr. Dunn had objected and Judge Tyson decided to make findings at the hearing. (RLNQ 100-06).

evidentiary hearing" and a due date for any objections or counterproposals.[8] (RLNQ 39, 41, 43). Mr. Zacks assumed Tom Dunn had related their agreement made prior to the 1989 hearing regarding preparation of the order. (RLNQ 42). When Mr. Zacks received the motion to disqualify for alleged ex parte communication, he was angry and felt "sandbagged." (RLNQ 44). As a result, he wrote a letter to Mr. McClain regarding their agreement relating to preparation of the order.[9] (RLNQ 49). He wrote another letter to Mr. McClain a year later when he learned that CCR was raising the issue on appeal. (RLNQ 57, 130-32). He did not remember having any discussion with Judge Tyson or Tyson's judicial assistant regarding the motion to disqualify. (RLNQ 53-54).

In his supplemental brief, Appellant claims that the trial court engaged in three separate ex parte communications with the State during the pendency of his 3.850 motion which denied him a fair and impartial proceeding. Supplemental initial brief at 11-22. The first ex *parte* communication occurred when Judge Tyson called the State to prepare the order denying relief. The second

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[8] The cover letter read in pertinent part: 'This Order was constructed using the expressed direction of Judge Tyson as the guideline, pursuant to our prior understanding reached at the Evidentiary hearing." (RLNQ 121).

[9] Neither party submitted this letter as an exhibit at the relinquishment hearing.

occurred when Judge Tyson called the State to make a deletion in the order. The third occurred when Judge Tyson discussed with the State the prior agreement regarding preparation of the order after Appellant moved to disqualify Judge Tyson for acting pursuant to the prior agreement.

The State submits that Appellant consented to the first two, and that the third one had no effect on the order denying relief. Although the parties disagreed as to the timing of the prehearing meeting in chambers, they all agreed that Judge Tyson proposed a plan to have the prevailing party prepare the order at his direction. The record would support a finding that Appellant's attorney, Martin McClain, agreed to the procedure. The record would also support a finding that when Judge Tyson received a motion to disqualify after acting pursuant to that agreement he contacted the State only to resolve what he believed was a misunderstanding. He remembered obtaining everyone's consent to have the prevailing party prepare the order, he called the prosecutor to confirm his recollection, and he asked the prosecutor to discuss the matter with defense counsel to resolve the dilemma. Under the circumstances, the three instances of ***ex parte*** communication were either consented to or not improper.

Even were they improper, they did not deprive Appellant of due process. As this Court has explained, the concept of "due process"

is incapable of precise definition, but certain well-defined rights are clearly subsumed within its meaning. Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Id.

Appellant cites to Rose v. State, 601 So. 2d 1181 (Fla. 1992), to support his claim that he was denied due process, but Rose is inapposite. In Rose, the State submitted a proposed order denying postconviction relief, which this Court assumed was requested ex parte, but did not serve a copy on Rose's current counsel before the trial court adopted the order in its entirety. Id. at 1182-83. As this Court explained in a later case involving similar facts, "Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the opportunity to review the order and to object to its contents." Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). See also Groover v. State, 640 So. 2d 1077, 1078 (Fla. 1994) (attributing due process violation in Rose to lack of notice and opportunity to be heard); Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994) (same).

Here, assuming that Appellant's counsel did not consent to the procedure used, he was given more than ample notice and an opportunity to be heard. The State prepared the order and faxed it to Appellant's counsel on May 7, 1991. (PCR2 120-26). The

following day, Appellant's counsel filed a motion to disqualify and an objection to the proposed order. (PCR2 265-68, 279-80). A month passed before the trial court ruled on the motion to disqualify and the motion for postconviction relief, (PCR2 283, 284-87). If notice and an opportunity to be heard are the essence of due process, Appellant was provided all to which he was entitled. See Swafford v. State, 636 So. 2d 1309, 1311 (Fla. 1994) (finding no due process violation where trial court requested state to prepare order and defendant had opportunity to, and did, challenge propriety of order denying relief); Groover, 640 So. 2d at 1078-79 (finding no due process violation where trial court signed state's proposed order three days after receiving it and defense had opportunity to address issues in previous brief and at hearing before court signed order); Hardwick, 648 So. 2d at 103 (finding no due process violation where state's proposed order was served on defense months before trial court signed order and defense filed extensive response to order).

While this Court was unconcerned with whether the ex *parte* communication assumed in Rose actually prejudiced the defendant, the State submits that such a consideration is required for the fair administration of justice. Judge Tyson presided over the trial, and saw and heard the witnesses testify, including Chiquita Lowe, the recanting identification witness. By applying Rose's per

se rule of reversal in this case, this Court would deprive the State of crucial factual findings relating to the veracity and credibility of Chiquita Lowe. On remand, a judge unfamiliar with the case would be forced to compare the cold trial transcripts with Chiquita Lowe's in-court, evidentiary hearing testimony. If for some reason Ms. Lowe was not available to testify, then the judge would be forced to compare cold trial transcripts with cold hearing transcripts to assess her credibility. Under the circumstances, where Appellant has suffered no prejudice by the *ex parte* communications in this case, a *per* se rule of reversal would be too harsh a remedy and would unduly punish the State.

For the following reasons, this Court should apply a prejudice standard when assessing Appellant's due process claim: Judge Tyson testified that he ruminated over Appellant's newly discovered evidence claim for several days after the evidentiary hearing. He made notes, then pondered the issue some more, then made more notes. When he finally decided what he wanted the order to include, he called the prosecutor and related his decision. He had made the decision to deny Appellant's postconviction motion before he called the prosecutor. (RLNQ 14). Whether he related the substance of the order, or dictated the order verbatim, there was no discussion about the propriety of his findings. (RLNQ 13, 36-37, 47).

And if he called the prosecutor back to **make** a change,[10] he was not calling to change the ultimate conclusion. Rather, he was calling merely to make a deletion: I called him -- I think I called him up to have something deleted. He changed my mind. I left it in, I think; but in any event, that was it. (RLNQ 16) (emphasis added). Such **a** conversation, if it occurred, clearly did not prejudice Appellant where the result of the order would not have changed.

To the extent Judge Tyson and the prosecutor discussed the motion to disqualify, and the fact that the parties had agreed to the preparation of the order by the prevailing party, this conversation did not affect the trial court's decision to deny relief on the postconviction motion. That decision **had** already been made. The trial court was simply surprised that Appellant's counsel was challenging the procedure for preparing the order when he had previously agreed to it. He wanted the prosecutor to call defense counsel and settle the misunderstanding, because he did not believe it **was** appropriate to do it himself. Cf. Barwick v. State, 660 So. 2d 685, 693-94 (Fla. 1995) (finding trial court's reference to and explanation of previous hearing in order denying motion to disqualify not improper; "a trial judge is permitted to explain the

[10] Judge Tyson's testimony was at best equivocal about whether a later conversation occurred. Mr. Zacks was not questioned at all about this alleged **conversation.**

status of the record."), cert. denied, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996); Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) (refusing to reverse denial of motion to disqualify where trial judge commented that he was being quoted out of context; "[a] certain amount of visceral reaction is unavoidable.").

Finally, and most importantly, Appellant had more than ample opportunity to object to the substance of the proposed order. Despite this opportunity, he did not object to its substance. He objected to the procedure by which it was created, but he did not object to its substance. Thus, again, if the essence of due process is notice and the opportunity to be heard, Appellant was provided them, but failed to take advantage of them. As a result, he cannot claim that he was prejudiced by the State's preparation of the order in this case.[11]

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[11] Appellant also relies on Love v. State, 569 So. 2d 807 (Fla. 1st DCA 1990), which supports the State's argument that Appellant must show he was prejudiced by Judge Tyson's conduct. In Love, the trial judge called an assistant attorney general to seek legal advice on an evidentiary matter pending before the judge. Based on that conversation, the judge initially decided to exclude certain evidence offered by the defendant, but ultimately admitted the evidence after the state withdrew its objection. On appeal, the district court found that the trial judge's ex *parte* communication with 'an arm of the prosecution" did not mandate reversal because 'there ha[d] been no showing that the inappropriate behavior of the trial judge prejudiced the defendant," Id. at 810. In a footnote, the district court also noted that a violation of the Code of Judicial Conduct does not mandate reversal absent prejudice. Id. at 810 n.1. See also Nassetta, 557 So. 2d at 921 ("An ex-parte communication by a judge is not, per se, a ground for disqualification. Such communication would have to be alleged with

The Eleventh Circuit Court of Appeals has applied a prejudice test under similar circumstances. In In re Colony Square Company, 819 F.2d 272 (11th Cir. 1987), cert. denied, 485 U.S. 977 (1988), Colony Square Company (Colony Square) was involved in bankruptcy proceedings when Prudential Insurance Company of America (Prudential) moved to compel Colony Square to comply with its bankruptcy plan. After a hearing on the motion to compel, the bankruptcy judge called Prudential's attorney and "outlined what he wished his order to say and asked [the attorney] to draft it." Id. at 274. Prudential's attorney delivered it to the judge and, after some minor corrections were made, the judge signed the order. Colony Square's attorney knew nothing of the ex *parte* contacts. Id.

Several weeks later, Colony Square moved to disqualify the bankruptcy judge and, after a hearing, the judge called Prudential's attorney and asked him to prepare an order denying the motion. "During their conversation, [the attorney] took notes as to what the judge indicated should be covered in the decision." Id. at 274. The attorney prepared the order, and the judge signed it. Again, Colony Square knew nothing of the ex ***parte*** contacts. Id. Colony Square was also unaware that Prudential's attorney

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specificity . . . to determine whether the communication was prejudicial.").

drafted another order for the judge which denied Colony Square's motion for reconsideration of the award of attorney's fees to Prudential. Id.

Once Colony Square became aware of these *ex parte* communications, it reasserted its motion for disqualification and sought to have the bankruptcy judge's orders **vacated.** The district court permitted expedited discovery, including written interrogatories to the bankruptcy judge, and held a five-day hearing on the matter. Ultimately, the district court denied Colony Square's motion for relief, finding that Colony Square had not been denied due process. The district court noted that Colony Square "was given notice of pending issues and an adequate opportunity to present its arguments prior to a decision being made by [the bankruptcy judge]." Id. It also rejected Colony Square's contention that it had been prejudiced by Prudential's preparation of the orders, because "it believed the orders were correct as a matter of law . . . ." Id.

On appeal, the Eleventh Circuit noted its, and other appellate courts', repeated condemnation of litigants ghostwriting orders. Id. at 274-75. It also noted that the bankruptcy judge had compounded the error by failing to give Colony Square an opportunity to respond to Prudential's proposed orders. Id. at 275. In addition, it noted that "the *ex parte* communications

occasioned by this practice create an obvious potential for abuse." Id. at 275-76. However, it found that simply allowing a party to draft the court's order without notice to the opposing party did not automatically invalidate the orders. Id. at 276. "Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair." Id.

In concluding that Colony Square was not denied due process, the Eleventh Circuit relied on two facts: (1) the bankruptcy judge had already reached a firm decision before asking Prudential's attorney to draft the orders, and (2) the judge had held hearings where he 'played an active and inquiring role," and was thus not swayed or influenced by Prudential's proposed orders; rather, he directed Prudential's attorneys to "draft orders which reached a particular result and discussed specific points." Id. Based on these facts, it found that the bankruptcy judge "did not abdicate his adjudicative role." Id. It also found compelling the fact that appellate review of the complained-of order "serves to correct any errors in the procedure used" by the bankruptcy judge. Id. at 277. Finally, the Eleventh Circuit rejected Colony Square's contention that the bankruptcy judge was obligated to recuse himself because the ex ***parte*** communications and ghostwritten orders raised the "appearance of impropriety." Id. at 276 n.14. See also Anderson v. City of Bessemer City, 470 U.S. 564, 571-73 (1985)

(rejecting application of closer scrutiny to findings of fact adopted by court from orders proposed by prevailing party, especially where court provided framework in earlier memo, opposing party was provided opportunity to respond to findings, and court modified proposed findings); In re Dixie Broadcasting, Inc., 871 F.2d 1023, 1029-30 (11th Cir. 1989) (applying Colony Square to reject due process claim where bankruptcy judge asked party in court to prepare order, opposing counsel made no request to review order or for opportunity to make objections to it, and parties had ample opportunity to argue their case), cert. denied, 493 U.S. 853 (1990).

Here, Appellant was granted an evidentiary hearing and was allowed to submit a post-hearing memorandum, which he did. The trial judge made a firm decision and drafted at least a framework for the order before calling the State to prepare the order. Appellant was provided a copy of the proposed order and was given an opportunity to object to the substance of it, which he chose not to do. Under these circumstances, any error occasioned by any ex *parte* communications did not prejudice Appellant or deny him due process of law. Moreover, review of the trial court's order will serve to correct any errors in the procedures used by the trial court. Therefore, this Court should deny Appellant's due process claim and, ultimately, his appeal.

B. Limitation of testimony and evidence

In Claim I of his 3.850 motion, Appellant alleged that trial counsel failed to investigate Eddie Lee Mosley as a suspect and impeach his elimination by the police. (PCR 109-10, ¶¶ 24-25). In Claim II, he alleged that the State withheld evidence relating to Mosley's status as a suspect and his elimination by the police. (PCR 111-12). In Claim III, he alleged that the State presented false testimony regarding Mosley's status as a suspect and his elimination. (PCR 115-16, ¶¶ 6-9). Finally, in Claim IV, he claimed as newly discovered evidence that Eddie Lee Mosley had been indicted in two rape/murders and tied to six other rape/murders plus five sexual batteries in the northwest section of Fort Lauderdale between 1973 and 1987, that Mosley was considered by Fort Lauderdale police as the city's "most dangerous serial killer," that Mosley had an I.Q. of 51, that Mosley had twice been found incompetent to stand trial, that Mosley was a loner and lived on the streets, and that Mosley was arrested for pushing a shopping cart full of stolen plants down the street with the intent to sell them--all of which allegedly corroborated witnesses' descriptions of the man seen around the victim's home at or around the time of the murder. Appellant did not, however, allege the source of such information, nor attach any documents to his motion to support

these allegations. (PCR 117-21). The trial court summarily denied all four claims. (PCR 29-30, 33, 37-38, 43-45).

On appeal, this Court affirmed the trial court's denial of these claims: "Smith's allegations that the police lied about and withheld evidence concerning other suspects are insufficiently supported." Smith v. Dugger, 565 So. 2d 1293, 1295 (Fla. 1990). However, regarding Appellant's last-minute newly discovered evidence claim based on Chiquita Lowe's affidavit, this Court stated,

> Smith asserts that the trial court should have held an evidentiary hearing to evaluate new evidence. We agree. . . .
>
> * * * *
>
> In his motion for reconsideration of rehearing, Smith submitted an affidavit by [Chiquita] Lowe in which she swears that the man she saw was not Smith but Eddie Lee Mosley, a former suspect who has since been implicated in numerous rape/murders and sexual batteries occurring during the **same** time period and in the same geographical area as the instant crime. The affidavit reads:
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> [Quotation of entire affidavit].
>
> We conclude that the trial court erred in failing to conduct an evidentiary hearing to evaluate this newly discovered evidence.

Smith, 565 So. 2d at 1294-96.

From the opinion, it is obvious that the scope of the remand was limited to Chiquita Lowe's recanted testimony. At the

subsequent evidentiary hearing, however, Appellant sought to introduce extraneous evidence relating to Eddie Lee Mosley, which the trial court prohibited. Some was offered to support an ancillary motion for subpoenas, and the rest was offered as substantive evidence to corroborate Lowe's testimony. For example, Appellant filed a motion a week before the evidentiary hearing, asking the trial court to issue a subpoena duces tecum to the Broward County Medical Examiner so that he could obtain autopsy records relating to murders committed by Eddie Lee Mosley.[12] He wanted to use the information to corroborate Chiquita Lowe's assertion that Mosley was the actual perpetrator in this case. To support his motion, Appellant sought to append a list of murder victims allegedly attributable to Mosley, and a newspaper article suggesting that Mosley is a serial killer. (PCR2 15-19, 21-22). The State's objection to the timeliness of such a request and the relevancy of any such information was sustained. (PCR2 19-26).

In this appeal, Appellant claims that the trial court abused its discretion in prohibiting the admission of the list of murder victims and the newspaper article as substantive evidence. **Corrected initial brief** at 23-29. The list of Mosley's alleged

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[12] The evidentiary hearing was not held until six months after this Court issued its mandate; yet, Appellant had not made any attempt to seek the subpoena during this time. Rather, he waited until the week before the hearing to file his motion, and then argued the motion at the hearing.

victims and the newspaper article, however, were not offered as substantive evidence. They were submitted to support Appellant's motion for the issuance of a subpoena duces tecum. They were considered for that purpose, and the motion was denied. Appellant never sought to introduce them as substantive evidence at the evidentiary hearing. Nor does he challenge the trial court's denial of that motion.

Regardless, such documents were inadmissible hearsay, beyond the scope of the evidentiary hearing, and/or irrelevant. The only authority on which Appellant relies to support their admission is State v. Savino, 567 So. 2d 892 (Fla. 1990), which stands for the general proposition that reverse William's rule evidence may be admissible if relevant. Relevancy, however, is not the only requirement for admission. Evidentiary foundations must be met in a 3.850 hearing as in any other hearing. Cf. Morris v. State, 624 So. 2d 864, 865 (Fla. 2d DCA 1993) ("[A]ffidavits generally cannot substitute for live testimony, subject to cross-examination, in proceedings under Florida Rule of Criminal Procedure 3.850."); In re: Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production, 683 So. 2d 47, 476 (Fla. 1996) ("Any public record that a postconviction defendant offers into evidence in a postconviction proceeding shall be admitted on the basis of the applicable law of evidence.").

Neither of these documents fell within any exception to the hearsay rule. Moreover, the State had no way to cross-examine or refute the substance of the list or the newspaper article. Thus, absent any indicia of their reliability, they were properly denied admission. Cf. Lightbourne v. State, 644 So. 2d 54, 56-57 (Fla. 1994) (finding that affidavits, letters, and taped phone calls were properly prohibited at evidentiary hearing because none were admissible under rules of evidence), cert. denied, 115 S. Ct. 1406, 131 L. Ed. 2d 292 (1995).

Appellant did seek to introduce as substantive evidence the testimony of Dr. Walter Hathaway, an optometrist who had reviewed Appellant's 1988 eye exam records from Lake Butler. As later proffered by Appellant, Dr. Hathaway would have testified that Appellant is "extremely nearsighted or myopic. Without wearing glasses, he's - functionally he's blind." (PCR2 94). His eyesight is worse than 20/400. (PCR2 98). And in his opinion Appellant would not have been able to leave the scene of the crime by running out and jumping a fence without his glasses. (PCR2 98). And the lighting conditions at the scene would not have made a difference. (PCR2 103). The trial court sustained the State's objection to this testimony as outside the scope of the remand. (PCR2 103-07).

This ruling was proper since it was clearly beyond the scope of the evidentiary hearing. Appellant challenged trial counsel's

failure to obtain an expert concerning his poor eyesight in Claim I.F. of his 3.850 motion, which this Court determined was properly denied without an evidentiary hearing. Smith v. State, 565 So. 2d 1293, 1295 (Fla. 1990) ('Smith claims that his trial counsel was ineffective [because] . . . he should have obtained expert testimony concerning Smith's poor eyesight; . . . The trial court properly rejected th[is] claim[] . . . . [F]ailure to develop eyesight evidence **may** have been the result of a reasonable **strategic** decision to concentrate on other matters.") . Since the denial of this claim had been affirmed, and since the evidentiary hearing **was** limited to Chiquita Lowe's alleged recantation, Dr. Hathaway's testimony was properly prohibited.

Finally, Appellant sought to introduce as substantive evidence the written reports of psychological evaluations performed by Bruce Frumkin, Earnest Cohen, Leslie Alker, Dr. Eichert, and Dr. Koprowski on Eddie Lee Moslev; **a** deposition of Cynthia Maxwell, who was one of Mosley's victims; an affidavit of Lisa Wiseman, another of Mosley's victims; a court order directing that Moslev be involuntarily hospitalized; **a** motion to appoint additional experts in one of Moslev's cases; and booking sheets and offense reports relating to five of Mosley's **cases.** (PCR2 26-47). The prosecutor objected to their introduction because he had never seen the documents before (timeliness), he had no way to question or cross-

examine the substance of the documents (hearsay), and they were only marginally, if at all, relevant to the issue (relevancy). (PCR2 27-29, 32-35, 40-41, 44-45, 47). The trial court sustained the State's objections to the introduction of these documents on those grounds. (PCR2 35, 45, 47).

As with the list and the newspaper article, these documents were properly excluded. First, they supported a claim of the 3.850 motion which this Court had found to be "insufficiently supported." And second, none were admissible under the rules of evidence, because none fell within any exception to the hearsay rule. Moreover, the State had no way to cross-examine or refute the substance of the doctors' reports, the deposition, the affidavit, the order, the motion, the booking sheets, or the offense reports relating to Mosley. Thus, absent any indicia of their reliability, they were properly denied admission. Cf. Lightbourne, 644 So. 2d at 56-57 (finding that affidavits, letters, and taped phone calls were properly prohibited at evidentiary hearing because none were admissible under rules of evidence).

Even if some or all of the documents fell within a hearsay exception, such evidence was beyond the scope of the evidentiary hearing. The only 'evidence" this Court recognized and referenced in its opinion was Chiquita Lowe's affidavit. It was to this evidence alone that it granted an evidentiary hearing. Thus,

Appellant was properly precluded from admitting any other extraneous information relating to Eddie Mosley's alleged involvement. Cf. Garcia v. State, 622 So. 2d 1325, 1327 (Fla. 1993) (finding no abuse of discretion where trial court cut off defense questioning at evidentiary hearing after finding testimony irrelevant). Therefore, this claim should be denied.

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR POSTCONVICTION RELIEF BASED ON ALLEGEDLY NEWLY DISCOVERED EVIDENCE (Restated).

On appeal from the summary denial of Appellant's 3.850 motion, this Court remanded for the trial court to consider Appellant's claim that a key identification witness, Chiquita Lowe, had recanted her trial testimony wherein she identified Appellant as the man she had seen in front of the victim's house an hour or so before the murder. Smith v. Dugger, 565 So. 2d 1293, 1294-96 (Fla. 1990). As this Court has previously held, however, "[r]ecantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." Armstrons v, State, 642 So. 2d 730, 735 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995). In fact, because such recanted testimony is "exceedingly unreliable," the court must not grant a new trial 'where it is not satisfied that such testimony is true." Id. Thus, in considering such a claim, the trial court must 'examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for a new trial. . . . Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted." Id. See also

Jones v. State, 591 So, 2d 911, 915 (Fla. 1991) ("[H]enceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.") .

Before applying this test for assessing recanted testimony, however, a trial court faced with a claim of newly discovered evidence must determine whether the evidence qualifies as newly discovered. Jones, 591 So. 2d at 916. To qualify as such, the proponent of such evidence must show that the asserted facts were not known to him, trial counsel, or the trial court, and could not have been discovered with the exercise of due diligence at the time of trial. Id.

While a change in a witness' testimony may be "new," the facts underlying the testimony may not be, or the facts underlying it may have been discoverable at the time of trial with the exercise of due diligence. See id. Here, the trial court did not make an initial assessment of the evidence to determine whether it qualified as newly discovered, or at least it did not make a written finding of such. However, if the record supports any valid ground for affirming the trial court's order, it should be affirmed. Caso v. State, 524 So. 2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an

alternative theory supports it."), cert. denied, 488 U.S. 870 (1989); see also Glendening v. State, 604 So. 2d 839, 841 (Fla. 2d DCA 1992) (affirming denial of motion for new trial on alternate theories where trial court made no findings), rev. denied, 613 So. 2d 4 (Fla. 1993); McBride v. State, 524 So. 2d 1113 (Fla. 4th DCA 1988) (affirming denial of 3.850 motion as improper, successive request for relief, although denied improperly by trial court as untimely); Rita v. State, 470 So. 2d 80, 83 (Fla. 1st DCA 1985) (noting that order denying 3.850 motion "must be affirmed if the record reveals other competent grounds for doing so").

The State submits that the substance of Chiquita Lowe's testimony could have been discovered at the time of trial with the exercise of due diligence. The original trial record reveals that defense counsel was well **aware** that Eddie Lee Mosley had been one of many suspects in this murder, as he questioned both Detective Amabile and Detective Scheff about him at the trial. (T 945-47, 1024-25) . At the evidentiary hearing, despite contrary testimony by the two detectives (PCR2 132-35, 183, 186, 189, 191, 195-96), Chiquita Lowe testified that she was never shown a photograph of Eddie Lee Mosley at the time of trial (PCR2 70) . Defense counsel could have shown her pictures of Eddie Lee Mosley, and any other suspect, at the time of trial. The fact that he could have, but did not, precludes any claim of newly discovered evidence four

years later. Cf. Correll v. State, 22 Fla. L. Weekly S188 (Fla. Apr. 10 (1997) (finding state expert witness' misrepresentation of credentials not newly discovered evidence because facts could have been discovered had appropriate questions been asked); Mills v. State, 21 Fla. L. Weekly S527 (Fla. Dec. 4, 1996) (finding that witness who led collateral counsel to other witnesses was available at time of trial and could have provided same information if asked).

Even if it does not, the record supports the trial court's ultimate findings that Chiquita Lowe's recanted testimony was not credible and that, if credible, such testimony would probably not produce an acquittal on retrial. The assessment of newly discovered evidence, e.g., recanted testimony, lies within the sound judicial discretion of the trial court, and the exercise of that discretion is presumedly correct. State v. Spaziano, 22 Fla. L. Weekly S193, 194-95 (Fla. Apr. 17, 1997). Only where an abuse of discretion clearly appears in the record should this Court disturb the trial court's findings. Id. Moreover, given the trial court's superior vantage point in assessing the witnesses' credibility and demeanor, this Court should presume that its factual findings, if supported by the record, are correct. Id. at 195; see also Zolache v. State, 657 So. 2d 25, 25 (Fla. 4th DCA 1995) (finding itself 'unable to disturb [trial court's] decision"

that newly discovered evidence was not reliable and authentic, where record supported finding, even though case may involve wrongfully convicted, innocent man); Stone v. State, 616 So. 2d 1041, 1044 (Fla. 4th DCA 1993) ("It is the trial court's responsibility to determine the credibility of a witness; in this case, we cannot state that the court abused its discretion when it found that [the recanting witness] lacked credibility.").

In this particular case, greater deference should be given because the trial judge who assessed the recanting witness' testimony **also** had the benefit of hearing the witness' original testimony at the trial. Here, Judge Tyson presided over Appellant's trial and heard all of the evidence against Appellant, including Chiquita Lowe's unequivocal testimony that Appellant **was** the man she had seen in front of the victim's house an hour or so before the murder. Judge Tyson also presided over the hearing in which Chiquita Lowe recanted her trial testimony and testified that Eddie Lee Mosley was the man she had seen that night.

In his written order denying relief, Judge Tyson specifically found that Ms. Lowe did not seem 'confused" at the trial, but rather was "direct, forthright, and certain in her demeanor." On the other hand, he found that she was "extremely hesitant, slow, and evasive" at the evidentiary hearing. (PCR2 285). Judge Tyson also found "significant" Ms. Lowe's "unhesitating, positive

identifications under oath" during two statements to the police immediately after the murder, her identification of Appellant during her deposition by defense counsel without the'presence of the state, and her "unequivocal, sworn testimony in front of the jury at the defendant's trial." (PCR2 285). On the other hand, Judge Tyson found suspect the fact that Ms. Lowe, who has been convicted of theft since the trial, had recanted only after a defense investigator approached her at her home four years after the trial and showed her a single picture of Eddie Mosley.[13] (PCR2 285-86). Ultimately, based on all of these factors, Judge Tyson concluded that Ms. Lowe's recanted testimony at the evidentiary hearing was not credible, but that her testimony at trial, which was consistent with her pretrial statements, was credible. (PCR2 286). In addition, Judge Tyson rejected Ms. Lowe's claim that she was pressured by the police or prosecutors to testify in any particular manner. (PCR2 287).

Besides Ms. Lowe's lack of credibility, Judge Tyson also found no credible evidence to support Appellant's claim that Mosley was the actual perpetrator. All of the key witnesses were shown Mosley's photograph prior to the trial, and none identified him as

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[13] Though not mentioned by the trial court, the Governor had signed a warrant and Appellant's execution had been set for January 16, 1990. Ms. Lowe's affidavit was signed on December 21, 1989, eight days after the trial court denied Appellant's application for stay of execution and four days before Christmas.

a suspect. Moreover, Dorothy McGriff, who the trial court believed had no reason to lie, specifically excluded Mosley, her cousin, as the man she had seen leaning in her bedroom window the night of the murder. (PCR2 286) .

These findings are supported by the record. Chiquita Lowe unequivocally identified Appellant in a sworn statement to the police immediately following a photo lineup in which she selected Appellant's photograph:

> Q. Let the statement reflect that Chiquita Lowe has raised her right hand and has been sworn in. Chiquita did Detective Amabile and myself drive up to your house today?
>
> A. Yes .
>
> Q. And at that time did you come out to the car and did I show you a group of six photographs?
>
> A. Yes you did.
>
> Q. And did I ask you to take a look at the photographs and tell me if you'd seen any of these people before?
>
> A. Yes.
>
> Q. Were you able to select one of these photographs as being a person you'd seen before?
>
> A. Yes.
>
> Q. Which photograph did you select? Which number?
>
> A. Number two.

Q. Was this the same person that you saw on the night of Sunday, April 14, 1985, walking along the 2900 block of Northwest 8th Place?

A. Yes.

Q. And you have already given me a taped statement as far as what happened that night, is that correct?

A. uh-huh.

Q. Did I point that photograph out to you or tell you to select it?

A. No you did not.

Q. And we haven't threatened you in any way?

A. No.

Q. And you're certain about your identification, that's the same person?

A. Positive.

(State's exhibit #6 at evidentiary hearing; Appendix A hereto).

Then, in a pretrial deposition without the State's presence, Ms. Lowe again unequivocally identified Appellant as the man she had seen:

Q. Did [the police] ever show you **any** photographs?

A. Yes.

* * * *

Q. You pointed out the person you believe looked like the man?

A. Yes.

Q. What about the photograph, what made you pick out that photograph from the other 5 photographs?

A. Because he looked like the man I seen that night.

Q. What looked like him?

A. Everything.

Q. I mean, the hair?

A. The hair, the face, that eye, them holes in the face, all it looked just like him.

* * * *

Q. Why does that stick out in your mind? If you just saw him so briefly, how could you describe him?

A. I looked directly in his face. I was sitting in the car and he was looking directly at me.

* * * *

Q. Did the police indicate to you, when they showed you those photographs, that man's picture would be in those 6?

A. They just showed them to me, and I just picked him out.

(State's exhibit #4 at evidentiary hearing; Appendix B hereto).

And again at trial Ms. Lowe testified that she **was** absolutely positive in her identification of Appellant from the photo lineup as the man she had seen:

Q [BY THE PROSECUTOR] But the next day, Friday, did they bring some pictures out?

A [BY MS. LOWE] Yes.

Q What happened when they brought the pictures?

A They said, look at these photographs. They say, if you see the man you seen that night on that day, just point him out and I point him out.

Q [BY THE PROSECUTOR] Any hesitation on your part in pointing out the man?

A No.

Q The man whose picture you pointed out, was that the man you saw Sunday night coming across the street of Shandra Whitehead's house about 10:30 p.m.?

A Yes.

* * * *

Q What photograph did you pick out?

A Two.

Q Is that the man that you saw outside the house Sunday night about 10:30?

A Yes.

Q Any doubt in your mind?

A No doubt in my mind.

(R 678-80).[14]

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[14] Both Detective Amabile and Detective Scheff also testified that Ms. Lowe was unequivocal in her identification of Appellant from that photo array. (R 901-03, 987-88).

Ms. Lowe also testified unequivocally at the trial that she was not assisted or pressured in her identification in any way:

> Q [BY THE PROSECUTOR] Now did the police help you as to who you should pick out?
>
> A [BY MS. LOWE] No.
>
> Q Did they point to number two or suggest to you this is the right guy?
>
> A No.
>
> Q Give you any hints at all?
>
> A No,
>
> Q Were they fair in the way they showed you the photographs?
>
> A Yes.
>
> Q Were you able to make that identification based on what you had seen yourself?
>
> A Yes.

(R 681).[15]

Finally, at trial, Ms. Lowe was asked if she saw in the courtroom the man she had seen that night, and she positively identified Appellant:

> Q [BY THE PROSECUTOR] Now if you saw that man today, Chiquita, do you think you would be able to recognize him?
>
> A Yes.

---

[15] Again, both detectives also testified that Ms. Lowe was not assisted or pressured in her identification. (R 902-03, 987).

Q I ask you to look around the courtroom, take your time and see if you see the man that was outside Shandra's house on Sunday, April 14th?

A Yes.

Q Point him out, please.

A Over there.

Q Describe what he's wearing today?

A Got on a black two piece, blue tie, glasses, same beard and his hair was cut.

THE PROSECUTOR: Your Honor, let the record reflect that the witness has identified the Defendant, Frank Lee Smith.

THE COURT: Granted.

(R 680).

On cross-examination, defense counsel even asked Ms. Lowe to get down from the stand and look at Appellant, which she did. She remained adamant in her identification:

Q [BY DEFENSE COUNSEL] Why don't you take a good look at Mr. Smith. Why don't you come down?

* * * *

THE COURT: Witness, would you please step down.

Q (By Mr. Washor) Do you see that scar on his face?

A Yes.

Q You never saw the scar on the face of the man that you saw?

A True.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Dimitrouleas) If I may, Your Honor. You had a chance to look at the Defendant's face. Is that the man that came across the street, came up to your car and asked you for fifty cents on Sunday night?

A Yes.

(R 706-07).

At the evidentiary hearing, however, Ms. Lowe testified that in 1989 an investigator named Jeffrey Walsh from the Office of the Capital Collateral Representative came to her home and showed her a single photograph of Eddie Lee Mosley. (PCR2 50-51, 72-73). Walsh asked her if she had ever seen the man, and she told him that he was the man that had flagged her down. (PCR2 50-52). She knew it was the same man because when she saw the picture "it brought moments back of the incident when it happened" and "[al warm feeling came over [her]." (PCR2 52, 74-75). She was "very, very, very certain" it was the same man. (PCR2 52).

On cross-examination, Ms. Lowe claimed she did not remember identifying Appellant or anybody else from the different photo lineups the detectives showed her. (PCR2 57-58). Nor did she

remember giving a deposition or testifying previously that she was positive Appellant was the man she had seen. (PCR2 65-67, 71). She only remembered describing the man she had seen to a sketch artist, after which a composite sketch was drawn. (PCR2 58). When confronted with Appellant's photo array, she did not remember picking anyone out, but claimed that "photo number two was the hair like the guy that I saw." (PCR2 59-60, 71). And when confronted with her signature on documents which attested to her identification of Appellant as the man she had seen, she remembered only that she was "[under] a lot of pressure" from the detectives who told her that 'the man is dangerous and if he stay out here, he's going to do it [to] someone else." (PCR2 60-63). She denied that she had previously testified that she was not pressured or threatened to make that identification. (PCR2 71-72). She also did not remember giving a sworn statement to the police after she identified Appellant from the array, and she denied that she had consistently identified Appellant, until she met with Mr. Walsh. (PCR2 64). Rather, she claimed that she had continuously had doubts about her identification of Appellant because the perpetrator was "muscular, big, and [Appellant] was not." (PCR2 **65).** Nevertheless, she identified Appellant at trial as the man she had seen because she was "[under] a lot of pressure." (PCR2

65). She denied that she was ever shown a photograph of Eddie Lee Mosley. (PCR2 69-70).

On redirect, Ms. Lowe testified that she did not know the victim's family, but knew she (Lowe) was an important witness. (PCR2 77). She also felt pressure from the community wanting a conviction. (PCR2 78). She was "confused" at the time of trial and had doubts about her identification of Appellant, but the police kept saying that Appellant was dangerous and needed to be off the street. (PCR2 79-80). Regarding the photo lineup, she only told the police that the hair of the person in the second photograph looked the same, but the police kept asking if he was the man. (PCR2 81). She knows Mosley is the real perpetrator. (PCR2 84).

In rebuttal, the State called Dorothy McGriff; Detectives Scheff and Amabile; and the prosecutor, William Dimitrouleas. Ms. McGriff testified that the police showed her individual sets of photographs two or three times, and a big set. (PCR2 113) . Eddie Lee Mosley was in one of those groups. (PCR2 113, 117). Mosley was her cousin, who lived several streets away, but she told them that Mosley was not the man she saw. (PCR2 114, 121). She picked Appellant out of a book of photos right after the murder. (PCR2 118-21) .

Detective Scheff testified that, contrary to his trial testimony, they showed Dorothy McGriff, Gerald Davis, and Chiquita Lowe three photo arrays during the course of their investigation. (PCR2 132-33, 179-81). Ms. McGriff was also shown a book containing approximately 150 photos. (PCR2 158-59). Eddie Lee Mosley was in one of the groups. (PCR2 132). Mosley was "notorious in the northwest Fort Lauderdale area" and had become a natural suspect. (PCR2 132-35). When they showed Ms. McGriff the lineup, she commented that Mosley was her cousin, but no one, including McGriff, identified Mosley as the suspect. (PCR2 135).

According to Detective Scheff, Ms. Lowe identified Appellant in the third array on April 19, 1985. (PCR2 132). She was very cooperative and a credible witness. They did not pressure her to identify Appellant. They only asked her to be truthful and sure. (PCR2 136-37). She never expressed doubt about her identification. 'She was very, very sure of her identification from the moment that that line-up was displayed to her." (PCR2 138-39).

Detective Scheff further testified that Mosley lived within walking distance of the crime and was the first suspect because of his involvement in other cases in the area. (PCR2 149, 153-54). However, Mosley was eliminated based on the lack of fingerprints and the lack of an identification. (PCR2 145). Moreover, he had arrested Mosley before for murder and had investigated his cases.

In his opinion, Mosley would not engage in sex indoors, as in this case, or in cars; he had to be outside. (PCR2 141-42). Mosley also killed by manual strangulation, unlike in this case where the victim had been strangled with a ligature and bludgeoned with a rock. (PCR2 143). Mosley also killed black prostitutes. (PCR2 143). Finally, Detective Scheff testified that Mosley had very short hair in 1984, unlike that depicted in the photograph shown to Ms. Lowe by the CCR investigator. (PCR2 147-48) .

The prosecutor, William Dimitrouleas, testified that although he did not remember any specific conversation with Chiquita Lowe he would never pressure a witness. And he did not remember her ever saying that she **was** uncertain about her identification of Appellant. (PCR2 169-70) .

Detective Amabile testified that he remembered Eddie Mosley being included in a photo lineup because Dorothy McGriff pointed to the picture and remarked that Mosley was her cousin. They asked her if he was the man she saw and she said he was not. He also remembered that they then showed the same array to Chiquita Lowe. (PCR2 183, 186, 189, 191, 195-96). Eddie Mosley was not identified by anyone as the perpetrator. (PCR2 191). Detective Amabile **was** present when Chiquita Lowe gave both statements to Detective Scheff, and at no time did either of them pressure her into testifying by telling her Appellant **was a** dangerous man that needed

to be off the street. (PCR2 184). In his opinion, Ms. Lowe was "a bright, articulate person. [He] liked her. [He] thought she was credible **and** [he] believed her." (PCR2 184). She never indicated any hesitation or doubt about her identification of Appellant, nor did she qualify her identification in any way. (PCR2 184).

Based on the foregoing testimony, the record supports the trial court's finding that Chiquita Lowe's hearing testimony was unworthy of belief. Judge Tyson had the benefit of seeing Ms. Lowe and the other witnesses testify at the trial, and at the evidentiary hearing. Ms. Lowe's affidavit, made on the eve of Appellant's execution, and her testimony at the evidentiary hearing were effectively rebutted by her pretrial and trial testimony, and by other witnesses' testimony. Therefore, **Appellant's claim** of newly discovered evidence **was** properly denied. Cf. Armstrong, 642 So. 2d at 735 (affirming denial of motion for new trial where recanting witness' testimony remained consistently inculpatory until she learned after trial that defendant **was** father of her twins); Parker v. State, 641 So. 2d 369, 376 (Fla. 1994) (finding no abuse of discretion where trial court found new witness lacked credibility), cert. denied, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995); Stone, 616 So. 2d at 1044 (finding no abuse of discretion where trial court found that recanting witness lacked credibility); Glendening, 604 So. 2d at 840-41 **(same).**

But even if Judge Tyson had found, or should have found, Ms. Lowe's testimony credible, he nevertheless found no reasonable probability that her recanted testimony would produce an acquittal on retrial: "The Court also finds that the totality of the evidence submitted at the hearing would not have affected the outcome of the trial in this cause." (PCR2 287). This finding is also supported by the record.

Detective Amabile testified at the trial that they got a description of the suspect the night of the murder from Dorothy McGriff, who drove up and saw the suspect reaching in a window of her home. (R 919). The following day, April 15th, they pursued a suspect named James Freeman, but eliminated him as the perpetrator. (R 878-82, 965-66). The next day, April 16th, Gerald Davis called in and reported that he had had a conversation with a man an hour or so before the murder just down the street from the victim's home. He also gave them Chiquita Lowe's name as a possible witness, and they obtained a statement from her. (R 882-85, 966-68).

On April 17th, Davis and Lowe collaborated on a composite sketch that was circulated around the area. (R 885-88, 968-71). Two days later, Lowe called the detectives to report that the man she had seen the night of the murder had just tried to sell her grandmother a television. (R 971). While canvassing the

neighborhood, the detectives spoke to a group of men playing dominoes on a street corner, who confirmed that a man had just walked by trying to sell a television. When they showed the composite to the group, a man named Mobley stated that the composite looked like someone he knew as "Frank L." (R 888-89, 973). The detectives called for assistance in canvassing the neighborhood, and Lieutenant McCann drove around with Mobley. About an hour or so later, McCann and Mobley spotted Appellant, who Mobley identified as "Frank L.," walking down the street near Appellant's house: (R 889-90, 974).

At the police station, Appellant waived his rights, but denied any involvement in the murder, which he was familiar with from talk in the neighborhood. In fact, he stated that he had not been in the Washington Park neighborhood where the victim was killed in months. (R 891-99, 978-79). When confronted with the fact that three people saw him there the night of the murder, Appellant had no reaction. (R 900, 982). When confronted with the fact that the victim's brother saw him commit the murder, Appellant got angry, leaned forward, pointed at Detective Scheff, and said that the kid could not have seen him because it was too dark. When asked how he would know that, Appellant claimed that the detectives had told him the lights were out, but neither detective had told him so. (R 900, 983-84).

From there, the officer's showed McGriff, Davis, and Lowe a photo array containing Appellant's picture. McGriff and Lowe positively identified Appellant.[16] (R 902-07, 985-87). Davis was ninety percent sure of his identification of Appellant, but wanted to see a live lineup, which he did a week or so later. (R 909-12, 988). Again, he picked out Appellant, but was somewhat equivocal. (R 913-16, 988-89). Davis seemed to be waffling because he did not want to have to testify, but when Detective Scheff explained he would have to testify regardless, Davis made a positive identification of Appellant. (R 917-18, 990-93).

Throughout the trial and postconviction proceedings, Dorothy McGriff remained steadfast in her identification of Appellant as the man she had seen reaching in her window the night of the murder. (R 642-45, 662-63; PCR2 111-25). Eddie Lee Mosley was her cousin, and she knew without a doubt that Mosley was not the man she had seen. (PCR2 114). Gerald Davis, although not able to identify Appellant with absolute certainty, was "ninety percent sure" Appellant was the person he spoke to immediately prior to the murder. (R 764, 790-92, 796-97). He assisted in developing a composite sketch which a man named Mobley recognized as Appellant.

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[16] Even if Lowe were to testify at a retrial that the man she saw was Eddie Lee Mosley and not Appellant, the State could still introduce evidence that she unequivocally identified Appellant under oath numerous times pretrial and during the trial.

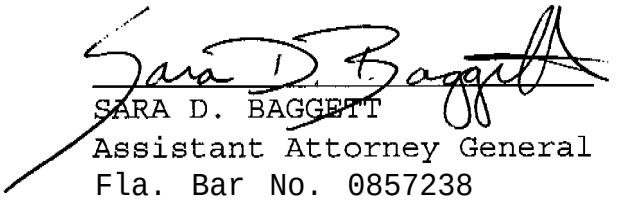
(R 973). He described the man he spoke to as "knock-kneed" (R 756), which Lieutenant McCann confirmed (R 855). He picked Appellant out of a photo lineup and a live lineup, and identified Appellant at trial. (R 753-54, 755, 764). At all times he indicated that Appellant looked like the person he spoke to. Jack Lampley identified Appellant at trial as the man who tried to sell his mother a television (R 804-07), and who Chiquita Lowe positively identified at trial as the man she had seen the night of the murder. (R 807, 676-77). When told that the victim's brother saw him commit the murder, Appellant responded indignantly that he could not have seen it because the lights were off, a fact which only the killer could have known. (R 900, 983-84). Finally, even if Chiquita Lowe were to testify at a retrial and identify Eddie Lee Mosley based on her "warm feeling" upon seeing his picture, she would be severely impeached with her numerous unequivocal identifications of Appellant under oath and the circumstances under which she identified Mosley. Based on all of the above, the trial court properly denied Appellant's motion for a new trial based on Lowe's recanted testimony, since it is not probable that a different verdict would be rendered if Lowe's change of testimony were introduced at a new trial. Armstrong, 642 So. 2d at 735-36; Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1993). This Court should affirm the trial court's findings.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's order denying relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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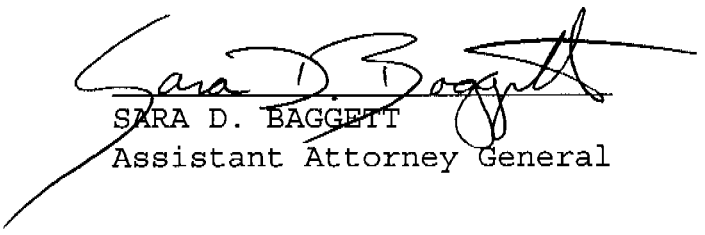
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Gail Anderson and Stephen Kissinger, Assistant CCR's, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 30th day of April, 1997.



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