IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,199

FRANK LEE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CORRECTED REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This supplemental brief follows this Court's order relinquishing jurisdiction to the Circuit Court for the Seventeenth Judicial Circuit for the purpose of getting the facts concerning the claim raised by Mr. Smith that there was an ex parte communication between the state and the trial judge. The circuit court held a hearing pursuant to this Court's order on August 7-8, 1996. This matter follows.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R. " -- record on first 3.850 appeal to this Court;

"PC-R2" -- record on second 3.850 appeal to this Court;

"PC-R3" -- supplemental record following relinquishment by this Court.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Smith renews his request for an oral argument in this matter. Mr. Smith has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Smith, through counsel, accordingly urges that the Court permit oral argument.

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REPLY TO APPELLEE'S STATEMENT OF THE CASE

To the extent that it is inconsistent with the Statement of the Case contained in Mr. Smith's initial Supplemental Brief, is unsupported by the record, and/or contains superfluous or irrelevant material, Mr. Smith objects to the Statement of the Case and Facts contained in the State's Answer Brief. Mr. Smith expressly adopts the Statement of the Case contained in his Initial Brief filed on October 2, 1992, and the Statement of the Case contained in his Supplemental Brief filed on February 24, 1997, following the remand to get the facts regarding the ex parte communication.

Moreover as to the 1996 evidentiary hearing, the State writes the facts in a slanted way assuming that the circuit court made findings of fact favorable to the State. However, the circuit court MADE NO FACTFINDINGS. The inconsistencies between various witnesses' testimony has not been resolved. Judge Tyson's testimony which contradicts both the testimony of the former Assistant State Attorney, Paul Zacks, and Mr. Smith's collateral counsel, Martin McClain, is entitled to no more deference than the testimony from either of them. The simple truth is that the State has failed to prove that Mr. Smith made a knowing, intelligent, and voluntary waiver of his right to be represented at all proceedings wherein the judge and the State discussed the merits of his case.

SUMMARY OF ARGUMENT

Argument I(A)

Mr. Smith's counsel did not give the State and the Court permission to engage in ex parte communication for the purpose of preparing an order denying Mr. Smith's postconviction motion. Certainly, the State has failed to prove a knowing, intelligent, and

voluntary waiver of the right to be represented at a discussion between the judge and the State of the merits of the case. There is no justification for departing from this Court's ruling in Rose v. State, 601 So. 2d 1181 (Fla. 1992) which involved the same Assistant State Attorney, Paul Zacks, engaging in identical conduct to what occurred here. Mr. Smith is entitled to a new evidentiary hearing before an impartial judge.

Argument I(B)

Judge Tyson improperly excluded important evidence corroborating Chiquita Lowe's identification of Eddie Lee Mosley as the assailant. This evidence had been previously adopted by the State as true when it gave notice to present the evidence as Williams Rule evidence in Mr. Mosley's 1987 murder case. The State contended that Mr. Mosley was a serial killer.

Argument II

Judge Tyson improperly denied 3.850 relief.

ARGUMENT I

A.

THE CIRCUIT COURT DENIED MR. SMITH HIS RIGHT TO BE HEARD BY AN IMPARTIAL TRIBUNAL WHEN IT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE.

After conceding that three separate ex parte communications occurred between, Paul Zacks, counsel for the State, and the Honorable Robert Tyson, Jr., the presiding circuit judge following Mr. Smith's 1991 evidentiary hearing, the State argues that the evidence presented below shows that Mr. Martin McClain, Mr. Smith's attorney, agreed to the first two communications and that the third communication should not entitle Mr. Smith to relief

because the subject of that communication was not the preparation of the order denying relief, only the merits of whether Judge Tyson should disqualify himself from presiding over Mr. Smith's case before entering the order denying relief, Appellee's Answer Brief, at 27.

There is no dispute that after the evidentiary hearing in 1991, Judge Tyson contacted Paul Zacks and discussed the Frank Lee Smith case. Judge Tyson discussed with Mr. Zacks what should be put in an order denying 3.850 relief. Judge Tyson testified that he received a draft of the order from Mr. Zacks. He then called Mr. Zacks again -- "I called him -- I think I called him to have something deleted. He changed my mind. I left it in, I think; but in any event, that was it." (PC-R3 16). Mr. Smith had a right to be represented by counsel when Judge Tyson and Paul Zacks discussed the merits of the case. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). That right may be waived by Mr. Smith. Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). The State has made no argument that Mr. Smith knowingly, intelligently and voluntarily waived his right to counsel. Instead, the State argues that Mr. McClain consented to an ex parte discussion of the merits of the case.

The State's argument that the evidence presented upon relinquishment would support a finding' that Mr. McClain had consented to ex parte communication is not supported by the record. Mr. Zacks, the State's own witness, expressly denied that it was Mr. McClain who had consented to the ex parte contact (PC-R3. 34-36, Defense Exhibit 2) and maintained that it was Thomas Dunn, Mr. Smith's attorney during an earlier proceeding in 1985, who had consented to this contact (PC-R3. 35). Judge Tyson, who did state that the agreement was reached prior to the 1991 hearing, but was unable to recall the name of the attorney who had

'However, such a finding was in fact not made by the circuit court.

allegedly agreed to this contact. He, however, described the attorney making the agreement as 5 foot 10 inches tall (PC-R3. 18). He also testified that he had complimented the attorney on the quality of the Rule 3.850 motion (PC-R3. 11). Mr. McClain, who has appeared before this Court on many occasions, testified that he was, and is, 6 feet 2 inches tall (PC-R3. 64). Moreover, Mr. Dunn testified that it was he who Judge Tyson complimented the Rule 3.850 motion, but that this was in the courtroom and on the record, as indeed it is (PC-R. 101).

In fact, the only testimony to which the State directs this Court's attention (Appellee's Answer Brief, at 27) is that of Mr. McClain, who said that the subject did indeed arise before the 1991 hearing, but that he expressly objected to any ex parte contact between the State and the trial judge (PC-R3. 71-72). Contrary to the State's argument, the record does not "support" the conclusion that Mr. McClain consented to the ex parte contact which clearly occurred. It directly refutes it.[2] Mr. McClain specifically testified he opposed the suggestion and understood that there would be a conference call once the judge had decided how he would rule.

The argument that the third admitted ex parte contact would not entitle Mr. Smith to relief is also unpersuasive. Not only is it impossible to meaningfully distinguish ex parte communication regarding the preparation of an order from ex parte communication regarding whether the court should in fact enter that order, the considerations which were determinative in Rose v. State, 601 So. 2d 1181 (Fla. 1992), apply with equal force to the third

[2]Moreover, what is at stake is Mr. Smith's right to representation at discussions of the merits between the State and the presiding judge. There is absolutely no evidence that Mr. Smith entered a knowing, intelligent, and voluntary waiver of that right. Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993).

communication between Mr. Zacks and Judge Tyson. Mr. Zacks' discussion with Judge Tyson over their respective recollection of the facts underlying Mr. Smith's motion to disqualify, in and of itself,[3] entitles Mr. Smith to a new evidentiary hearing. See, generally. Wav v. Tharpe, Case No, 88,901, Florida Supreme Court (May 9, 1997)(Writ of Prohibition issued requiring circuit court to hold new evidentiary hearing to be held after presiding judge disqualified prior to entry of order denying relief).

The State also asks this Court to retroactively retreat from it holding in Rose, Cannon 3A(4) of Florida's Code of Judicial Conduct, Rule 2.160 of the Florida Rules of Judicial Administration (formerly, Rule 3.230, Florida Rules of Criminal Procedure) and almost sixty years of Florida jurisprudence and impose an actual prejudice prong on the disqualification of judges in cases of ex parte contact. The purported "prejudice" to the State in Mr. Smith's case does not justify such an unprecedented and radical departure from established law. In fact, it is no different than those faced by the advantaged party any time a judge is removed. In every instance, new findings of fact must be made, the credibility of witnesses must be determined, evidence must be reweighed. It is a price this State has been willing to pay for the integrity of its judicial system. Perhaps this Court explained this principle as well as possible in Rose:

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The obvious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

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[3] The circumstances of third, ex parte discussion, which the State concedes occurred without Mr. Smith's consent, is also circumstantial evidence of, if not a pattern, at least the willingness of Mr. Zacks and Judge Tyson to engage in such discussions. Moreover, it was the same Paul Zacks who engaged in ex parte contact at issue in Rose.

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . , The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> . . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

Rose v. State, 601 So. 2d at 1183.

In any event, prejudice is obvious from Judge Tyson's testimony. Not only did Judge Tyson testify that he provided only guidelines, but he also testified that he and Mr. Zacks actually engaged in discusion of the order itself and that Mr. Zacks convinced him to alter his opinion.

> [JUDGE TYSON] : [T]hereafter the order came down, and I believe I looked at the order. It appeared to be okay, but I think there might be 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. He was asked to send a copy to the other side.

(PC-R3. 15-16). Emphasis supplied.[4]

The State relies upon In re Colony Square Co., 819 F.2d 272 (11th Cir. 1987). At issue there were federal rules, not the state rules at issue here and in Rose v. State. Moreover, in Colony Square, the Eleventh Circuit specifically noted that the judge in

[4]There is no transcript of what passed between Judge Tyson and Paul Zacks. Moreover, their testimony is not consistent. Judge Tyson specifically recalls Paul Zacks persuading him to change his mind about the content of the order. In such circumstances, even if prejudice were not presumed, the State cannot prove the error harmless beyond a reasonable doubt.

question had not been "swayed or influenced" in any way by the party drafting the order. Here, Judge Tyson testified that Paul Zacks did persuade him to change his mind. Colony Sauare, thus, is factually and legally distinguishable.

The State would have this Court sacrifice the integrity of the judicial system for no other reason than to preserve a "win"[5] for the State. The price is simply too high, the benefit too small. Mr. Smith is entitled to a new evidentiary hearing before an impartial tribunal, and he is entitled to be represented by counsel at all proceedings absent a knowing, intelligent and voluntary waiver. Durocher v. Sinaletarv, 623 So. 2d 482 (Fla. 1993).

B.

AT THE 1991 EVIDENTIARY HEARING, JUDGE TYSON IMPROPERLY EXCLUDED RELEVANT TESTIMONY AND EVIDENCE.

This Court ordered an evidentiary hearing because Chiquita Lowe's star-tingly affidavit indicating that she had identified the wrong man at Frank Lee Smith's trial. According to that affidavit, Mr. Smith was not the man she saw leaving the scene of the homicide, but it was in fact Eddie Lee Mosley . This Court reversed the denial of 3.850 relief saying, "We conclude that the trial court erred in failing to conduct an evidentiary hearing to evaluate this newly discovered evidence, " Smith v. Dugger, 865 So. 2d 1293, 1297 (Fla. 1990).

At the 1991 evidentiary hearing, Mr. Smith sought to present a wealth of evidence which provided corroboration of Ms. Lowe's identification of Eddie Lee Mosley as the man fleeing the scene of the homicide. However, Judge Tyson, at the urging of Assistant State

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'Mr. Smith would submit an undeserved "win". See, Appellant's Initial Brief, at 29-60.

Attorney Paul Zacks, refused to admit the evidence. Now on appeal, the State presents an outright false assertion of fact. The State asserts: "The list of Mosley's alleged victims and the newspaper article, however, were not offered as substantive evidence." Answer Brief at 40 (emphasis in original). The State does not include a record cite for this false assertion. However, reference to the record establishes that the assertion is false. The exhibits at issue came at the beginning of the evidentiary hearing when Mr. Smith's counsel was arguing for a motion for issuance of a subpoena duces tecum to the Broward County Medical Examiner (Transcript at 15). In responding to questions propounded by Judge Tyson, counsel for Mr. Smith explained that he had a wealth of documents that supported his request for the subpoena, but were also admissible in and of themselves at the evidentiary hearing:

> And basically, I am seeking to get the same access to the same information regarding Eddy Lee Mosely. And basically my position is that is in the 1987 case, it is relevant on Williams Rule kind of information that should be considered by this Court on the newly discovered evidence. There's Williams Rules out there.

(Transcript 17-18)

Subsequently, counsel for Mr. Smith stated:

> Your honor, in connection with Mr. Zacks' statement concerning his suspicions about Eddy Lee Mosely and all these cases, I offer the newspaper clippings that are from the time 1987 which provide some additional information, insight.

(Transcript 21).

Judge Tyson ruled:

> I will treat these as A and B for Identifications, and the matters that you're suggesting here in court and preserved for the record, but I am not accepting these into evidence for the evidentiary hearing.

(Transcript 23) .

Thus, Judge Tyson understood that the documents had been offered into evidence and ruled that the documents would not be admitted. The Record of Evidence prepared by the Deputy Clerk present in the courtroom also reflects this same understanding. An asterisk appears next to "Proffer Evidence," and thereafter a list A through P. At the bottom of the page, it provides "Proffer Evidence rejected by court but shall be preserved for appeal." Included in the list are those documents marked "A" and "B".

In arguing that Judge Tyson did not err in excluding the evidence, the State completely overlooks State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Gunsby is not mentioned even once by the State. In considering a claim of newly discovered evidence, the evidence must be evaluated cumulatively along with alleged Brady material which by itself would not have warranted relief and evidence not presented at trial due to deficient representation by counsel.

The State argues that the documents constituted inadmissible hearsay. However, the State engages in no analysis as to each document sought to be introduced. To be hearsay, the document must contain a statement "offered in evidence to prove the truth of the matter asserted." Section 90.801(1)(c) of Florida's Evidence Code. However, an exception to the hearsay rule provides:

> A statement that is offered against a party and is:
>
> * * *
>
> (b) A statement of which the party has manifested an adoption or belief in its truth.

Section 90.803(18) of Florida's Evidence Code.

The documents at issue here were offered to corroborate Ms. Lowe's identification of Eddie Lee Mosley . Ms, Lowe did not identify as the assailant an upstanding citizen with no criminal history who was unlikely to have committed the homicide in question. Instead, she identified a serial killer who committed numerous similar murders. The documents which demonstrate that Eddie Lee Mosley was a serial killer with a particular modus operandi were adopted by the State as true when it prosecuted Mr. Mosley.

In fact, the State had "manifested an adoption or belief in [these statements'] truth." In the case against Mr. Mosley, the State had filed the following document in a court of law:

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 87-11516CF

JUDGE: CARNEY

STATE OF FLORIDA

Plaintiff,

vs.

NOTICE OF INTENT TO OFFER EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

EDDIE LEE MOSLEY

Defendant.

THE STATE, by and through the undersigned Assistant State Attorney, and pursuant to Rule 90.404 Florida Rules of Evidence, hereby notifies the defense of its intent to introduce evidence of other crimes, wrongs, or acts,

THE STATE, contends that the following evidence of other crimes, wrongs, or acts is relevant to prove motive, intent, plan, identity, and/or absence of mistake of accident:

1. The murder of Gloria Irving, who was found dead in Broward County, Florida on march 16, 1980, her death due to asphyxiation or strangulation.

2. The murder of Vetta Turner, who was found dead in Broward County, Florida on July 9, 1973, her death due to asphyxiation or strangulation.

3. The murder of Annette Tukes, who was found dead in Broward County, Florida on February 22, 1980, her death due to asphyxiation or strangulation.

4. The murder of Santrail Lowe, who was found in Broward County, Florida on February 24, 1983, her death due to asphyxiation or strangulation.

5. The murder of Geraldine Barfield, who was found dead in Broward County, Florida on December 19, 1983, her death due to asphyxiation or strangulation.

6. The murder of Susie Boynton, who was found dead in Broward County, Florida on December 24, 1979, her death due to strangulation and stab wound to neck.

7. The nonconsensual sexual battery of Cynthia Williams by the defendant on March 10, 1980, in Broward County, Florida, said defendant using or threatening to use force choking Cynthia Williams.

8. The nonconsensual sexual battery of Francis Darlington by the defendant on April 3, 1973, in Broward County, Florida, said defendant using or threatening to use force by choking Francis Darlington.

9. The nonconsensual sexual battery of Patsy Slater by the Defendant on April 4, 1973, in Broward County, Florida, said defendant using or threatening to use force by choking Patsy Slater.

10. The nonconsensual sexual battery of Adelle Hollies by the defendant on June 19, 1973, in Broward County, Florida, said defendant using or threatening to use force by choking Adelle Hollies.

11. The nonconsensual sexual battery of Mary Wright by the Defendant on April 12, 1980, in Broward County, Florida, said defendant using or threatening to use force by choking Mary Wright.

12. Counts I or II of the Indictment charging the defendant with two murder counts, assuming the charages are severed for trial.

I HEREBY CERTIFY that a copy of the foregoing was served upon Steve Michaelson and/or Gary Cowart, Attorneys for the Defendant, by hand this 16th day of October, 1987.

MICHAEL J. SATZ
State Attorney

By,_____
Charles N. Morton Jr.
Assistant State Attorney
Bar# 201391

The State having adopted the truth of the statements -- that Eddie Lee Mosley was a serial killer -- Eddie Lee Mosley's history was admissible. The State had in fact investigated Mr. Mosley's history and prepared to present it while trying to obtain a conviction of first degree murder against Mr. Mosley. The State's position was Mr. Mosley committed these murders and rapes, and his history constituted Williams Rule evidence admissible against him. Having adopted the allegations as true, the documents at issue were admissible.

Judge Tyson's refusal to consider this highly relevant and corroborative evidence of Ms. Lowe's testimony was error. Judge Tyson further erred in not considering the testimony of Dr. Hathaway regarding Frank Lee Smith's poor vision. Ms. Lowe recalled the assailant was not wearing glasses, Dr. Hathaway's testimony that Frank Lee Smith without glasses, "he's -- funtionally he's blind," (Transcript 94), corroborated Ms. Lowe's conclusion that

she had not seen Frank Lee Smith that night, but had seen Eddie Lee Mosley . This evidence was relevant and should have been considered. See State v, Gunsby. The cumulative effect of unpresented evidence must be considered in 3.850 in deciding whether newly discovered evidence warrants a new trial. Judge Tyson erred.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. SMITH'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In 1990, Mr. Smith filed a Rule 3.850 motion in the circuit court. Without an evidentiary hearing, the circuit court denied Mr. Smith Rule 3.850 relief. This Court held, "the trial court erred in failing to conduct an evidentiary hearing to evaluate this newly discovered evidence [Chiquita Lowe's affidavit]. " Smith v. Dugger, 565 So. 2d 1293, 1297 (Fla. 1990). This Court reasoned:

> At trial, the state's case against Smith consisted primarily of an allegedly inculpatory statement made by Smith and identification of Smith made by three witnesses. Dorothy McGriff, the victim's mother, testified that as she drove up to her home at 11:30 p.m., she saw a man standing outside one of the windows, She observed the man from a distance and could not identify his face. She later identified Smith based only on his shoulders. Chiquita Lowe testified that as she drove past the victim's house, a man flagged her down and asked her for fifty cents. She "looked dead at him" from a distance of eighteen inches and later conclusively identified Smith as the man. Gerald Davis testified that as he walked past the victim's house, a man engaged him in a conversation for several minutes. The street lights were out and Davis could not remember "how the guy looked." He testified that Smith looked like the man but he could not identify him positively. Of the witness identifications presented at trial, that of Lowe clearly was the most credible. After the jury had deliberated for five hours, it requested that it be permitted to rehear Lowe's testimony. The court declined. One hour later. the jury

> reseated its reauest. The court acceded. Two and one-half hours later. the jurv rendered its verdict.

Smith, 565 So. 2d at 1296-97 (emphasis added).

On March 7, 1991, the circuit court held an evidentiary hearing as ordered by this Court. Except for a proffer, the circuit court would not allow Mr. Smith to put in any corroborative evidence that Eddie Lee Mosley, the man Ms. Lowe's affidavit says she saw the night of the offense, was the man who committed this crime, and that Mr. Smith was not that man (P.C .-R. 27-47, 106-07). The proffered evidence included: a list of suspected Mosley victims, newspaper articles regarding Mosley, Dr. Frumkin's psychological evaluation of Mosley, Dr. Cohen's psychological evaluation of Mosley, Leslie Alker's HRS report on Mosley, Dr. Eichert's psychological report on Mosley, Dr. Roprowski's psychological report on Mosley, Cynthia Maxwell's deposition testimony regarding Mosley's sexual assault of her, Lisa Weisman's affidavit testimony regarding Mosley's sexual assault of her, an involuntary hospitalization order regarding Mosley, a motion appointing a mental health expert for Mosley, a Broward Sheriff's Office (B.S.O.) booking sheet regarding Mosley dated 5/19/87, a B.S.O. booking sheet regarding Mosley dated 5/17/84, a B.S.O. booking sheet regarding Mosley dated 4/30/82, a B.S.O. booking sheet regarding Mosley dated 4/12/80, a Ft. Lauderdale police report regarding Mosley dated 12/25/83, and Dr. Hathaway's testimony regarding Mr. Smith's eyesight.

In her testimony, Chiquita Lowe stated she identified the wrong man at trial. Ms. Lowe's mistake was an understandable one as Mr. Smith and Mr. Mosley , the man Ms. Lowe identified as the perpetrator in her affidavit and hearing testimony, look alike. The biggest difference between Mr. Smith and Mr. Mosley is their size. Although Mr. Davis

and Ms. Lowe said that Mr. Smith looked like the man they saw that night, Mr. Davis repeatedly stated that he thought that Mr. Smith was not big enough. Ms. Lowe had only seen a photograph of Mr. Smith's face prior to trial, and Ms. Lowe did not realize that Mr. Smith was the wrong man. When she first saw Mr. Smith in person at the trial, she realized that Mr. Smith was not large enough to be the man she saw that night. It was too late, and Ms. Lowe did not know what to do, Due to the pressure she felt, Ms. Lowe identified Mr. Smith as the man she saw, even though she knew at the time he was the wrong man.

The State dismisses Chiquita Lowe's testimony claiming that it does not entitle Mr. Smith to relief because it could allegedly have been severely impeached by her trial testimony and prehearing statements. Appellee's Answer Brief, at 66. Appellee's analysis is improper under Jones. In Jones this Court stated that a defendant is entitled to a new trial if the evidence, "had it been introduced at the trial, would have probably resulted in an acquittal. " Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). Emphasis supplied. The question is thus not whether the evidence will be favorably received by the jury at a new trial, or how it could now allegedly be impeached, but how it would probably have affected Mr. Smith's original trial, Had the evidence been presented then, the trial testimony upon which Appellee so heavily relies for impeachment purposes would not have existed. Had the photograph of Mr. Mosley been available to trial counsel and had he shown it to Ms. Lowe, there is a possibility that even her deposition testimony would not have existed. Finally, had

Detectives Amabile and Scheff actually shown Ms. Lowe a picture of Eddie Lee Mosley,[6] even her initial "identification" of Mr. Smith may not have existed.

The State also attacks the importance of Chiquita Lowe's testimony, i.e. that even if Ms. Lowe had identified Mr. Mosley, the State's case was so strong that Mr. Smith would have been convicted anyway. The State is simply incorrect, The other identifications were suspect, at best. Ms. Lowe was "clearly the most credible" witness, as this Court found when ordering the evidentiary hearing. Mr. Smith's so-called "confession" was a single remark that a particular witness could not have seen Mr. Smith because the room was dark. Contrary to the State's assertion, this information was hardly the type of information known only to the perpetrator, but rather a logical assumption given the time of day that the crime was committed. [7] Furthermore, the argument that Mr. Smith's conviction rested upon the strength of this "confession" does not comport with the lengthy deliberations and the jury's expressed interest in Ms. Lowe's testimony.

Finally, the circuit court's credibility findings must be viewed in the context of not only the appearance of impropriety created by its repeated ex parte contact with counsel for the State. They must also be viewed in light of the overwhelming evidence supporting Ms. Lowe's hearing testimony and directly contradicting the "new" contradictory testimony of Detectives Amabile and Scheff. Appellant's Initial Brief at 29-60. The findings are not supported by the record. They are not supported by the sketch made by Ms. Lowe when she

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[6]These detectives incredibly maintained at the hearing below that they had shown Mr. Mosely's photograph to Ms. Lowe even though they had testified to the contrary at trial and stated to the contrary in their official reports. See, Argument II, B, Appellant's Initial Brief, at 37-52.

'Mr. Smith, who has severe mental problems, consistently maintained at the time of trial that he had been provided this information by law enforcement

was first questioned which closely matches Eddie Lee Mosley . They are not supported by her physical description of the man she saw. They are not supported by Eddie Lee Mosley's history of pedophilia and murder, or by his limp, or by his "lazy" eye. They are based solely in the trial court's predetermination that Mr. Smith would not receive relief.

The State argues that the record reflects that Ms. Lowe's testimony could have been discovered at the time of trial through the exercise of due diligence, therefore it cannot constitute "newly discovered" evidence. If so, then Mr. Smith is nonetheless entitled to relief under State v. Gunsby, a case the State neglected to cite. If trial counsel did not exercise due diligence, he rendered deficient performance which prejudiced Mr. Smith.

As the United States Supreme Court has explained: "Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations. " Protective Committee for Ind. Stockholders v. Anderson, 390 U.S. 414, 449 (1968). Here, Judge Tyson improperly excluded evidence and refused to consider strong corroboration of Ms, Lowe's identification of Eddie Lee Mosley as the assailant. This error taints the entirety of his order and warrants a reversal.*

CONCLUSION

For the reasons stated herein in the Initial Brief and the Supplemental Brief, this case must be reversed and remanded,

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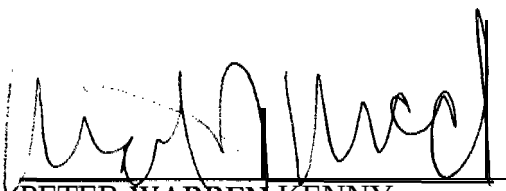
'This in addition to the argument set out supra that the order was the product of improper ex parte contact.

I HEREBY CERTIFY that a true copy of the foregoing Corrected Supplemental Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 22, 1997.



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