

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,199

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FRANK LEE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal of a trial court's denial of Rule 3.850 relief in a capital post-conviction proceeding. The post-conviction record is cited as "PC-R. \_\_\_\_" with the appropriate page number following thereafter. The direct appeal record is cited as "R. \_\_\_\_" with the appropriate page number following thereafter. All other citations are self-explanatory or are otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Smith lives or dies. This Court has traditionally allowed oral argument in capital cases. A full opportunity to air the issues through oral argument is appropriate in this case, given the significance of the issues involved and the stakes at issue, and Mr. Smith, through counsel, accordingly respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On May 9, 1985, Mr. Smith was indicted by a grand jury for first-degree murder, sexual battery, and burglary in the Seventeenth Judicial Circuit, Broward County, Florida. After entering not guilty pleas, Mr. Smith was tried by a jury beginning on January 21, 1985. The trial lasted eight days. After eight hours and twenty-five minutes of deliberations, the jury returned a guilty verdict (R. 1252). On February 5, 1986, the one-day penalty phase was held and the jury recommended death (R. 1364). On May 2, 1986, the judge sentenced Mr. Smith to death (R. 1440). Mr. Smith unsuccessfully appealed his convictions and sentence, Smith v. State, 515 So. 2d 182 (Fla. 1987), and certiorari by the United Supreme Court was denied on March 21, 1988, Smith v. State, 485 U.S. 971 (1988).

 Under the exigencies of a warrant, Mr. Smith filed a **Rule 3.850** motion in the circuit court and a habeas corpus petition in this Court. Without an evidentiary hearing, the circuit court denied Mr. Smith Rule 3.850 relief.

This Court denied Mr. Smith's habeas petition, but as to Mr. Smith's Rule 3.850 motion 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 map 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 repeated its request. The court acceded. Two and one-half hours later, the jury 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. The circuit court only permitted Mr. Smith to present Ms. Lowe's testimony. 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. **Koprowski'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 affidavit and in her hearing 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 circuit court allowed the State to present Ms. **McGriff**, the victim's mother, who testified that she was shown a



photograph of Mr. Mosley by Detectives Scheff and Amabile and told them he was not the man she saw that night (PC-R. 114). Mr. Mosley was Ms. **McGriff's** cousin (**Id.**). Ms. McGriff did not see Mr. **Mosley's** picture in a 6-picture photo lineup but in a photo book the police showed her (PC-R. 119). The State was also allowed to present Detectives Scheff and Amabile, the two police officers who investigated the case. The officers testified that the three witnesses -- Dorothy McGriff, Gerald Davis and Chiquita Lowe -- were all shown three photo lineups, each consisting of six photos (PC-R. 132-133). Officer Scheff testified that the third photo lineup, containing **Mr. Smith's** picture, was shown to Ms. Lowe on April 19, 1985 (PC-R. 132). The offense occurred on April 14, and Officer Scheff testified he went to see Mr. Mosley after the offense (PC-R. 148). Before April 19, according to **Officer Scheff's** hearing testimony, Ms. Lowe and the other witnesses had been shown a photo lineup containing Mr. **Mosley's** picture (PC-R. 133). According to Officer Scheff, none of the witnesses identified Mr. Mosley (PC-R. 135). The State did not introduce a copy of the photo lineup containing Mr. Mosley's picture and did not introduce any police reports indicating that such a lineup had been shown to the witnesses. Officer Scheff testified that his reports did not indicate he showed any witnesses a photo lineup containing Mr. **Mosley's** picture (PC-R. 160).

Officer Scheff admitted on the stand that his hearing testimony directly contradicted his prior trial testimony (PC.-R.

181). Both Detectives Scheff and **Amabile** testified at Mr. Smith's trial that the witnesses, Ms. Lowe, Mr. Davis, and **Mrs. McGriff**, were shown only two photo lineups -- one containing a Mr. Freeman's photo and one containing Mr. Smith's photo (R. 946, Amabile and R. 1026, Scheff), Their testimony at trial was also consistent with the sworn testimony they both gave at their depositions. Moreover, at trial Ms. Lowe testified about only those two photo lineups (R. 678-82 [Smith photo lineup]; R. 684 [Freeman photo lineup]). Mr. Davis also testified at trial that he viewed only two photo lineups (R. 784). In fact, the prosecutor introduced both lineups into evidence at trial to show that Freeman was eliminated as a suspect (R. 881, Freeman photo lineup, and R. 902, Smith photo lineup).

Detective Scheff, the lead investigator in this case, gave a **very** lengthy and detailed deposition covering in chronological order everything he did in this case. He never mentioned that Mr. Mosley was a serious suspect that they actively investigated. He did not mention that there was a third **photo lineup containing Mr. Mosley's** photograph. He did not mention that Mr. Mosley was a relative of Mrs. McGriff. After Detective Scheff explained that Mr. Freeman was eliminated as a suspect by Ms. Lowe, Mr. Davis, and Mrs. McGriff, the following colloquy occurred:

Q. Did you have, at this point in time, anybody in mind?

A. You mean, as a suspect?

Q. Yes.

A. Oh, no. .

Q. How about any relative of the deceased, uncles, cousins?

A. We had booked an individual by the name of Edwin McGriff, who is a cousin to Dorothy. As I had indicated earlier, we checked with - on the first night, for similar crimes. And, at that point in time, we discovered that Edwin McGriff had been accused, I think, in 1982, of a sexual battery of a minor black female child, and subsequently, we sat Dorothy McGriff down and explored the possibility with her that it might have been her cousin. She was quite emphatic that the person that she had seen was not her cousin and that she was being truthful. It was my feeling that she was.

(Scheff deposition p. 44). Again at Mr. Smith's trial, Detective Scheff was asked about relatives and again he indicated that a cousin, Edwin McGriff, was the only family member who was a suspect (R. 1022-23). Detective Scheff testified that this cousin, Edwin McGriff, was never displayed in a photo lineup (R. 1024). Detective Scheff did admit at trial that Mr. Mosley was a suspect, but testified that no photo lineup containing Mr, **Mosley's** picture was **ever** shown to the witnesses:

Q Was Eddie Lee Mosley ever a suspect in this case?

A Eddie Lee Mosley was a suspect in this case along with Edwin McGriff. Initially when we first began investigating the case, really had no specific direction to go in.

Q How about Jessie Smith?

A Jessie Smith is Eddie Lee Mosley under an alias name.

Q Lee Greely, G-r-e-e-l-y Smith?

A I don't know.

Q That's all I have.

A Spell it-again?

Q **G-r-e-e-l-y.** Doesn't ring a bell?

A **No.**

Q The man called Gator Mouth ever a suspect in this case?

A Yes.

Q The man that went by the name of Gator Mouth?

A Right.

Q Was a guy by the name of Big John ever a suspect in this case?

A **Yes.** I wouldn't say they were suspects in the case. I would say they **were** people who were brought to our attention for one reason or another.

Q How about Edward Simmons, did you ever check with John Boucada of your department? He supposedly looks like Mr. Smith.

MR. DIMITROULEAS: I will object to counsel testifying and **I'm** objecting to the form of the question.

THE COURT: Objection sustained, may **be** rephrased.

Q (By Mr. **Washor**) Did you ever investigate Edward Smith?

A Edward Simmons?

Q Simmons.

A **No,** sir.

Q Never had any contact **with Detective** Boucada regarding him?

A No, sir.

Q Were any of these people ever shown to any of the witnesses in either a photo or live lineup, people whose names I **just read off** other than Freeman?

A Other than Freeman, no.

(R. 1024 - 1026) (emphasis added).

At a pre-trial deposition, defense counsel specifically asked Detective Amabile if any of Mrs. **McGriff's** cousins were ever suspected of the murder. Detective Amabile responded that Edwin McGriff was the only cousin ever considered a suspect (Amabile Deposition at p. 44). Detective Amabile was asked this again at Mr. Smith's trial and again responded that no family members, other than Edwin McGriff, were suspects (R. 946). Moreover, Detective Amabile, like Detective Scheff, testified at trial that none of the suspects, with the exception of Freeman, were displayed in a photo lineup:

Q There were a slew of other suspects in this case, weren't there, besides Mr. Freeman?

A A slew or --

Q More than one?

A Yes.

Q Was there a Carspelia (phonetic) Williams who was a suspect?

A His name was given to us.

Q Eddie Lee Mosley?

A Yes.

Q Jessie Smith?

A I don't recall that name.

Q Greeley (phonetic) Smith?

A Again, I don't recall that name.

Q Edward Calvin McGriff?

A Yes.

Q Was he related to the family at all?

A I believe so, yes.

Q A person by the name of Gator Mouth?

A Yes.

Q A person by the name of Big John who Detective Frost said in his report somebody identified a composite?

A Yes.

Q Were any of these leads followed up on?

A Yes.

Q Were they all followed up on?

A Yes, to the best of my knowledge with the exception of the two names I don't recall hearing.

Q What became of Big John?

A That I believe Detective **Scheff** and myself checked **out** and he did not fit the physical description at all.

Q Is that reflected in **anywhere in** your notes or reports or anything of that nature?.

A No, that would be Detective **Scheff's**.

Q He should have it somewhere?

A He should.

Q Were any of these other people other than Mr. Freeman in the photographic display or in the live lineup shown to any other witnesses?

A **No.**

Q Did you investigate any of the family members backgrounds to see whether they were ever involved in this kind of thing before?

A I believe Edward McGriff.

Q Anybody else?

A **No.**

(R. 945-6) (**emphasis** added).

At the conclusion of the hearing, it was decided that the State and Mr. Smith would simultaneously do post-hearing memoranda (PC-R. 205). Post-hearing memoranda were done (PC-R. 231-64). The State and the circuit court judge then had ex parte communication in which the circuit court asked the State to prepare an order (PC-R. 274). The state then sent with a cover letter a proposed order to Mr. Smith (PC-R. 274-78). Mr. Smith filed a Motion to Disqualify the circuit court judge because of the ex parte communication (PC-R. 265-82). The motion was denied. Mr. Smith also filed objections to the **state's** draft order (PC-R. 279). The circuit court never ruled on Mr. Smith's objections, but signed verbatim the State's proposed order (Compare PC-R. 275-78 [proposed order] with PC-R. 284-87 [signed order]). Mr. Smith appealed.

#### SUMMARY OF ARGUMENT

1. The circuit court denied Mr. Smith his right to be heard by an impartial tribunal when the circuit court judge engaged in ex parte communication with the Assistant State Attorney representing the State. After the evidentiary hearing, Assistant State Attorney Zacks informed Mr. Smith's counsel that Judge Tyson had contacted Mr. Zacks and discussed Mr. Smith's case. Judge Tyson directed Mr. Zacks to prepare an order denying relief. Mr. Smith and his counsel were not privy to the discussion. Upon learning of the ex parte communication, Mr. Smith's counsel filed a motion to disqualify Judge Tyson. The

motion was denied, and Judge Tyson signed verbatim the order prepared by the State. The motion to disqualify was facially sufficient and timely, and Judge Tyson should have **recused** himself. Because of the ex parte communication, Mr. Smith reasonably questioned Judge Tyson's impartiality. Under Rose v. State, the ex parte communication requires reversal and a new evidentiary hearing.

The circuit court also denied Mr. Smith a full and fair hearing when it refused to admit or consider evidence relevant to Mr. Smith's claim. This evidence supported Mr. Smith's claim that Eddie Lee **Mosley**, not Mr. Smith, committed the murder. The trial court's refusal to admit this evidence denied Mr. Smith a fair opportunity to prove his claim, and a new evidentiary hearing is required.

2. At the evidentiary hearing, Chiquita Lowe **testified** that she was mistaken when she identified Mr. Smith at trial as the man she saw the night of the murder. Ms. Lowe realized this mistake when she saw Mr. Smith in the courtroom. Before then, she had only seen a photograph of Mr. Smith's face. When she saw Mr. Smith at trial, Ms. Lowe realized he was not big enough **to be** the man she saw. However, even though realizing her mistake at trial, Ms. Lowe did not know what to do and thus identified Mr. Smith. At the evidentiary hearing, Ms. Lowe positively identified Mr. Mosley as the man she saw. The circuit court determined that **Ms. Lowe** is "convinced" that Mr. **Mosley is** the man she saw.



Nevertheless, the circuit court erroneously denied relief, although had **Ms.** Lowe's identification of Mr. Mosley been presented at trial, Mr. Smith would not have been convicted. The circuit court premised its denial of relief upon the supposed existence of a third photo lineup containing Mr. **Mosley's** picture. The State's witnesses at the evidentiary hearing testified that this third photo lineup was shown to all of the identification witnesses shortly after the offense in 1985. The circuit court reasoned that Ms. Lowe identified Mr. Mosley because she had been shown his picture in 1985, not because she had seen him the night of the offense. This premise, however, is contrary to everything in the pretrial and trial record: pretrial and **at** trial, every witness -- the detectives and identification witnesses -- testified under oath that the identification witnesses were shown only two photo lineups. one lineup contained Mr. Smith's picture, and the other contained a Mr. Freeman's picture. At trial, the detectives specifically testified that the witnesses were not shown a lineup containing Mr. **Mosley's** picture. There was no third Mosley lineup, and thus the circuit court's premise for denying relief is incorrect. Ms. Lowe identified **Mr.** Mosley because he was the man she saw. This evidence would have resulted in **Mr.** Smiths' acquittal. Relief is required.

## ARGUMENT

### ARGUMENT I

THE CIRCUIT COURT DENIED MR. SMITE HIS RIGHT TO BE HEARD BY **AN IMPARTIAL TRIBUNAL WHEN IT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE AND DENIED MR. SMITE HIS RIGHT TO A FULL AND FAIR HEARING WHEN IT PRECLUDED MR. SMITE FROM INTRODUCING RELEVANT EVIDENCE, AND THIS CASE SHOULD BE REMANDED FOR A FULL AND FAIR EVIDENTIARY HEARING BEFORE AN IMPARTIAL TRIBUNAL.**

- 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 Stat+.

On March 7, 1991, an evidentiary hearing was held in Mr. Smith's case pursuant to this Court's order. On April 29, 1991, Assistant State Attorney Paul Zacks left a message for Mr. Smith's counsel to call Mr. Zacks. Subsequently, Martin **McClain**, Chief Assistant CCR, returned the call. At that time, Mr. Zacks said that Judge Tyson had telephoned Mr. Zacks and discussed Mr. Smith's case. As a result of that discussion, Mr. **Zacks** was assigned to draft 'an order denying Mr. Smith relief. Shortly thereafter, Mr. Smith's counsel received via facsimile a draft order and an accompanying cover letter detailing the timetable Judge Tyson and Mr. Zacks had worked out.

After learning of the ex parte communication between Judge Tyson and the State, counsel for Mr. Smith filed a Motion to Disqualify Judge, requesting that Judge Tyson **recuse** himself from Mr. Smith's case because of the ex parte communication (PC-R. 265-66). Counsel for Mr. Smith also filed Objections to Draft Order, arguing:

On May 7, 1991, defense counsel received the State's draft of a-proposed order denying 3.850 relief

in the above entitled matter. The proposed order and its cover letter accompany this pleading. Defense counsel's understanding is that the Order was drafted by the State after Judge Tyson called Assistant State Attorney Paul **Zacks** and discussed the matter. Neither Mr. Smith nor undersigned counsel were privy to that discussion. Undersigned counsel had requested that any post-hearing discussions about the case not be ex parte and that such discussions be conducted with all parties present. Counsel further suggested that the discussions could be telephonic but that a court reporter should be on the line in order to put the discussions on the record.

(PC-R. 279). Judge **Tyson** did not rule on the Objections to Draft Order. On June 6, 1991, Judge Tyson denied the Motion to Disqualify (PC-R. **283**), and, the next day, June 7, 1991, signed verbatim the State's order (PC-R. 284-87).

Judge Tyson's actions in conducting ex parte discussions with the State regarding the merits of Mr. Smith's case denied Mr. Smith his right to have his case adjudicated by an impartial tribunal, in violation of Florida law, due process, **equal** protection, and **the** Eighth and Fourteenth Amendments. The ex parte communication between Judge Tyson and the State denied Mr. Smith **"the** cold neutrality of an impartial **judge"**:

The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. **See generally** Steven Lubet, Ex Parte Communications: An Issue in Judicial Conduct, 74 *Judicature* 96, 96-101 (1990).

Cannon **3A(4)** of Florida's Code of Judicial Conduct states clearly that

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Fla. Bar Code of Jud. Conduct, Canon **3(A)(4)** (emphasis added). Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single **litigant**. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by un rebutted remarks about the other **side's** case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. As Justice **Overton** has said in this Court:

[C]anon [3A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they **are** expressly authorized by statutes or rules.

In re Incruiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).

We are not here concerned with whether an ex parte communication **actually** prejudices one party at the expense of the other. The most insidious 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:

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)**. Thus, a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

Rose v. State, 17 F.L.W. **S319**, 320 (**Fla.** May 28, 1992) (**emphasis added**). In Rose, this Court reversed the denial of Rule 3.850 relief because it appeared that the State and trial judge had ex parte communications during which the State was directed to prepare the order denying relief. In Mr. Smith's case, **the State** has admitted **there** was ex parte communications between Judge Tyson and Mr. **Zacks**. Moreover, unlike Rose where the order was a summary denial of relief and where no evidentiary hearing had been held, in Mr. Smith's case, the judge and assistant state attorney had ex parte communication regarding an issue upon which an evidentiary hearing **had been held and which therefore required** the judge to resolve disputed facts. As in Rose, this conduct requires a reversal and a new hearing on Mr. Smith's claim.'

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'Mr. Smith's case involves the same State Attorney's Office and the same judicial **circuit** as was involved in Rose.

In Mr. Smith's case, Judge Tyson engaged in ex parte discussions with the State regarding the ultimate issue to be decided -- the merits of Mr. Smith's claim -- and permitted the State to resolve (in its favor) the factual matters presented at the evidentiary hearing. Mr. Smith **was** entitled to impartial factfindings, not findings made by the opposing **party**:

The attorney general of the state is not a disinterested expert in a criminal case but, in fact, is an **arm** of the prosecution. **See** section 16.01, Fla. Stat. (1989). Ex parte communication between a trial judge and assistant attorney general concerning a pending criminal case is totally inappropriate and will mandate reversal if: 1) The defense has requested that the trial judge recuse himself or has requested a mistrial which is denied: 2) where the defendant can demonstrate that there was prejudice **as a** result of the improper communication: or 3) the judge is sitting as the trier of fact. **See** Livingston v. State, 441 So. 2d 1083 (Fla. 1983); State v. Steele, 348 So. **2d** 398 (Fla. 3rd DCA 1977).

Love v. State, 569 So. 2d 807, 810 (Fla. 1st DCA 1990). Here, Judge **Tyson** -- the trier of fact -- engaged in ex parte communication with the Assistant State Attorney -- counsel for the opposing party. Mr. Smith requested that Judge Tyson recuse himself, but the request was denied. Judge Tyson's conduct therefore **"mandate[s] reversal."** Love.

The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the fact-finding process. **See** Code of Judicial Conduct, Canon 1, Canon **2A**, Canon **3A(4)**, Canon 3C. Canon **3A(4)** emphasizes, **"A** judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, **neither** initiate nor

consider ex parte or other communications concernins a pending or impending sroceeding." (Emphasis added).\*

When a court is required to make findings of fact, "the findings must be based on something more than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by **one** party to the controversy, but by both." Simms v. Greene, 161 **F.2d** 87, 89 (3rd Cir. 1947). A death-sentenced inmate desewes at least **as** much.

[T]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E. E. O. C. v. Federal Reserve Board of Richmond, 698 **F.2d** 633, 640-41 (4th Cir. **1983**), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 **F.2d** 426, 435 (5th Cir. **1977**). Rule 3.850 proceedings are governed by the principles of due process. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Due process cannot **be squared** with the treatment that the motion to vacate received in this capital case. It is one thing for a court to adopt a proposed order on ministerial or procedural matters. It is quite another for a court to adopt wholesale one side's findings on the merits of what is at issue in the action. Mr. Smith was entitled to a full and fair independent resolution from the court; here, the claim

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<sup>2</sup>Canon 3A(4) of the Code of Judicial Conduct was the Canon relied upon by this Court in Mr. Rose's case. See Rose, 17 F.L.W. at 320.

was resolved by his party opponent. Courts have criticized such procedures consistently -- the taste of unfairness remains in such cases because findings should be made by the court, not "written by the prevailing party to a bitter dispute." Amstar Corp. v. Domino's Pizza, Inc., 615 **F.2d** 252, 258 (5th Cir. 1980). See also Love v. state; Shaw v. Martin, 733 **F.2d** 304, 309 n.7 (4th Cir. 1984). Given the heightened scrutiny which the Eighth Amendment requires in capital proceedings, a resolution such as the one involved in this case is even more distasteful.

Mr. Smith was entitled to all that due process allows -- a full and fair hearing by the court on his claims. Rose; Cf. Holland v. State, 503 So. **2d** 1250 (Fla. 1987). These rights were abrogated by the circuit court's adoption of the state's factually and legally erroneous **order**<sup>3</sup>. This Court ordered a **full** and fair resolution of Mr. Smith's well-founded innocence claim; however, Mr. Smith was denied an impartial tribunal. This case should be remanded for a full and fair evidentiary hearing before a new circuit judge for a proper resolution of the issues.

The circuit court denied the Motion to Disqualify as "**legally** insufficient" (PC-R. 283). This ruling was incorrect. The Florida Rules of Criminal Procedure provide **for** the disqualification of a judge as follows:

RULE 3.230. DISQUALIFICATION OF JUDGE

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the

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<sup>3</sup>See Argument II.



movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only. but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(Emphasis added).

A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. After Mr. Smith learned of the ex parte communication, Mr. Smith filed a motion to disqualify and objections to draft order. Mr. Smith filed his motion and objections prior to the circuit court's ruling on Mr. Smith's motion to vacate. **Mr.** Smith's motion met all of the requirements of a motion to disqualify. It contained: (1) a verified statement of the **specific** facts which indicate a bias or

**prejudice** requiring disqualification; (2) two affidavits; and (3) a certificate of good faith by counsel (PC-R. 265-82). The motion to disqualify was filed as soon as **Mr. Smith's** counsel learned of the ex parte communication between Judge Tyson and **Mr. Zacks**, and thus was timely. The motion was legally sufficient on its face.

This Court has repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleaed nor adjudicate the question of disqualification." Suarez v. State, 527 So. 2d 191 (Fla. 1988) (emphasis added).<sup>4</sup> To establish a basis for relief a movant:

need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the iudse feels, it is a ouestion of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Doualas, 400 so. 2d 553 (Fla. 4th DCA 1981). The question of **disqualification** focuses on those matters from which a litiaant may reasonably **question a judge's impartiality** rather than the **judge's** perception of his ability to act **fairly and impartially**.

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<sup>4</sup>See also Livingston, Bundy v. Rude, 366 So. 2d 440 (Fla. 1978); Digeronimo v. Reasbeck, 528 So. 2d 556 (Fla. 4th DCA 1988); Ryon v. Reasbeck, 525 So. 2d 1025 (Fla. 4th DCA 1988); Fruhe v. Reasbeck, 525 So. 2d 471 (Fla. 4th DCA 1988); Lake v. Edwards, 501 So. 2d 759 (Fla. 5th DCA 1987); Davis v. Nutaro, 510 so. 2d 304 (Fla. 4th DCA 1986); ATS Melbourne, Inc. v. Jackson, 473 so. 2d 280 (Fla. 5th DCA 1985); Gieseke v. Moriarty, 471 So. 2d 80 (Fla. 4th DCA 1985); Manasement Corm. v. Grossman, 396 So. 2d 1169 (Fla. 3rd DCA 1981).

Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983), reh'g. denied, 443 So. 2d 998 (Fla. 1984) (**emphasis** added). Mr. Smith's Motion to Disqualify clearly showed "**a well-grounded fear**" that Judge Tyson could not act impartially: the motion alleged that Judge Tyson engaged in an ex parte discussion with the State regarding the resolution of Mr. Smith's claim.

The focus of inquiry is limited to consideration of the reasonable fears of the movant that the **judge** cannot provide a fair and impartial order. This Court has emphasized:

What is important is the party's reasonable belief concerning his or her ability to obtain **a fair trial**. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Livingston at 1086-87 (**emphasis** added). See also Suarez, 527 So. 2d at 191; Crosby v. State, 97 So. 2d 181, 183 (Fla. 1957).

Based on the ex parte **communication**, Mr. Smith reasonably questioned Judge Tyson's impartiality. Mr. Smith's **fear** that the circuit court was not impartial was not only reasonable but realized when Judge Tyson signed the State's order despite Mr. Smith's timely objection. In Rose, this Court reasoned, "**We** are not concerned with whether an ex parte communication **actually** prejudices one party at the expense of **the** other. The most insidious 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." Rose, 17 F.L.W. at 320 (**emphasis** in original).

Disqualification was proper in this case. As stated above, the circuit court had at least one ex **parte** communication with the State. In Rose, this Court ruled, "a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation." 17 F.L.W. at 320 (emphasis in original). Rose establishes that the circuit court's action in Mr. Smith's case was **improper**.<sup>5</sup> This Court must remand Mr. Smith's case for a full and fair hearing before a new judge. Rose r e z .

B. The circuit court denied Mr. Smith his **right** to a full and fair hearing when it **precluded** Mr. Smith from **introducing relevant evidence**.

This Court ordered the trial court to "**conduct** an evidentiary hearing to evaluate new evidence." Smith v. Dugger, 565 So. 2d at 1297. Earlier in the opinion, the Court noted that Chiguita Lowe had identified Eddie Lee **Mosley** as **the** man she saw the night 'of the-offense and that Mosley was "**a** former suspect

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<sup>5</sup>The United States Supreme Court has also recognized the basic constitutional precept of a neutral, detached judiciary. Marshall v. Jerrico. Inc., 446 U.S. 238, 242 (1980). Due process guarantees the right to **a neutral** detached judiciary. Carey v. Pihus, 425 U.S. 247, 262 (1978); Taylor v. Hayes, 418 U.S. 488, 501 (1974).

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As **the United States Supreme Court** indicated in Beck v. Alabama,<sup>447</sup> U.S. 625 (1980) special procedural rules are **mandated** in **death** penalty cases in order to insure the reliability of the sentencing determination. "**In** capital cases the finality of the sentence imposed warrants protections that may or may not be required in other **cases**." Ake v. Oklahoma,<sup>470</sup> U.S. 68, 87 (1985) (**Burger**, C.J., concurring). Thus, in a **capital** case such as Mr. Smith's the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment.

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." 565 So. 2d at 1296. Despite this Court's directive to "conduct an evidentiary hearing to evaluate new evidence" and this Court's mention that other evidence corroborated Ms. Lowe's identification of Mr. Mosley, the trial court limited Mr. Smith's presentation to the testimony of **Ms. Lowe**. Mr. Smith was not provided a full and fair hearing on his newly discovered evidence claim.

The trial court refused to admit a list of thirty of Mr. Mosley's potential victims, seven local newspaper articles regarding Mr. Mosley as a serial killer, five mental health evaluations of Mr. Mosley, Cynthia Maxwell's deposition regarding Mosley's sexual assault on her, Lisa Wiseman's affidavit regarding Mosley's sexual assault on her, a circuit court order regarding the involuntary hospitalization of Mr. Mosley, a motion to appoint additional experts in State v. Mosley, and five police offense reports on Ms. Mosley (Defense Exs. A-P). The trial court also refused to admit Dr. Hathaway's testimony regarding Mr. Smith's eyesight (PC-R. 92-103). The trial court thus considered Ms. Lowe's testimony in a vacuum. **Ms. Lowe's** testimony that Mr. Smith was not the man she saw the night of the offense was only part of Ms. Lowe's affidavit upon which this Court ordered a hearing, The other part was that Mr. Mosley was the man Ms. Lowe saw that night. The evidence the circuit court

refused to admit corroborated Ms. Lowe's testimony that Mr. Mosley was the man she saw, and that Mr. Smith was not that man.

Ms. Lowe's testimony as to Mr. Smith not being the man she saw would have been corroborated by Dr. Hathaway's testimony if the trial court had allowed it into evidence. Ms. Lowe testified at the hearing and at trial (R. 703) that the man she saw on April 14, 1985 and April 19, 1985 did not have glasses on. Dr. Hathaway's testimony was that Mr. Smith is legally blind (PC-R. 94) and that his uncorrected vision is off the eye charts at **20/400** (PC-R. 98). Dr. Hathaway also testified that the average nearsighted person is -3.00 and that Mr. Smith is a -12.00. Ms. Lowe testified that the man flagged her down and approached her car, leaning in the driver's side window. Ms. Lowe did not testify that the man felt his way along her car or appeared to have trouble seeing her (i.e., as if he needed his glasses). Without glasses, Mr. Smith would certainly have struggled and fumbled.

Ms. Lowe's testimony that Mr. Mosley was the man was corroborated by all the mental health evaluations, the deposition, Lisa **Wiseman's** affidavit, the victim's list, the local newspaper articles, a motion to appoint additional experts in Mr. **Mosley's** trial, an involuntary **hospitalization** circuit court order for Mr. Mosley and the five police offense reports. Mr. Mosley has an established record for violent sex crimes, all involving girls and women from the northwest section of Fort Lauderdale, the same area where Shandra Whitehead was killed, and

is considered by Fort Lauderdale police as the **city's "most dangerous serial killer"** (Def. Ex. **B**). Since Mr. Smith's conviction, Mr. Mosley has been arrested, charged, and indicted in two rape/ murders. Additionally, he has been tied to six other rape/ murders and five forcible sexual batteries between 1973 and 1987 and is a suspect in numerous others (Def. Exs. **A, B, H, I, L, M, N, O, P**).

Police and Department of Corrections records regarding Mr. Mosley indicate strong resemblances between Mr. **Mosley's** behavior and that of the person encountered by Davis and Lowe. Both Mr. Davis and Ms. Lowe described the suspect's behavior as strange, delirious, and weird (R. 668-69, 750). Mr. Mosley has an I.Q. of about 51 and has been found to be incompetent to stand trial on two occasions (Def. Exs. **C, D, E, F, G**). Mr. Davis described the suspect as rugged looking (R. **750**), unkempt with kinky, **knotted** and uncombed hair (R. **751**), and said that he appeared to be a **"bum"** (R. 756). Mr. Mosley was a loner and spent much of his time living on the streets (Def. Exs. **C-G**).

Ms. Lowe testified at trial that about four days after the offense, a man came to her home trying to sell a television set, and that this man was the same person Lowe had seen near the victim's house (R. 677). The suspect **that** allegedly tried to sell the T.V. to Ms. Lowe's grandmother brought the T.V. to the house in a shopping cart (R. 804). Mr. **Mosley's** records establish that his usual routine was to steal things and then peddle them from a grocery cart (Def. Exs. **C, E, G, L, P**). When

Mr. Mosley was arrested in 1987, he was pushing a shopping cart full of stolen plants down the street, and admitted that he was going to sell them (Def. Ex. L). Upon his arrest, he also implicated himself in nine murders (Id).

Davis testified that the person he encountered approached Davis from a field across from the victim's house (R. 745-46), and asked Davis if he had any drugs and if he wanted to have sex (R. 748-49). **Mosley's** records establish that he had a habit of approaching strangers from a field and asking them for drugs. In 1980, Mosley was convicted of a sexual battery which occurred after he asked the victim where he could buy some drugs (Def. Ex. H). In 1984, Mosley was charged with a sexual battery which occurred in a vacant field (Def. Ex. M). During that assault, Mosley told the victim he had "**not** murdered all those **girls.**" Id. In 1982, Mosley was charged with a robbery and battery which occurred after Mosley approached a car and asked the driver if he wanted to buy some drugs (Def. Ex. N). The records also include an order for involuntary hospitalization (Def. Ex. J) that stated Mr. Mosley suffered from sexual preoccupation and overt homosexuality. In addition, there were many mental health evaluations (Def. Exs. C-G).

Davis also testified that the person he encountered "**ran** as if he was **knock-knee'd**, wasn't **straight**" (R. 756). Mosley's records establish that he suffered a serious leg injury as a child, at one time used a cane, and walks with a distinct limp (Def. Exs. C, D).



This crime involved the sexual assault and murder of an eight-year-old girl. **Mosley's** records include statements in which he has said he has no problem fulfilling his sexual needs because he watches the girls coming out of school and has no trouble satisfying his sexual needs (Def. Ex. F). At the time of the offense, when Davis refused the suspect's sexual advances, the suspect told Davis, "**I** guess I have to go back and jack myself **off**" (R. 749), and then headed for the victim's house (R. 750).

The only evidence tending to implicate Mr. Smith was the identification testimony at trial, which was established at the hearing to have been a mistake. As Ms. Lowe testified at the hearing, Eddie Lee Mosley was the man she saw, and Frank Lee Smith was not the man. Ms. Lowe indicated that when she saw Mr. Smith in the courtroom (she had never seen him in person before that time); she **knew** he was not the man she encountered near the victim's home. Ms. Lowe's testimony is corroborated by records indicating that Mosley has a history of sexual offenses involving girls and women in the same section of Ft. Lauderdale, that Mosley peddles stolen goods from a grocery cart (as the suspect in this case did), that Mosley has a pattern of approaching strangers from fields and asking for drugs (as Davis testified the suspect in this case did), that Mosley had a serious leg injury and walks with a limp (as Davis testified the suspect in this case did), and that Mosley is preoccupied with sex (as the suspect in this case indicated to Davis).

The trial court erred in refusing to admit and consider this evidence. The evidence was relevant to Mr. Smith's claim and therefore admissible. See State v. Savino, 567 So. 2d 892 (Fla. 1990) ("a defendant may introduce similar fact evidence of other crimes or 'reverse Williams rule evidence' for exculpatory purposes if relevant"). The trial court's refusal to admit this evidence denied Mr. Smith a full and fair hearing. This Court should reverse and order a new evidentiary hearing at which Mr. Smith may present and have considered all of the evidence supporting his claim.

#### 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.**

This Court found that the State's case **against** Mr. Smith **hinged** upon the identification testimony of Ms. Lowe who had seen a suspicious man near the victim's home about one hour before the time of the offense. Smith v. Duvaer, 565 So. 2d 1293, 1295 (Fla. 1990). Discussing Ms. Lowe's role at trial, this Court explained that "[o]f the witness identifications presented at trial, that of Lowe clearly was the most credible." Id. No physical evidence implicated **Mr. Smith -- there** were no fingerprints, no blood stains, no serology evidence and no fiber particles, The State's case consisted of the three identification witnesses of whom **Ms. Lowe** was clearly the key.

**Mrs. Dorothy McGriff**, the victim's mother, who had seen a man in the dark reaching into a window of her home, could not

describe the man's face (R. 655), and only "identified" Mr. Smith by the shape of his shoulders (R. 656). Mr. Davis, a passerby who encountered a strange man in the street near the victim's home, could not positively identify Mr. Smith (R. 795), and could only say Mr. Smith **"looked like"** the man Davis had seen (R. 793). Ms. Lowe was the key, as the jury twice requested that her testimony be read during the jury's deliberations. The jury obviously had significant doubts regarding Mr. Smith's guilt, deliberating for over eight hours -- ultimately resolving that doubt based upon Ms. Lowe's testimony. It is from this perspective that this Court remanded Mr. Smith's case based upon Ms. Lowe's affidavit in which she swore **"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."** Smith v. Dugger, 565 so. 2d at 1296.

What was revealed in post-conviction -- and what the Circuit Court heard at the evidentiary hearing -- would have resolved the jury's doubts in Mr. Smith's favor. Ms. Lowe has now provided sworn testimony explaining that when she was testifying at Mr. **Smith's** trial, she knew that Mr. Smith **was** not the man she had seen near the victim's house. **Ms.** Lowe explained that the photograph of another suspect in the crime, Eddie Lee Mosley, is the man she saw and that she wrongly identified Mr. Smith. Ms. Lowe did not waiver from her sworn affidavit but gave compelling

testimony which only confirmed what she had said in the affidavit.<sup>6</sup> Through Ms. Lowe's testimony, Mr. Smith has proven his entitlement to relief -- that Ms. Lowe's testimony at the evidentiary hearing **"had** it been introduced at the trial, would have probably resulted in an **acquittal."** Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

A. Ms. Lowe's Hearing Testimony

Ms. Lowe's<sup>7</sup> testimony at the evidentiary hearing conclusively establishes what the defense counsel at trial was attempting to show -- that Mr. Smith was the wrong man. The State at the hearing, and the circuit court judge in the order denying relief, made no suggestions, allegations or findings that Ms. Lowe was now lying about who she believes she saw on April 14, 1985. In fact, the circuit court judge in the order denying relief found that Ms. Lowe "became convinced that Mosley **was** the individual she had seen at her home near the time of the **homicide**" (PC-R. 285). This is not a case in which the lower court has found the recanting witness, Ms. Lowe, to be lying. To the contrary, the court found that she is **"convinced"** that Mr. Smith is not the man she saw on the night of the murder and that it was Mr. Mosley instead. This is obvious to anyone who reviews the transcript of Ms. Lowe's testimony. **Ms.** Lowe unhesitantly

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<sup>6</sup>The text of Ms. Lowe's affidavit is set forth fully in this Court's previous opinion. Smith v. Dusser, 565 So. 2d at 1296.

<sup>7</sup>**Prior** to the evidentiary hearing, Ms. Lowe was married. Her name is now Chiquita Ling. To avoid any confusion, she will be referred to by her **maiden** name, Ms. Lowe.

testified that she still recalls very well the moment the man flagged her down on April 14, 1985 (PC-R. 50).

Ms. Lowe became "**convinced**" that Mr. Smith was not the individual she saw on the night of the murder long before she gave her affidavit in 1989. Prior to trial, Ms. Lowe had never seen Mr. Smith in person. She had only seen a photograph of Mr. Smith in a photo lineup. When she saw Mr. Smith in the courtroom, she became "**convinced**" that Mr. Smith was the wrong man. At the evidentiary hearing, she testified:

Only thing I remember is when I walked into the courtroom . . . I seen Mr. Frank [Smith] standing up there. I had my -- they kept saying is that the man, but I had my doubts that was the man because the man I seen that night he was muscular, big and Mr. Frank [Smith] was **not.**"

(PC-R. 65). Ms. Lowe testified that despite her doubts she identified Mr. Smith at trial as the man she saw (PC-R. 79). When asked why she **didn't** tell the **court** and jury that she made a mistake, she testified:

A. No, I couldn't feel like that. Because -- I couldn't. I was confused.

Q. Were you worried while you were testifying about whether or not Mr. Smith was the right person?

A. I was confused.

THE COURT: I didn't hear the answer?

THE WITNESS: Confused.

BY MR. MCCLAIN:

Q. Can you tell me as best you can what you are thinking? What was it that you were confused about?

A. That they saying they got the man. The man needs to be off **the** street. **He's** dangerous and they

kept saying "**this** is the **man**," you just have to say "**this** is the man because he need to **be** off the street." And I was thinking about the little girl's mama, that she's going through this, that had happened with her daughter and everything. I **was** just confused.

Q. Did you feel a lot of weight on your shoulders?

A. Yes.

Q. When you were in the courtroom and you looked at Frank Lee Smith, did you have nagging doubts in the back of your head?

A. Yes.

\* \* \*

BY MR. MCCLAIN:

Q. When you looked at Mr. Smith in the courtroom, what were you thinking?

A. What they told me, "**the** man was dangerous and he needs to be off the street."

Q. What were you thinking about his **fitting the** description?

A. He didn't fit that description that I sketched out.

Q. When you got off the witness stand, what did you think?

A. Terrible.

(PC-R. 79-80). Ms. Lowe's doubt about her identification of Mr. Smith was present long before 1989. At trial, she knew that Mr. Smith was not the man she saw -- that **he didn't** fit the description she sketched out. (**Id**).

She testified that when Mr. Walsh, an investigator with undersigned counsel's office, approached her on December 10, 1989 and showed her a photograph of Mr. Mosley she knew that:

This is the one that flagged me down in the car... [I]t brought moments back of the incident when it happened. ... A warm feeling came over me.

(PC-R. 52). When asked if she was certain Mr. Mosley was the man she saw, Ms. Lowe testified that she was **"very, very, very, certain"** (PC-R. 52; see also PC-R. 74-75 and 84).

Ms. Lowe testified that once the police arrested Mr. Smith, she was under **"a lot of pressure"** to identify him as the man she saw that night (PC-R. 63-64, 71). When questioned about her identification of Mr. Smith from the photo lineup, she testified:

They asked me is one of these the guy. I said no, but I said that his hair was like the guy I seen that night.

(PC-R. 71). Ms. Lowe admitted picking out Mr. Smith from the photo lineup but was emphatic that she told the detectives **"that the hair was like the guy -that [she] saw"** (PC-R. 60).

**Ms.** Lowe explained that Detectives Scheff and Amabile pressured her to make an identification of Mr. Smith at the photo lineup (PC-R. 63). She testified that she was under:

**"A lot of pressure . . . from the police officer that came out there telling me that the man is dangerous and if he stays out there, he's going to do it to someone else. So I was up on a lot of pressure."**

(PC-R. 62-63).

She explained further:

I only told them that the hair look like the man that did it. And when I say the hair that looks like the man that did it, they kept pushing me **"Is this the man, Is this the man, Is this the man."** . . . They kept saying that.

(PC-R. 81).

Ms. Lowe also testified that she felt pressured by the prosecutor (PC-R. 63). She specifically recalled being pressured to say that the man she saw that night had a scar under his eye (PC-R. 53). Of course, Mr. Smith has a significant noticeable scar under his right eye (R. 706).<sup>8</sup> Ms. Lowe said she was pressured to testify at trial about the scar but refused to do so (PC-R. 53). In fact, the circuit court judge at the evidentiary hearing, noticing the scar under Mr. Smith's eye, asked Ms. Lowe about this:

The Court: **Ma'am**, did you say the person that you saw did or did not have a scar?

The Witness: The man that learned in my car? No scar.

The Court: Did not have a scar?

The Witness: No scar.

(PC-R. 87-88).

Ms. Lowe testified that she felt pressure from not only the state but also from her neighborhood, people she knew, and friends (PC-R. 78). Moreover, Ms. Lowe was constantly thinking about the victim:

I know that little girl got killed. I know she had got killed and that's all that was going through my mind, the little girl got killed.

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<sup>8</sup>At trial, the significance of Ms. Lowe's description of the individual she saw on the night of the murder as having no scar was brought out by trial counsel. Counsel instructed Ms. Lowe to step down and look closely at Mr. Smith's face. Ms. Lowe did so and acknowledged the scar on Mr. Smith's face and affirmed that she never saw that noticeable scar on the face of the man she saw on the night in question (R. 706-7).



(PC-R. 86). As a result of all this pressure, Ms. Lowe was, in her words, **"confused"** when she finally saw Mr. Smith in person and realized he was not the man she saw that night (PC-R. 79). At the time of Mr. Smith's trial, Ms. Lowe was only 19-20 years old (PC-R. 77).

Ms. Lowe's hearing testimony left no doubt that at Mr. Smith's trial she realized that Mr. Smith was the wrong man. On December 10, 1989, this was only confirmed when she saw Mr. **Mosley's** photo and **"became** convinced that Mosley was the individual she had seen at her home near the time of the **homicide"** (PC-R. 285) (Circuit Court order denying relief). The state failed to establish -- in fact, never attempted to show -- that Ms. Lowe had a motive to lie at the evidentiary hearing. Although the State questioned her about having been convicted of a theft charge subsequent to Mr. Smith's trial, the **State never** tried to establish nor argue that Ms. Lowe has now decided to fabricate her testimony as a result of that conviction. Moreover, Ms. Lowe openly admitted that she had been convicted of a theft charge (PC-R. 73). The record clearly establishes that Ms. Lowe's theft conviction is in no way related to her testimony that Mr. Smith is the wrong man. She testified truthfully, and, as the circuit court found, is **"convinced"** that Mr. Mosley and not Mr. Smith is the man she saw that night.

In light of Ms. Lowe's unimpeachable recantation, the State attempted to establish that Ms. Lowe is merely confused and that she had, at the time of the pretrial investigation, been shown a

photo lineup containing Mr. **Mosley's** photo which she failed to recognize. When asked if she had been shown a photograph of Mr. Mosley pre-trial she emphatically stated she would recognize Mosley if she saw him (R. 69), that "**they** didn't show me no picture of **him**," (PC-R. 70) and that "**the** only thing that was close to the guy that I seen that **night**" was the composite sketch they drew (PC-R. 70). Moreover, Ms. Lowe's testimony at the evidentiary hearing was consistent with her trial testimony that she had only been shown two photo lineups -- the one containing Mr. Smith's photograph and another containing a photograph of a previous suspect, a Mr. Freeman. When questioned about being shown photographs other than the photo lineup containing Mr. Smith's photograph, Ms. Lowe testified:

I do know that they did show me some more photographs because it was a guy in the photographs they kept questioning me about. I don't **know him** personally, but I knew him.

(PC-R. 69). Ms. Lowe testified at trial about this same photo lineup containing a photograph of Mr. Freeman, a man from the neighborhood that she recognized (R. 684). Although she recognized Mr. Freeman, she said that he was not the man she saw on the night in question (R. 684). At trial, as at the evidentiary hearing, Ms. Lowe testified about only those two photo lineups -- there was no third photo lineup.

B. **The "Mysterious" Mosley Photo Lineup**

Ms. Lowe is not the only one who had, prior to the evidentiary hearing, testified under oath that there were only two photo lineups shown to the witnesses. Both Detectives Scheff

and Amabile gave clear unambiguous testimony at Mr. Smith's trial that the witnesses, Ms. Lowe, Mr. Davis, and Mrs. McGriff, were shown only two photo lineups -- one containing Mr. Freeman's photo and one containing Mr. Smith's photo (R. 946, Amabile and R. 1026, Scheff). Their testimony at trial was also consistent with the sworn testimony they both gave at their depositions. Moreover, Mr. Davis testified at trial that he viewed two photo lineups (R. 784). In fact, the prosecutor introduced both lineups into evidence at trial to show that Freeman was eliminated as a suspect (R. 881, Freeman photo lineup, and R. 902, Smith photo lineup). Finally, all of the police reports in the case mention only the two photo lineups (PC-R. 159-60). The only conclusion to be drawn from this unambiguous evidence is that there were only two photo lineups shown to the witnesses -- there was no photo lineup containing Mr. **Mosley's** photograph, Ms. Lowe, Mr. Davis and Ms. McGriff do not mention it at trial or in their depositions. Detectives Scheff and Amabile swear at trial and in their depositions that there was no third photo lineup. There are no notations of a third photo line-up anywhere in the homicide file (PC-R. 160). Additionally, the prosecutor never produced a third photo lineup at trial.

Despite this overwhelming evidence that only two photo lineups were conducted, the State presented at the evidentiary hearing the completely contradictory testimony of Mrs. McGriff and Detectives Scheff and Amabile that there was a third photo lineup containing Mr. Mosley's photograph. Notably absent from

the State's case at the evidentiary hearing was any testimony from Mr. Dimitroleas concerning this Mosley photo lineup. Surely, as the prosecutor, he would have been aware of the photo lineup if it had been conducted. Mr. Dimitroleas introduced the Freeman photo lineup into evidence at Mr. Smith's trial. His failure to do the same with this mysterious Mosley photo lineup and his absolute silence concerning this lineup at the evidentiary hearing is clearly damning of the State's theory that such a lineup was conducted. None of these witnesses provide any explanation for this significant contradiction in their testimony at trial and at the evidentiary hearing and the state offered no theory on how this photo lineup failed to surface until seven years after the fact. Nevertheless, the circuit court relied upon this **"mystery"** photo **lineup** to discredit Ms. Lowe's testimony without addressing the overwhelming pre-hearing evidence which established that there was no third photo lineup containing Mr. Mosley's photograph.

In an attempt to establish that **there** was a third photo lineup containing Mr. **Mosley's** photograph, the State called the victim's mother, Mrs. **McGriff**. Mrs. **McGriff's** testimony concerning this **"mysterious"** photo lineup was confusing at best:

**Q.** At anytime did the **police come** to you in those days after your daughter was killed and show you photographs?

A. Yes.

**Q.** Do you remember how many times or how many photographs they may have showed you?

A. Oh, about two or three.

Q. Did they show you a large group of photographs or was it one at a time?

A. Yes, they showed me one at a time and then they showed me large size.

Q. Okay. And on any of those occasions, did the police officers show you a picture of Eddy Lee Mosley?

A. Yes.

Q. Was it in a group or single photo, do you remember?

A. It was in a group.

(PC-R. 113). On cross-examination, counsel attempted to clarify Mrs. **McGriff's** answer:

Q. Now, you indicated that they showed you two or three photos, or was that two or three they showed you?

A. They showed me about two or three photo -- Well, they asked me to look through the pictures.

Q. They gave you a couple of photos, gave them to you and asked you to look through them?

A. Uh-huh.

Q. And that was all the photos that the police ever showed you or did they show you more later, or do you remember?

A. No, I don't remember.

Q. Okay. Did they also show you -- I mean, if you don't remember just say you don't remember. **I'm** just trying to be sure. I understand what you're saying.

Do you remember, did they actually show you a line **up** at one point in time with about six pictures in it?

A. No, there wasn't no six pictures. It was like a photo book, do you know how you get a photo book?

Q. Yes.

A. I looked through the photo book and skimmed through to look in the photo book.

Q. So they showed you a photo book?

A. Yes.

Q. And it was a photo book with more than six pictures in it?

A. Yes.

Q. And when did they show you the photo book?

A. Oh, gee. I just don't remember, but I think right after - right after my baby's death, I think, I'm not for sure, right after. I'm not sure.

Q. You mean like the next day?

A. Yeah.

Q. And did they show you photo of Frank Lee Smith that day?

A. Did they show me?

Q. Yes.

A. No, I picked him out myself.

Q. In that book?

A. Yes.

Q. And that was the next day after your daughter's death?

A. Yes.

Q. Was Eddy Lee Mosley in that photo book?

A. Yes.

Q. Did the police specifically say "how about this guy?"

A. No.

Q. But you saw his photo in there?

A. Yes.

Q. Did you tell the police that that was not the person?

A. Yes.

Q. You just -- Did you -- As you went through the photo book, did you say "**this** isn't the person, this isn't the person?\*"@

A. Yes.

Q. And then when you got to Frank Lee Smith you said "**this** is the **person**?"

A. Yes.

(PC-R. 118-121). Obviously, Mrs. McGriff does not remember what happened and does not know what she is talking about. Prior to the evidentiary hearing, neither she nor Detectives Scheff or Amabile ever mentioned Mrs. McGriff viewing photographs out of a photo book.

Moreover, their testimony has always been that Mrs. McGriff identified Mr. Smith from a photo lineup and not while -perusing a photo book (R. 642, McGriff; R. 985, Scheff; R. 908 Amabile). At the evidentiary hearing, both Detectives Scheff and Amabile stated that Mrs. McGriff was shown a photograph of Mr. Mosley in a photo lineup and not a photo book (PC-R. 148, Scheff and 185-6, Amabile). Detective Amabile who sat through Mrs. **McGriff's** testimony at the evidentiary hearing admitted that her memory as to what transpired and when it transpired was different from his memory (PC-R. 198).

Although Mrs. McGriff, Detective Scheff, and Detective Amabile have different stories concerning how and when Mr. **Mosley's** photograph was shown to Mrs. McGriff, they all testified

that she identified his photograph as **Mr. Mosley** and stated he was her cousin and not the man she saw that night. In fact, Detective Amabile testified that he remembered this specific photo lineup because Mrs. McGriff had stated that Mr. Mosley was her cousin. The problem with this testimony is that as with the testimony about the existence of a third photo lineup containing **Mr. Mosley's** photograph, their prior sworn testimony is in direct contradiction. At no time pre-trial or at trial did anyone identify Mr. Mosley as a relative of **Mrs. McGriff** -- and they were all asked whether any of her relatives were suspected of the murder. In answer to the direct question, the only relative the detectives ever identified pre-trial or at trial was Edwin McGriff, another cousin of Mrs. McGriff.

Detective Scheff, the lead investigator in this case, gave a very lengthy and detailed deposition **covering** in chronological order everything he did in this case. He never mentioned that Mr. Mosley was a serious suspect that they actively investigated. He did not mention that there was a third photo lineup containing **Mr. Mosley's** photograph.' He specifically did not identify Mr. Mosley as a relative of Mrs. McGriff. After explaining that **Mr. Freeman** was eliminated as a suspect by Ms. Lowe, Mr. Davis, and Mrs. McGriff, the following colloquy occurred:

Q. Did you have, at this point in time, anybody in mind?

---

'Detective Scheff testified in detail about the Freeman photo lineup (Scheff deposition, p. 44) and the Smith photo lineup (Scheff deposition, **p. 69**), but never mentioned a third photo lineup.



A. You mean, as a suspect?

Q. Yes.

A. oh, no.

Q. How about any relative of the deceased, uncles, cousins?

A. We had booked an individual by the name of Edwin McGriff, who is a cousin to Dorothy. As I had indicated earlier, we checked with - on the first night, for similar crimes. And, at that point in time, we discovered that Edwin McGriff had been accused, I think, in 1982, of a sexual battery of a minor black female child, and subsequently, we sat Dorothy McGriff down and explored the possibility with her that it might have been her cousin. She was quite emphatic that the person that she had seen was not her cousin and that she was being truthful. It was my feeling that she was.

(Scheff deposition p. 44). Again at Mr. Smith's trial, Detective Scheff was asked about relatives and again he indicated that a cousin, Edwin McGriff, was the only family member who was a suspect (R. 1022-23). Detective Scheff testified that this cousin, Edwin McGriff, was never displayed in a photo lineup (R. 1024). Detective Scheff did admit at trial that Mr. **Mosley** was a suspect, but never said he was eliminated by all three witnesses through a photo lineup or that he was a cousin of Mrs. McGriff. In fact, Detective Scheff testified that he did not show a photo lineup containing Mr. **Mosley's** picture to any of the witnesses:

Q Was Eddie Lee Mosley ever a suspect in this case?

A Eddie Lee Mosley was a suspect in this **case** along with Edwin McGriff. Initially when we first began investigating the case, really had no specific direction to go in.

Q How about Jessie Smith?

A Jessie Smith is Eddie Lee Mosley under an alias name.

Q Lee Greely, G-r-e-e-l-y Smith?

A I don't know.

Q That's all I have.

A Spell it again?

Q G-r-e-e-l-y. Doesn't ring a bell?

A No.

Q The man called Gator Mouth ever a suspect in this case?

A Yes.

Q The man that went by the name of Gator Mouth?

A Right.

Q Was a guy by the name of Big John ever a suspect in this case?

A Yes. I wouldn't say they were suspects in the case. I would say they were people who were brought to our attention for **one reason** or another.

Q How about Edward Simmons, did you ever check with John Boucada of your department? He supposedly looks like Mr. Smith.

MR. DIMITROULEAS: I will object to counsel testifying and **I'm** objecting to the form of the question.

THE COURT: Objection sustained, may be rephrased.

Q (By Mr. **Washor**) Did you ever investigate Edward Smith?

A Edward Simmons?

Q Simmons.

A **No**, sir.

Q Never had any contact with Detective Boucada regarding him?

A No, sir.

Q Were any of these people ever shown to any of the witnesses in either a photo or live lineup, people whose names I just read off other than Freeman?

A Other than Freeman, no.

(R. 1024 - 1026).

At his pre-trial deposition, defense counsel specifically asked Detective Amabile if any of Mrs. **McGriff's** cousins were ever suspected of the murder. Detective Amabile responded that Edwin McGriff was the only cousin ever considered a suspect (Amabile Deposition at p. 44). Detective Amabile was asked this again at Mr. Smith's trial and again responded that no family members, other than Edwin McGriff, were suspects (R. 946). The same Detective Amabile, seven **years** later, testified under oath that he **doesn't** remember much about the photo lineups except for the instance when Mrs. McGriff identified Mr. Mosley as her cousin:

Q. Do you recall what photo lineups were shown the witnesses? And let me clarify when I use the word "**witnesses,**" I am referring to Dorothy McGriff, **Chiquita** Lowe and Gerald Davis?

A. Unfortunately I would have to answer yes because of hearing the prior [evidentiary hearing] testimony [of Mr. McGriff and Detective Scheff]. What I recall, I recalled it more than one photo lineup being shown. I know from testimony today it **was** also mostly the **reason** I stated to **Mr. Zacks,** that I recall Eddy Lee Mosley is - that's how I found out that he was related to Dorothy McGriff.

(PC-R. 185-86). Of course, this testimony is in direct contradiction with his pre-trial and trial testimony that the

only relative of Mrs. McGriff who was a suspect in the case was Edwin McGriff, a cousin. Moreover, Detective Amabile, like Detective Scheff, testified at trial that none of the suspects, with the exception of Freeman, were displayed in a photo lineup:

Q There were a slew of other suspects in this case, weren't there, besides Mr. Freeman?

A A slew or --

Q More than one?

A Yes.

Q Was there a Carspelia (phonetic) Williams who was a suspect?

A His name was given to us.

Q Eddie Lee Mosley?

A Yes.

Q Jessie Smith?

A I don't recall that name.

Q **Greeley** (phonetic) Smith?

A Again, I don't recall that name.

Q Edward Calvin McGriff?

A Yes.

Q Was he related to the family at all?

A I believe so, yes.

Q A person by the name of Gator Mouth?

A Yes.

Q A person by the name of Big John who Detective Frost said in his report somebody identified a composite?

A Yes.

Q Were any of these leads followed up on?

A Yes.

Q Were they all followed up on?

A **Yes**, to the best of my knowledge with the exception of the two names I don't recall hearing.

Q What became of Big John?

A That I believe Detective Scheff and myself checked out and he did not fit the physical description at all.

Q Is that reflected in anywhere in your notes or reports or anything of that nature?

A No, that would be Detective **Scheff's**.

Q He should have it somewhere?

A He should.

Q Were any of these other people other than Mr. Freeman in the photographic display or in the live lineup shown to any other witnesses?

A **No**.

Q id you investigate any of the family members backgrounds to see whether they were ever involved in this kind of thing before?

A **I believe Edward McGriff.**

Q Anybody else?

A **No**.

(R. 945-6).

The overwhelming credible evidence establishes that the witnesses were never shown a photo lineup of Mr. Mosley and that the detectives never mentioned his name to Mrs. **McGriff** and, therefore, never learned that he was related to Mrs. **McGriff**. The testimony the State presented on this issue is contradicted

by every sworn statement made pre-trial and at trial by the State's own witnesses, and is contrary to the detectives' homicide report and files. When Detective Scheff was asked if he had any written documentation in the homicide file reflecting the Mosley lineup he testified:

A. I don't think so. I might. I would have to look through the file.

Q. With the file that you brought, is there any indication in there of showing a photo of Eddy Lee Mosley to any of the witnesses?

A. The file is -- I just brought this so I could have some hope of remembering this stuff.

Q. In what you brought that you thought would help you, and with your memory, is there anything to indicate you showed a photo lineup containing Eddy Mosley?

A. **No.**

THE COURT: Showed who?

THE WITNESS: Eddy Lee Mosley.

MR. MCCLAIN: A photo lineup containing Eddy Lee Mosley.

THE COURT: To whom?

BY MR. MCCLAIN:

Q. To --

A. Anybody.

Q. **Anybody.** To these three witnesses that we've been talking about?

A. **No.**

(PC-R. 159-60) (**emphasis** added). Moreover, Detective Scheff had no explanation for this glaring contradiction between his **pre-**

trial and trial testimony and his testimony at the evidentiary hearing:

**Q.** I'm going to hand you pages from your trial testimony. I have three pages to show you and starting with was Eddy Lee Mosely (sic) a suspect. If you can just read from there on until the middle of the third page [R. 1024-26].

A. I am sorry read to where?

**Q.** Let me show you.

A. Wait a minute, which is the first page?

**Q.** Eddy **Mosely's** on the first page.

A. Was Eddy Lee Mosely ever a suspect - Do you want me to read it out loud?

**Q.** You can read it to yourself.

A. Okay.

**Q.** In those three pages, does that help refresh your recollection as to your trial testimony?

A. Yes.

**Q.** You were asked out a series of suspects by the prosecutor --

A. Yes.

**Q.** -- if Eddy Lee Mosely was one of those suspects?

A. **Yes.**

**Q.** In fact, he read you a list of names and asked you for a response?

A. That's correct.

**Q.** At the end he asked you were any of those names he read to you were shown to the witnesses?

A. Yes.

**Q.** And you said other than Freeman --

A. Yes, I'm assuming that's accurate. I have no reason to not doubt it's accurate.

Q. Is that consistent with your testimony here today?

A. No **it's** not.

MR. MCCLAIN: I have nothing further, Your Honor.

THE COURT: Re-direct? Could you repeat that question and answer again that you just asked?

MR. MCCLAIN: Was that consistent with your testimony here today?

THE COURT: No, the last question?

MR. MCCLAIN: The question was, were any of these people ever shown to any of the witnesses in either a photo or live line-up (sic), people whose names I just read off other than Freeman. Answer, other than Freeman, no.

THE COURT: Go ahead.

MR. ZACKS: Nothing further, Judge.

(PC-R. 179-181).

There is no credible evidence to support the State's contention that there was a third photo lineup containing **Mr. Mosley's** photograph and that it was shown to the three witnesses. This third photo lineup is of course the basis for the circuit court's finding as to how Ms. Lowe became confused and then **"convinced"** that Mr. Smith was the wrong man and that Mr. Mosley was the man she actually saw. The trial court assumed that Ms. Lowe recognized Mr. **Mosley's** picture in 1989 because she had been shown his picture in 1985. The truth is Ms. Lowe was not shown Mr. **Mosley's** picture in 1985 because there was no Mosley lineup.



The truth is that Ms. Lowe "became convinced" that Mr. Smith was the wrong man at trial when she saw him in person.

C. **The Pressure Ms. Lowe Felt**

At the evidentiary hearing, the State attempted to rebut Ms. Lowe's claims that she was pressured throughout the process to make a positive identification of Mr. Smith. The State presented the testimony of Detectives Scheff and Amabile and Mr. Smith's prosecutor, Mr. Dimitroleas, who to varying degrees stated that there was no pressure put on Ms. Lowe. A review of the entire record **of** this case establishes that the very tactics complained of by Ms. Lowe were in fact used upon the other identification witness, Mr. Davis.

The identification procedures used with Mr. Davis were just as troubling as those described by Ms. Lowe at the evidentiary hearing. He gave an initial description of the man he saw near the victim's home, and after assisting with the drawing of the composites and discussing the composite with Ms. Lowe, he was also shown a photo lineup. On the first occasion he did not identify anyone (R. 754). He did make an identification on the second occasion saying Mr. Smith **"looks** like" the man he saw (R. 784). In fact, he indicated the police were acting in a suggestive manner (R. 786).

Because of this questionable identification, Mr. Davis was shown a live lineup. Before the lineup, the detectives showed Mr. Davis a photograph of Mr. Smith (R. 789). During the lineup the officers asked him **"do** any of these guys look like the one in

the picture" (R. 790-91). At the lineup, Davis was **"bothered"** because Mr. Smith did not seem as tall as the man Davis had seen, but Davis was reassured when the police told him all the men in the lineup were **6'** or **6'1** tall (R. 757). Davis repeatedly told the police that Mr. Smith only **"looked like"** the man Davis had seen, but felt compelled by the police to make a selection from the lineup (R. 793). Mr. Davis picked out Mr. Smith because of this pressure. In fact, prior to the in-court identification the prosecutor was seen pointing Mr. Smith out to Mr. Davis.

At Mr. Smith's trial, the State requested that the court call Mr. Davis as a witness because they could not vouch for his credibility based on his inconsistent statements citing Williams v. State, 443 So. **2d** 1053 (Fla. 1st DCA 1984). What is readily apparent from the record is that the State did not want to call Mr. Davis as their witness because of **what he** would say about the tactics and pressure used by Detectives Scheff **and Amabile**. Of course, Detectives Scheff and Amabile at trial denied putting any pressure on Mr. Davis to make an identification of Mr. Smith, just as they denied at the hearing that they pressured Ms. Lowe. The tactics used by Detectives Scheff and Amabile were clearly established at Mr. Smith's trial. Ms. Lowe's testimony now only confirms what **Mr. Davis** testified to at trial -- that the identifications of Mr. Smith were the result of improper police pressure.

**D. Ms. Lowe's Hearing Testimony Is A Basis For Relief**

The circuit court's denial of Mr. Smith's Motion to Vacate Judgment and Sentence is not supported by substantial competent evidence. Ms. Lowe's recantation at the evidentiary hearing entitles Mr. Smith to a new trial. This Court has already determined that Ms. Lowe was the sole material witness at Mr. Smith's trial. At the evidentiary hearing, Ms. Lowe provided sworn testimony consistent with the affidavit she provided in December 1989. She explained that at Mr. Smith's trial upon seeing Mr. Smith for the first time she realized he was not the man that she saw on the night of the murder. Ms. Lowe testified that she felt pressured to identify Mr. Smith as the individual she had seen and became confused about what to do. She unequivocally testified that Mr. Smith was not the man she saw. **Rather**, the man she saw was Mr. Mosley, another suspect in the case. Based upon the evidence presented at the evidentiary hearing, by both Mr. Smith and the State, the circuit court's denial of relief is not supported by the record. Moreover, the circuit court's findings go beyond the proper role of the Court and preempt the function of the jury.

All of the circuit court's conclusions rely upon **Ms.** Lowe having been shown a photo lineup containing Mr. **Mosley's** picture pretrial. The starting point for an analysis of the circuit **court's** denial of relief is the court's finding that:

Ms. Lowe "**recanted**" her trial testimony four years later, following an approach by a defense investigator at her home, when the investigator showed her a single picture **purporting to** be Eddie Lee Mosley. Having been

shown a picture of Mr. Mosley years before by the police investigators (and rejecting Mosley as the individual she saw), [in December 1989) Ms. Lowe apparently became confused, and became convinced that Mosley was the individual she had seen at her home near the time of the homicide.

(PC-R. 285) (emphasis added). The crux of the circuit court's finding is that Ms. Lowe is mistaken in her present belief that Mr. Mosley is the individual she saw on the night of the homicide. The court premised this conclusion upon the existence of the mysterious Mosley photo lineup, reasoning that Ms. Lowe recognized Mosley's photo in 1989 because Ms. Lowe had been shown Mosley's photo in 1985. The court found that when Ms. Lowe was shown Mr. Mosley's photo by Mr. Walsh in December 1989, she became confused, thinking he was the individual she saw on the night of the homicide because she was merely remembering Mr. Mosley's photo from the photo lineup the police showed her **pre-trial**. The court further concluded that as a result of that **"confusion"**, Ms. Lowe "became convinced" that Mr. Mosley is the individual she saw on the night of the murder. However, the court's premise -- that Ms. Lowe was shown **Mosley's** photo in 1985 -- is incorrect, as all of the credible pretrial and trial evidence discussed above demonstrates.

The circuit court did not find that Ms. Lowe is now lying. To the contrary, the circuit court found that Ms. Lowe is **"convinced"** that it was Mr. Mosley she saw and not Mr. Smith. There was absolutely no evidence presented which would support a finding that Ms. Lowe is now lying. She has absolutely no reason to recant her trial **testimony**. She does not know Mr. Smith and

has no motive to assist him. In fact, she does know the victim's family and if she were to be affected by bias or motive, her testimony at trial and at the evidentiary hearing make clear that it would be in favor of the victim's family, not Mr. Smith. The State presented no evidence to indicate any motive for Ms. Lowe to now falsely recant her trial testimony. Instead, Ms. Lowe provided a compelling and reasonable explanation for the difference in her testimony at trial and at the evidentiary hearing: confusion from seeing Mr. Smith **face** to face for the first time at his trial and then realizing he was not the man (PC-R. 79-80), not confusion from seeing Mr. Mosley's photo in 1985. There is absolutely no evidence that Ms. Lowe's recantation was inherently unreliable and incredible because of a motive to lie.

The circuit court rejected Ms. **Lowe's** recantation on **its** belief that she **is** now confused because she had seen Mr. **Mosley's** photo pre-trial. Although Mr. Smith does not concede that there ever was a photo lineup containing Mr. Mosley's photograph, even assuming there was evidence to support the circuit court's theory as to how Ms. Lowe **"became** confused, and became convinced Mr. Mosley was the individual" she saw, the circuit court's role should end there. Ms. Lowe's present belief that Mr. Mosley is the man is sufficient evidence to warrant a new trial. Ms. Lowe's evidentiary hearing testimony **"would** probably have resulted in an **acquittal."** Jones v. State, 591 So. **2d** 911, 916 (Fla. 1991). Absent a finding that Ms. **Lowe's** recantation is

inherently unreliable and incredible, the ultimate question of whether she is confused now or at trial is for a jury to decide, not the circuit court.

The circuit court **exceeded** its role **and** usurped the **role** of the jury in determining that although **Ms. Lowe** is now convinced that **Mr. Mosley is** the individual and not **Mr. Smith** and that she was wrong at trial, she is now merely confused. It was not for the circuit court to determine the guilt of **Mr. Smith** or the innocence of **Mr. Mosley**; it was not for the court to weigh the new evidence as though it were a jury, determining what is true and what is false. The circuit court's duty was the very narrow one of ascertaining whether there was new evidence fit for a new jury's judgment. See Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). More properly **the issue** was whether honest minds, capable of dealing with evidence, would have probably reached a different conclusion, because of the new evidence, from that of the first jury? **Id.** Surely, a jury hearing **Ms. Lowe's** evidentiary hearing testimony would have acquitted **Mr. Smith**. Whether a jury would ultimately acquit **Mr. Smith** is for a jury to decide after hearing all the relevant testimony. The circuit court's role is not to usurp that jury function. Whether an eye witness is confused is an issue which must be submitted to a jury not one which a judge may determine for the jury, Thus, even accepting for the sake of argument that the circuit court's findings are supported by the record, **Mr. Smith** has made a sufficient showing that his conviction should be vacated and a new trial ordered so that a

jury can determine whether Ms. Lowe's present belief that Mr. Mosley is the individual she saw is based upon her observations and memory of that night or a product of her confusion.

The record establishes, however, that the circuit court's findings are not supported by substantial competent evidence but are contrary to the entire record, both the trial and evidentiary hearing record. Not only are the circuit court findings rejecting Ms. Lowe's recantation dependent upon the Mosley photo lineup but the circuit court's finding that there is **"absolutely no credible evidence to support the defendant's claim that it was Eddie Lee Mosley who committed the murder of Shandra Whitehead"** is also wholly dependent upon this Mosley photo lineup:

All of the credible evidence demonstrates conclusively that the defendant's claim (that it was Eddie Lee Mosley who **committed** the murder] is totally unfounded. The evidence established that Mosley, together with a few **other** men, was considered by the police early in the investigation as a potential suspect. In this vein, the police showed **Mosley's** picture to all of the available witnesses. (Thus the Court observes that if any one was **"targeted"** by the police as a suspect it was Mosley, and not the defendant). The witnesses unanimously stated that Mosley was not the individual they had seen.

(PC-R. 286).<sup>10</sup>

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"Further, the circuit court did not admit or consider the evidence indicating that Mr. Mosley committed the murder. See Argument I, Section B. Thus, the circuit court's conclusion that there is "absolutely no credible evidence to support the defendant's claim that it was Eddie Lee Mosley who committed the **murder**" was reached without consideration of relevant evidence and is wholly unsupported by the record.

Moreover, the circuit court's conclusion creates a very real problem under Brady v. Maryland, 373 U.S. 83 (1963). The State never disclosed the **"third"** photo lineup, never disclosed that Eddie Mosley was related to and familiar with the victim, and

The circuit court in its findings offers absolutely no explanation as to why all of the witnesses, Detectives Scheff and Amabile, Ms. Lowe, Mr. Davis and Mrs. McGriff, pretrial and at trial swore that there were just two photo lineups and that the only suspect who was identified as a relative of Mrs. McGriff was Edwin McGriff. The circuit court in its order merely ignores the substantial competent pre-hearing evidence that indicated that the three witnesses were shown only two photo lineups, one containing Mr. Freeman's photo and the other containing Mr. Smith's photo, and that the only suspect who was identified as a relative of Mrs. McGriff was Edwin McGriff. In doing so, the circuit court totally ignored evidence that a jury would never ignore. In analyzing a claim of newly discovered evidence, a court must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at **trial.**" Jones v. State, 591 So. 2d at 916. The trial evidence must be considered by someone, for the circuit court obviously never evaluated it, relying upon the hearing testimony as the sum total of the truth. A new jury is best able to weigh this significant pre-hearing evidence -- evidence which is contrary to the circuit court's theory of confusion and the testimony of the state's witnesses at the evidentiary hearing.

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never revealed that false testimony had been presented, Certainly, had trial counsel known of these matters he would have pursued it and discovered that Ms. Lowe's identification of Frank Lee Smith was shaky. Showing her a picture of Eddie Mosley before the jury would have completely changed her testimony. This new evidence calls into question this Court's prior rejection of Mr. **Smith's Brady** claim.



The mystery Mosley photo lineup is the basis for the circuit court's findings that Ms. Lowe "became confused, and became convinced that Mosley was the individual" and that **"all** of the available eyewitnesses identified Smith, and rejected **Mosley."** (PC-R. 285-6). However, all of the pre-hearing evidence proves that this photo lineup was never conducted, and the circuit court never addressed this evidence. The reason is obvious. The State never offered an explanation. A proper evaluation of the evidentiary hearing record and the trial record establishes that Ms. Lowe's hearing testimony, **"had** it been introduced at the trial, would have probably resulted in an **acquittal."** Jones v. State, 591 so. 2d 911, 916 (Fla. 1991).

#### **CONCLUSION**

Based upon the record and the discussion herein, Mr. Smith respectfully urges that this Court reverse the lower court's order, **grant** Mr. Smith a *new* trial and sentencing, and/or remand for a new evidentiary hearing before an impartial judge.

I HEREBY CERTIFY that a true copy of the foregoing *motion* has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 2, 1992.

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