IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,199

FRANK LEE SMITH

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLANT

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

STEPHEN M. KISSINGER
Assistant CCR
Florida Bar No. 0979295

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY BTATEMENT

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

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

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

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

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

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

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

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. The circuit court heard argument on December 13, 1989, and summarily 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 man standing outside one of the

> windows. She observed the man from a distance and could not identify his face. She later identified Smith based only on his shoulders. Chiquita Lowe testified that as she drove past the victim's house, a man flagged her down and asked her for fifty cents. She "looked dead at him" from a distance of eighteen inches and later conclusively identified Smith as the man. Gerald Davis testified that as he walked past the victim's house, a man engaged him in a conversation for several minutes. The street lights were out and Davis could not remember "how the guy looked." He testified that Smith looked like the man but he could not identify him positively. Of the witnesg ide tifications presented at trial, that of Lowe clearly was the most credible. After the iurv had deliberated for five hours, it requested that it be permitted to rehear Lowe's testimonv. The court declined. One hour later, the jury repeated its request, The court acceded. Two and one-half hours later, the iurv 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. 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 filed (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 the denial of his post conviction motion in September, 1992.

That appeal is currently pending before this Court. Among other issues in his initial brief, Mr. Smith raised improper ex parte contact at the post conviction hearing between the judge, Robert Tyson, Jr., and the State Attorney, Paul Zacks. In response to Mr. Smith's claim of improper ex parte contact, the Attorney General's Office filed a motion with this Court specifically requesting that this Court relinquish jurisdiction to the trial court to "get the facts" surrounding the claim of improper ex parte contact. This Court granted the State's motion on October 30, 1992. The proceedings in the circuit court were thereafter delayed by the State's interlocutory appeal of an adverse discovery ruling by the circuit court, which this Court resolved in State v. Smith, 656 So. 2d 1248 (Fla. 1994). The circuit court held its hearing pursuant to this Court's order "to get the facts" on August 7-8, 1996.

Testimony was taken from four witnesses: (1) The Honorable Robert W. Tyson, Mr. Smith's trial judge, the judge who denied his Rule 3.850 motion after a non-evidentiary hearing on December 13, 1989, and the judge who denied his Rule 3.850 motion after the March 7, 1991, evidentiary hearing; (2) Paul Zacks, the former Broward County Assistant State Attorney who represented the State of Florida at both the December 13, 1989, and March 7, 1991, hearings; (3) Thomas Dunn, Mr. Smith's attorney at the December 13, 1989, non-evidentiary hearing, and (4) Martin J.

McClain, Mr. Smith's attorney at the March 7, 1991 evidentiary hearing (PC-R3. 2).

On direct examination by the State, Judge Tyson stated that there was an agreement reached in the morning before the 1991 evidentiary hearing regarding how the order was going to be done (PC-R3. 9). He stated that the hearing was scheduled to begin at either 9:30 or 10:00 in the morning. He stated that "the people from CCR" arrived and that he asked them to come back in his chambers. He said that they were joined there by Mr. Zacks (PC-R3 10). He said that he complimented a male CCR attorney on the 3.850 motion (PC-R3. 11). Judge Tyson testified that Mr. Smith's attorney, whose name he did not recall, agreed to allow his to contact the winner and to tell them "what I want them to prepare in the order." (PC-R3. 11). Judge Tyson added that there was another male attorney at this hearing who also agreed to this procedure (PC-R3. 12). Mr. Smith was not present during this conversation (PC-R3. 25). Judge Tyson stated that he thought about the hearing for a while, took some hand written notes of what he wanted, and then contacted Mr. Zacks and "told him that I wanted him to prepare an order along the following lines" (PC-R3. 13-14). Judge Tyson then recalled that he actually received memoranda from the parties prior to calling Mr. Zacks or scribbling down these notes (PC-R3. 15).

Judge Tyson testified regarding his contact with Mr. Zacks:

> I went through [the memoranda] again and figured out what I wanted to be included in the final order and I finally called up Mr. [Zacks]. Thereafter, the order came down,

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

(PC-R3. 15-16). Emphasis supplied.

Judge Tyson testified that he asked Mr. Zacks to send the order to CCR, but that it took so long for CCR to respond that he mentioned the delay to his judicial assistant, Denise (PC-R3. 16). He stated that he received Mr. Smith's motion to disqualify before he signed the order (PC-R3. 16).

On cross examination, Judge Tyson was asked more questions regarding the identity of the CCR attorney who had agreed to allow him to contact the prevailing party. He described the attorney as 5 foot 10; with brownish hair. He testified that the attorney who was with him was shorter, with darker hair, but he could not be sure of the description of the latter person because of the elapse of time (PC-R3. 18).

Judge Tyson conceded that he sometimes got the 1989 and 1991 hearings confused (PC-R3. 19). He also conceded that there was no delay between the date Mr. Zacks faxed the order to CCR and the date he received the motion to disqualify (PC-R3. 20).

On cross-examination Judge Tyson also more fully discussed the events following his receipt of Mr. Smith's motion to disqualify.

> [Mr. Zacks] was angry. He came down and said something to Denise. He said, "do you believe, that," to Denise. He was very

> angry. When I found out about it, I responded to him right there in the office because he was angry.
>
> * * *
>
> I said to Mr. [Zacks], I said something to the effect of why I called him up; and I reminded him about the conversation we had the night before the hearing. And that hearing, I recall, was the agreement he had probably forgotten. I just couldn't believe what was occurring, so I called him up to remind him. That was my initial reaction.

(PC-R3. 22).

The State also called Mr. Zacks. Mr. Zacks testified that there were two hearings, one in 1989 and one in 1991. The CCR attorneys at the first hearing were Tom Dunn, Leslie Delk, and an unidentified third male attorney (PC-R3. 31). Mr. Zacks testified that prior to the first hearing, Judge Tyson invited Mr. Dunn and Ms. Delk into his chambers. He stated that they had a brief discussion regarding Mr. Dunn's military service. He said that, during this discussion, the unidentified male attorney went out to his car (PC-R3. 34-35). Mr. Zacks testified that Judge Tyson then proposed to Mr. Dunn and Ms. Delk that after the hearing he would call the prevailing party, tell them what he wanted, and asked them to prepare the order. Mr. Zacks said that Mr. Dunn and Ms. Delk agreed to this procedure (PC-R3. 35). He confirmed that this meeting occurred before the 1989 hearing (PC-R3. 36). He said that following the 1989 proceeding the case was remanded for a limited evidentiary hearing. He said that following the 1991 evidentiary hearing, weeks or maybe a month or two went by and he received a call from Judge Tyson who said to him that he had an order in Mr. Smith's case and that he dictated

the order to Mr. Zacks verbatim (PC-R3. 36-37). He said that he wrote the order down by hand and that those notes were in his file (PC-R3. 37). He testified that there was no meeting between the court and counsel before the 1991 evidentiary hearing (PC-R3. 38).

Mr. Zacks testified that he faxed the order to Mr. McClain on May 7, 1991, accompanied by a cover letter informing Mr. McClain that, if he had any objections or counterproposals, he should send those to Mr. Zacks (PC-R3. 41). In response to questions by the court, Mr. Zacks testified that Mr. McClain was not present during the meeting when Judge Tyson discussed the preparation of the order (PC-R3. 41). During cross-examination, Mr. Zacks confirmed that there had been no agreement involving Mr. McClain and that any agreement regarding the preparation of the order had been with Mr. Dunn (PC-R3. 49-50).

Mr. Zacks was also questioned on cross-examination regarding his actions following Mr. Smith's motion to disqualify. He specifically denied ever discussing that motion with Judge Tyson (PC-R3. 53-54).

Mr. Smith's first witness was Mr. McClain. Mr. McClain testified that he was Mr. Smith's counsel at the March 7th evidentiary hearing. He testified that he was 6 feet 2 inches tall (PC-R3. 64). Mr. McClain stated that he received a call from Mr. Zacks on May 7th informing him that Judge Tyson had called him and asked him to draft an order, that he had done so, and that he would be faxing the order to Mr. McClain (PC-R3. 64-

65). Mr. McClain stated that he immediately drafted an objection to the order and a motion to disqualify Judge Tyson because of his ex parte communication with Mr. Zacks (PC-R3. 65-66).

Mr. McClain stated that there was a meeting in Judge Tyson's chambers prior to the evidentiary hearing. He stated that there was a brief discussion regarding Mr. Dunn being in Saudi Arabia. He stated that, as he was leaving Judge Tyson's chambers, the subject of closing arguments was brought up. Mr. McClain suggested that the parties submit post-hearing memoranda. Mr. McClain testified that Judge Tyson suggested that the parties draft an order, but that Mr. McClain objected (PC-R3. 71-72). Mr. McClain suggested that the Court issue its order at a telephonic conference, but Judge Tyson indicated that he did not like telephonic conferences. No further discussions were held (PC-R3. 72).

Mr. McClain also described his interaction with Mr. Zacks after Mr. Smith filed his motion to disqualify Judge Tyson. According to Mr. McClain, Mr. Zacks told Mr. McClain that he had spoken to Judge Tyson regarding the motion to disqualify, that the two had reviewed notes regarding an alleged agreement involving Mr. McClain, and that these notes confirmed that Mr. McClain had entered into such an agreement (PC-R3. 75). Mr. McClain stated that he told Mr. Zacks that there was no such agreement. He stated that Mr. Zacks thereafter changed his position and maintained that the agreement was made with Mr. Dunn in 1989, at the time of the non-evidentiary hearing (PC-R3. 75).

Following Mr. McClain's testimony, Mr. Smith moved the trial court to require the State to produce Mr. Zacks' handwritten verbatim transcript of Judge Tyson's oral order (PC-R3. 95). The State opposed the motion on two grounds: there were no such notes in the files and such notes would not be public records because the notes were incorporated in the ex parte order. Counsel for Mr. Smith argued that such notes, if any, would reflect whether Mr. Zacks had simply transcribed Judge Tyson's exact words, or whether Mr. Zacks created his own order with only limited guidance from the court; therefore, they were directly relevant to the credibility of both Mr. Zacks and Judge Tyson. The trial court denied Mr. Smith's motion (PC-R3. 97-99).

The next day, Mr. Smith called Thomas H. Dunn, the CCR attorney who had represented him at the 1989 non-evidentiary hearing. Mr. Dunn testified that there was no meeting in Judge Tyson's chambers prior to the 1989 hearing. He stated that he had a brief conversation with Mr. Zacks in the hall prior to hearing, that the bailiff indicated that Judge Tyson was ready, and that they went into the courtroom and began the hearing (PC-R3. 100-101). Mr. Dunn stated that Judge Tyson did compliment him on his Rule 3.850 motion, but that this was in the courtroom and on the record (R. 101). He testified that Judge Tyson orally addressed each issue during the 1989 hearing. Mr. Dunn explained that there was an off the record discussion after the hearing where Judge Tyson suggested that each side prepare proposed orders, but that the State had objected to this procedure. He

added that it was eventually agreed that Judge Tyson would simply issue a short written order stating that the petition was denied for the reasons set forth on the record (PC-R3. 105-106, 114).

SUMMARY OF ARGUMENT

The facts gathered below demonstrate not only that the ex parte contact alleged by Mr. Smith in his motion to disqualify would place a reasonably prudent person in fear of not receiving a fair and impartial trial, but also that the ex parte contact actually occurred. The contact violated the Rules of Judicial Conduct, the Rule of Professional Conduct, and Mr. Smith's right to due process. Mr. Smith's counsel did not agree to allow the State and Judge Tyson to engage in ex parte communications. Moreover, even if the non-existent agreement had occurred, the nature of the contact between the State and Judge Tyson went far beyond any such agreement. Should this Court not grant Mr. Smith, an innocent man, the new trial to which he is clearly entitled, Mr. Smith is entitled to a new postconviction evidentiary hearing before an impartial tribunal.

SUPPLEMENTAL ARGUMENT I

THE CIRCUIT COURT DENIED MR. SMITH HIS RIGHT TO BE HEARD BY AN IMPARTIAL TRIBUNAL WHEN IT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE. (INITIAL BRIEF ARGUMENT I, A.)

The facts presented in the lower court establish that improper ex parte contact occurred between Judge Tyson and prosecutor Zacks regarding preparation of the order denying relief and that Mr. Smith is therefore entitled to a new hearing before an impartial tribunal.

A. An Improper Ex Parte Contact Occurred.

Both Judge Tyson and Mr. Zacks testified below that Judge Tyson contacted Mr. Zacks regarding the preparation of the order denying relief and that Mr. Smith's counsel was not privy to these conversations. According to Mr. Zacks, Judge Tyson called him and dictated the order "verbatim" (PC-R3. 36-37). Mr. Zacks also admitted that "the gist of [the order] was from [Judge Tyson]" (PC-R3. 47). Emphasis supplied. Judge Tyson, however, never stated that he dictated the order verbatim. Rather, Judge Tyson testified, "I told [Mr. Zacks] I wanted him to prepare an order along the following lines" (PC-R3. 14). Emphasis supplied.

Further, Judge Tyson testified that after he received the prepared order from Mr. Zacks, he decided "he wanted to have something deleted" (PC-R3. 16). Thus Judge Tyson called Mr. Zacks again, only to have Mr. Zacks convince him not to change the order: "I think I called him up to have something deleted. He changed my mind. I left it in" (Id.)(Emphasis supplied.)

Thus Judge Tyson and Mr. Zacks had two ex parte discussions about the order. Even if the first discussion involved only Judge Tyson dictating the order to Mr. Zacks.'

The second discussion was clearly a discussion of the merits during which Judge Tyson altered his ruling at Mr. Zacks' request, as Judge Tyson admitted ("He changed my mind").

Moreover, the ex parte contact continued after Mr. Smith's counsel filed a motion to disqualify based on the events involved in the preparation of the order denying relief. Judge Tyson testified that he engaged in two substantial ex parte discussions with Mr. Zacks regarding the merits of Mr. Smith's recusal motion prior to ruling on that motion. The first of these occurred when Mr. Zacks came to Judge Tyson's office after he had been served with the recusal motion. Judge Tyson testified:

> When I found out about it, I responded to [Mr. Zacks]right there at the office because he was angry.
>
> I looked somewhat astonished when he told me. My first reaction was that he had made a mistake; that is, the C.C.R. fellow had made a mistake. We talked about a lot of people. Everybody at C.C.R was busy. They needed more people. I believe that was the conversation we had that day.

(PC-R3. 22).

Judge Tyson also called Mr. Zacks up to further discuss the merits of the recusal motion.

> I said to Mr. [Zacks], I said something to the effect of why I called him up; and I reminded him about the conversation we had

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'Even such dictation constitutes a discussion of the merits and is thus improper.

> the night before the hearing. And that hearing, I recall was the agreement he had probably forgotten. I just couldn't believe what was occurring, so I called him up to remind him. That was my initial reaction.

(PC-R3. 22).

B. The Ex Parte Contact Which Occurred Between Mr. Zacks and Judge Tyson was Impermissible.

The State attempted to demonstrate that Mr. Zacks merely acted as a scrivener for Judge Tyson, and that therefore the contact was permissible. Though this argument would appear to violate the non-inquiry principal of Suarez, even if it did not, the evidence presented below fails to support the argument.

In State's Exhibit 2, the transmittal letter which accompanied the order prepared by Mr. Zacks, Mr. Zacks stated:

> [t]his order was constructed using the expressed directions of Judge Tyson as the guideline pursuant to our prior understanding reached at the Evidentiary hearing. Judge Tyson has asked me that if you have objections and/or a counter proposal, that it be faxed to me no later than 10:00 a.m. Friday morning, May 10, to enable Judge Tyson to consider the same prior to his scheduled vacation. If nothing is received prior to that time, Judge Tyson has indicated that he will sign the attached proposed order on May 10.

(PC-R3. State's Exhibit 2).

When Mr. Zacks testified, however, he claimed that Judge Tyson did more than provide guidelines or direction, and actually dictated the order to Mr. Zacks. He testified that he took Judge Tyson's dictation by hand and had to stop him on a couple of

occasions because he could not write very fast.[2] He also said that he did not have the opportunity to voice his pleasure or displeasure with Judge Tyson's order. He added that Judge Tyson gave him a specific date by which both counsel should file any objections (PC-R3. 37-38).

The differences between Mr. Zacks' cover letter and his testimony are significant. First, there is no provision in the cover letter regarding the State filing objections to the proposed order. Second, the cover letter asked that objections be provided to Mr. Zacks, not filed with the Court. Third, the letter clearly indicates that Mr. Zacks is acting as a conduit for information between opposing counsel and the court, i.e., "Judge Tyson has asked," and "Judge Tyson has indicated." (PC-R3. State's Exhibit 2). The letter is totally inconsistent with Mr. Zacks' testimony that he merely acted as a scrivener.

Mr. Zacks' testimony is also inconsistent with Judge Tyson's testimony. Judge Tyson never testified that he dictated the order to Mr. Zacks word for word. He never testified that he had the exact language of the order prepared before he called Mr. Zacks. Judge Tyson stated:

> I sat and hatched it for a while, probably about three, four or five days. Then I scribbled some more and crossed out some things on a "scribbly" yellow legal sheet. I kept it aside, then I hatched it for a while.
>
> I finally called up Paul [Zacks] after I decided what I wanted to be put in. I told

[2] Mr. Zacks testified that these notes should be in the State's file. The hearing prosecutor said that the notes were not in the file and opposed Mr. Smith's attempt to subpoena them.

> him as the prevailing party he would prepare an order of what I wanted in it.
>
> * * *
>
> I told him I wanted him to prepare an order along the following lines. I told him I wanted him to prepare an order.

(PC-R3. 13-14).

Not only did Judge Tyson testify that he provided only guidelines, but he also testified that he and Mr. Zacks actually engaged in discussion of the order itself and that Mr. Zacks convinced him to alter his opinion.

> [JUDGE TYSON]: [T]hereafter the order came down, and I believe I looked at the order. It appeared to be okay, but I think there might be one question about it that I wanted to have something deleted.
>
> I called him -- 1 think I called him up to have something deleted. He changed my mind. I left it in, I think; but in any event, that was it. He was asked to send a copy to the other side.

(PC-R3. 15-16). Emphasis supplied.

Mr. Zacks' testimony that he was simply a "scrivener" is refuted by both Judge Tyson and Mr. Zacks' own letter. Even if it were proper to challenge the assertions contained in Mr. Smith's motion to disqualify, the State has failed to present evidence to support that challenge.

C. Mr. Smith's Counsel did not Agree to Permit Ex Parte Contact Between the State and Judge Tyson.

The State argued that Mr. Smith's counsel agreed to ex parte contact between Judge Tyson and Mr. Zacks. However, the two witnesses which it presented told radically different versions of

the so-called "agreement." In fact, their testimony was radically different in practically all material aspects and is inconsistent with the record.

In Assistant State Attorney Paul Zacks' version, there was no agreement reached prior to the 1991 evidentiary hearing.[3] He maintained that the agreement was reached with Assistant Capital Collateral Representative Thomas Dunn prior to the 1989 non-evidentiary hearing. (PC-R3. 34-36, Defense Exhibit 2). Judge Tyson, on the other hand, maintains that the agreement was reached prior to the 1991 evidentiary hearing with an unnamed attorney who was about five feet, ten inches tall and whom he had complimented for the quality of the Rule 3.850 motion.

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[3] Mr. Zacks' testimony is contrary to the representations made to this Court by counsel for the State in it's Motion to Relinquish Jurisdiction, wherein it stated:

> Prior to the conduct of the evidentiary hearing in this cause upon remand, a status hearing was conducted at which time the trial judge, the Honorable Robert W. Tyson, Jr., Circuit Judge, advised counsel for both CCR and the state that, after the evidentiary hearing was completed, Judge Tyson would want to consult the prevailing party to discuss a proposed order. Indeed this "agreement" as to how the preparation of the order would be undertaken is reflected in the record at R 274, the prosecutor's [Mr. Zacks'] letter to CCR accompanying the proposed letter which indicates that the proposed order was being submitted to CCR "pursuant to our prior understanding . . .."

Appellant's Motion to Relinquish Jurisdiction, at 2. Considering the fact that Mr. Zacks denies that any "agreement" occurred prior to the 1991 evidentiary hearing, his letter clearly could not have referred to the same.

Unfortunately for the State's position, neither version is consistent with the record.

1. The Alleged Agreement Described in Mr. **Zacks'** Testimony is Directly Refuted by the **Record.**

It is not possible to reconcile Mr. Zacks' version with the record. While the record does reveal that an off the record conversation took place at some point during the 1989 **non-evidentiary hearing,** it clearly demonstrates that the alleged agreement described by Mr. Zacks did not.

> THE COURT: I'll leave it up to you. That is with the exception of the formal entry of the written order which we have discussed off the record procedurally for the moment. And we had initially discussed the possibility of the State and the Defense, excuse me, Mr. Dunn and Ms. Delk presenting orders to me that is reduced to writing, that **which has** just been found and ordered in this hearing. However. we ultimatelv decided to have a short order saving that the motion is denied, and refer to the record for the reasons; is that sufficient enough?
> MR. DUNN: Yes, your Honor.

(PC-R. 88-89).

The **order** in the 1989 non-evidentiary proceeding was not prepared in the manner described by Mr. Zacks, but in the manner set forth on the record. It was handwritten by Judge Tyson himself, incorporating the findings he had set forth (PC-R. 326).

2. The Alleged Agreement Described in Judge Tyson's Testimony is Directly Contrary to Both **Mr. Zacks' Testimony and** the Reoord.

Judge Tyson testified that the agreement occurred prior to the 1991 evidentiary hearing. However, Mr. Zacks stated both

from the stand and in his letter to Mr. McClain that it was Mr. Dunn who entered into the alleged agreement to allow ex parte contact between the State and Judge Tyson. In March of 1991, Mr. Dunn was in Saudi Arabia (PC-R3. 110-111). Mr. Zacks described at length conversations which could only have involved Mr. Dunn, e.g., the fact that Mr. Dunn was in the military (PC-R3. 34). He stated that Ms. Leslie Delk was present at the meeting. The record establishes that she was not present at the 1991 hearing. Mr. Zacks specifically stated that the agreement was before the 1989 hearing. There is simply no way that Mr. Zacks' version could have occurred in 1991. As noted above, while Judge Tyson may have been mistaken, if he was not, Mr. Zacks' version of the agreement was false. Therefore, to even reach the question of whether Judge Tyson's version is credible, Mr. Zacks' version must be completely rejected.

Even disregarding Mr. Zacks' testimony, Judge Tyson's description of the circumstances surrounding the alleged agreement is contrary to the record, Judge Tyson claimed that the agreement was reached prior to the 1991 evidentiary hearing. His physical description of the CCR attorney who made the agreement, however, matched Mr. Dunn, not Mr. McClain, who is six feet two inches tall (PC-R3. 64). Further, Judge Tyson claimed to have complimented the attorney present at the hearing for the quality of the Rule 3.850 motion. The only Rule 3.850 motion filed in Mr. Smith's case was the motion filed prior to the 1989 hearing drafted by Mr. Dunn. The transcript of the 1989 non-

evidentiary hearing contains Judge Tyson's compliments (PC-R. 5-6). According to Judge Tyson's testimony, the hearing before which the alleged agreement was reached was to begin somewhere around 9:00-10:00 A.M (PC-R3. 10). The 1989 hearing began at 10:30 A.M. The 1991 hearing began at 1:00 P.M. Indeed, every detail of Judge Tyson's recollection of the events surrounding the alleged agreement is repudiated by the record.

3. **The Suggestion** that the **Parties Prepare** *Orders* **was Expressly Rejected by Counsel for Mr. smith on Two Occasions.**

Contrary to the evidence submitted by the State, the testimony of Mr. Smith's witnesses, Mr. Dunn and Mr. McClain, was entirely consistent with the record. Mr. Dunn testified that during the 1989 hearing there was an off the record discussion after a recess where Judge Tyson suggested that the parties submit proposed orders (PC-R3. 102). Mr. Dunn objected to that procedure and suggested that Judge Tyson enter a short order incorporating the findings he had made from the bench (PC-R3. 102-103). That is exactly what happened (PC-R. 326).

Mr. McClain testified that there was a meeting between Judge Tyson, Mr. Zacks, and himself, in chambers prior to the 1991 evidentiary hearing. *Mr.* McClain stated that Judge Tyson had again suggested that the parties submit proposed orders. He stated that it was agreed that the parties would submit simultaneous memoranda (PC-R3. 71-72). As with Mr. Dunn, Mr. McClain's testimony of what occurred off the record was confirmed

by what happened on the record. At the conclusion of the 1991 evidentiary hearing, the following discussion took place:

> MR. ZACKS: You might want to establish a time for us to be filing our memos to the Court.
>
> THE COURT: How long will it take you to get a memo? When do you want it?
>
> MR. McCLAIN: Would 30 days be fine?
>
> THE COURT: Fine.
>
> MR. ZACKS: Do you want them simultaneous?
>
> MR. McCLAIN: I think simultaneous will be fine.
>
> THE COURT: Fine, simultaneous.
>
> MR. ZACKS: That's April i'th?
>
> THE COURT: Thank you very much and then we'll proceed as previously discussed.

(PC-R2. 205).

While the State suggested to Judge Tyson in the hearing below that the last sentence referred to the otherwise unannounced alleged "agreement" regarding the preparation of the order (PC-R3. 15), Judge Tyson conceded during cross examination that this sentence did not in any way refer to how the order was to be prepared and could also have pertained to the agreement to submit post-hearing memoranda (PC-R3. 21-22).

D. CONCLUSION.

There is absolutely no evidence to support the contention that counsel for Mr. Smith ever agreed to allow counsel for the State of Florida to have an ex parte meeting with the trial court

to determine how best to deny Mr. Smith relief. To the contrary, the record directly refutes such an allegation. There is now, however, solid proof that ex parte contact occurred between Judge Tyson and Mr. Zacks no fewer than four occassions and that substantive matters were discussed. Mr. Smith has discussed the applicable law in his Initial Brief. In the interest of judicial economy, only a portion of that argument is repeated here. The ex parte communication between Judge Tyson and the State denied Mr. Smith "the cold neutrality of an impartial judge." Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Smith was entitled to impartial factfindings, not findings made by the opposing party. 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. 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 deserves at least as much. 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. 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. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 24, 1997.

STEPHEN M. KISSINGER
Florida Bar No. 0979295
Chief Assistant CCR
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Ms. Sara D. Baggett
Assistant Attorney General
1655 Palm Beach Lakes Boulevard, Ste. 300
West Palm Beach, FL 33401