FILED
SID J. WHITE
28 1994
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Appellant,)
vs.) CASE NO. 82,930
LAWRENCE FRANCIS LEWIS,)
Appellee.)

FRANK LEE SMITH,)
Appellant,)
vs.) CASE NO. 78,199
STATE OF FLORIDA,)
Appellee.)

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0857238

DEPARTMENT OF LEGAL AFFAIRS
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL 33401-2299
(407) 688-7759

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 8

ISSUE I

WHETHER THE TRIAL COURTS ERRED IN DENYING THE STATE'S MOTIONS TO QUASH DEPOSITION SUBPOENAS ISSUED SUA SPONTE BY DEFENDANTS IN CAPITAL POST-CONVICTION PROCEEDINGS TO JUDGES WHO HAD FORMERLY PRESIDED OVER THE DEFENDANTS' CASES BUT WHO HAD RECUSED THEMSELVES FROM PRESIDING OVER PENDING LITIGATION.................. 8

CONCLUSION 19

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES — PAGES

Berkheimer v. Berkheimer,
466 So.2d 1219 (Fla. 2d DCA 1985) 11

Davis v. State,
624 So.2d 282 (Fla. 3d DCA 1993) ....passim

Ellett v. Ellett,
546 So.2d 1108 (Fla. 2d DCA 1989) 11

Harris v. Rivera,
454 U.S. 339 (1981) 16

Kinsey v. State,
179 So.2d 108 (Fla. 1st DCA 1965) 11

Lewis v. State,
572 So.2d 908 (Fla. 1990),
cert. denied, 111 S.Ct. 2914 (1991) 1

Makemson v. Martin County,
491 So.2d 1109 (Fla. 1986) 17

Ser-Nestler, Inc. v. General Finance
Loan Co. of Miami Northwest,
167 So.2d 230 (Fla. 3d DCA 1964) 11

Smith v. State,
515 So.2d 182 (Fla. 1987),
cert. denied, 485 U.S. 971 (1988) 4

Smith v. State,
565 So.2d 1293 (Fla. 1990) 5

State v. Battle,
302 So.2d 782 (Fla. 3d DCA 1974) 11

State v. Bryant,
276 So.2d 184 (Fla. 1st DCA 1973) 11

State v. Lott,
286 So. 2d 565 (Fla. 1973) 11

State v. Pardo,
596 So.2d 665 (Fla. 1992) 9

CONSTITUTIONS AND STATUTES — PAGES

Fla. Const. art. V, § 2(a) 11

TABLE OF AUTHORITIES (cont.)

OTHER SOURCES — PAGES

Fla. R. Crim. P. 3.220 11

Fla. R. Crim. P. 3.850 .... passim

STATEMENT OF THE CASE AND FACTS

Lawrence Francis Lewis

Lewis was tried by a jury in Broward County, Florida, and convicted on August 3, 1988, of first-degree murder and various other offenses. After a penalty phase proceeding, the Honorable Stanton Kaplan followed the jury's recommendation and sentenced Lewis to death. The Florida Supreme Court affirmed Lewis's conviction and sentence of death, Lewis v. State, 572 So.2d 908 (Fla. 1990), and the United States Supreme Court denied Lewis's petition for writ of certiorari. Lewis v. Florida, 111 S.Ct. 2914 (1991).

On September 11, 1992, Lewis filed in the trial court before Judge Kaplan a motion to vacate his judgment of conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.850, raising the following claims: 1) the State failed to comply with his public records requests, 2) he had been unable to obtain defense counsel's file, 3) the HAC instruction was vague, 4) the prior violent felony aggravating factor failed to "define the elements of the aggravating factor," 5) the trial court failed to instruct on or find age as a mitigating factor, failed to consider that Lewis was under extreme mental or emotional distress based on the turbulent relationship with his girlfriend, failed to consider that Lewis' ability to conform his conduct to the requirements of law was substantially impaired by his ingestion of alcohol preceding the murder, and failed to consider as a mitigating factor that Lewis was gainfully employed at the time of the murder, 6) the felony murder aggravating circumstance

constituted an automatic aggravating factor, 7) the felony murder aggravating circumstance instruction was vague, 8) Lewis was not examined by a mental health expert prior to sentencing, 9) the trial court relied on the Assistant State Attorney to draft the sentencing order, which it then signed without conducting an independent evaluation of the evidence, 10) the penalty phase jury instructions impermissibly diminished the jury's role in the sentencing process, and 11) the cumulative errors in the trial deprived Lewis of a fair trial. (Appendix A).

One month later, on October 11, 1992, Lewis filed a motion to disqualify Judge Kaplan from presiding over the post-conviction proceeding, alleging (1) that Judge Kaplan had previously worked for Lewis's original trial counsel, Richard Kirsch, and that they were still "personal friends," which prevented Judge Kaplan from considering the merits of any forthcoming ineffective assistance of counsel claim in a fair and impartial manner, and (2) that Judge Kaplan harbored personal animosity towards Lewis, as evidenced by Judge Kaplan's written response to the Executive Clemency Board's request for information. (Appendix B).

On December 11, 1992, Lewis filed an amended motion to vacate, adopting all of his previous claims, except claim II which he asserted was moot, and alleged three additional ones: 1) unspecified Brady violations which led to ineffective assistance of trial counsel, 2) unspecified Brady violations during the guilt phase of his first trial,[1] and 3) ineffective

[1] Appellant's first trial ended in a mistrial.

assistance of trial counsel at the penalty phase.[2] (Appendix C). Five months later, on May 12, 1993, Lewis filed a supplement to his motion to disqualify Judge Kaplan, claiming (1) that "Judge Kaplan made inappropriate remarks" in an episode of CBS' "48 Hours," entitled "Rough Justice," and (2) that, because monies for Special Assistant Public Defender and expert witness fees come from the same fund as monies for administrative courtroom needs, "[t]his situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County." Regarding this latter claim, Lewis asserted that "Judge Kaplan will of necessity be a witness regarding this conflict of interest issue."[3] (Appendix D).

On June 23, 1993, Judge Kaplan granted Lewis's motion to disqualify, finding the motion to be legally sufficient based upon the allegations regarding his personal relationship with trial counsel.[4] (Appendix F). Thereafter, counsel for Lewis *sua sponte* issued a deposition subpoena to Judge Kaplan.[5] In response, the State filed in the trial court a motion to quash the subpoena. (Appendix H). A hearing on the State's motion was held on September 29, 1993, before the Honorable Susan Lebow, who

---

[2] Lewis voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation after consulting with counsel.

[3] Respondent also added this latter claim to his motion for post-conviction relief in a supplemental pleading. (Appendix E).

[4] The order specifically limits the finding of legal sufficiency to this particular claim. The trial court did not even acknowledge that Respondent filed a supplemental motion to disqualify raising two other grounds.

[5] The notice setting the deposition has been provided in Appendix G.

had been appointed to replace Judge Kaplan in presiding over Lewis's post-conviction proceeding. (Appendix I). Judge Lebow took the State's motion under advisement and entered a written order on October 11, 1993, denying the State's motion to quash. (Appendix J).

Believing that jurisdiction properly lay in the Fourth District Court of Appeal, the State filed a petition for writ of common law certiorari in that court. Because of the appeal, Judge Lebow granted the State's motion to hold the circuit court proceedings in abeyance. (Appendix K). Thereafter, the Fourth District transferred the case to this Court, believing that jurisdiction properly lay here. By order of this Court dated February 4, 1994, Lewis' case was consolidated with Frank Lee Smith's case, expanded briefs were requested, and oral argument was set. This brief follows.

Frank Lee Smith

Smith was tried by a jury in Broward County, Florida, and convicted in 1986 of first-degree murder and various other offenses. After a penalty-phase proceeding, the Honorable Robert W. Tyson followed the jury's recommendation and sentenced Smith to death. This Court affirmed Smith's conviction and sentence of death, Smith v. State, 515 So.2d 182 (Fla. 1987), and the United States Supreme Court denied Smith's petition for writ of certiorari. Smith v. Florida, 485 U.S. 971 (1988).

After the Governor signed a death warrant, Smith filed a motion for post-conviction relief and request for stay of execution in the trial court, both of which were summarily denied. Smith then appealed the denial of the motion to this

Court, filed a petition for writ of habeas corpus, and sought a stay of execution. This Court denied the petition for writ of habeas corpus, but reversed the denial of the motion for post-conviction relief relating to the claim of newly discovered evidence and remanded for an evidentiary hearing on that claim. Smith v. State, 565 So.2d 1293 (Fla. 1990).

After an evidentiary hearing, the trial court again denied Smith's motion for post-conviction relief, and Smith appealed the denial to this Court. In his initial brief, Smith claimed that the prosecutor and the trial judge, the Honorable Robert Tyson, engaged in ex parte communications when preparing the order denying Smith's motion for post-conviction relief. Upon the State's motion, this Court temporarily relinquished jurisdiction to the circuit court "for the purpose of getting the facts concerning [the] claim." (Appendix L).

Pursuant to this order, Judge Mark Speiser, who replaced Judge Tyson for purposes of relinquishment, set this cause for a hearing on January 21, 1994. Smith sua sponte issued a subpoena to Judge Tyson to appear for a deposition on January 7, 1994, at 1:30 p.m. On January 3, 1994, the State filed a motion to quash/motion for protective order, claiming that Smith failed to follow the mandates of Davis v. State, 624 So.2d 282 (Fla. 3d DCA 1993), which now authorizes limited prehearing discovery in 3.850 cases. (Appendix M). At the hearing on the motion on January 6, 1994, Judge Speiser denied the State's motion to quash, but granted the State's motion for protective order and limited the Defendant's inquiry of Judge Tyson to the facts surrounding the preparation of the order, as opposed to his decision-making process regarding same. (Appendix N).

Later that day, the State filed in the trial court an unopposed written motion to stay the proceedings so that it could pursue an appeal in this Court regarding the issue of discovery in 3.850 proceedings as it had done in State v. Lewis. (Appendix O). Although Respondent did not object to the motion to stay, Judge Speiser nevertheless denied the State's motion. (Appendices N & P). The State then immediately filed an emergency motion in this Court seeking a stay of the trial court proceedings. It later filed an amended motion to stay the circuit court proceedings and a motion for protective order. This Court granted the stay pending the disposition of the appeals in Lewis and Davis. On February 4, 1994, this Court consolidated Smith and Lewis, ordered expanded briefs, and set the cases for oral argument. This brief follows.

SUMMARY OF ARGUMENT

Florida Rule of Criminal Procedure 3.850 has no provision for prehearing discovery, and none has traditionally been authorized. Although the Third District Court of Appeal recently authorized limited prehearing discovery in post-conviction proceedings, it was without authority to do so. This Court has the exclusive authority to modify or amend rules of practice and procedure. Regardless, because the trial courts in Lawrence Lewis' and Frank Smith's cases were bound to follow the Third District decision, the State sought to require adherence to the procedural requirements outlined by the Third District. By denying the State's motions to quash the subpoenas, the trial courts departed from the essential requirements of law.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURTS ERRED IN DENYING THE STATE'S MOTIONS TO QUASH DEPOSITION SUBPOENAS ISSUED SUA SPONTE BY DEFENDANTS IN CAPITAL POST-CONVICTION PROCEEDINGS TO JUDGES WHO HAD FORMERLY PRESIDED OVER THE DEFENDANTS' CASES BUT WHO HAD RECUSED THEMSELVES FROM PRESIDING OVER PENDING LITIGATION.

In both of these cases, the defendants were engaged in capital post-conviction litigation. Lewis was in the circuit court seeking post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and Smith was in the circuit court on limited relinquishment from this Court after the denial of his 3.850 motion. Lewis successfully disqualified Judge Kaplan, who had presided over his trial, then tried to depose Judge Kaplan in order to "investigate" potential post-conviction claims. Smith tried to depose Judge Tyson, who had presided over his post-conviction proceeding but who had been recused for purposes of the limited remand, prior to the evidentiary hearing.

In both cases, the defendants, through counsel (the Office of Capital Collateral Representatives), issued the deposition subpoenas to Judge Kaplan and Judge Tyson without seeking leave of court to do so. In both cases, the State moved to quash the subpoenas on the ground that Lewis and Smith had failed to follow the requirements of law. In both cases, the motions were denied.

At the time CCR issued the subpoenas in Lewis and Smith, Davis v. State, 624 So.2d 282 (Fla. 3d DCA 1993), authorized limited prehearing discovery in post-conviction proceedings. In Davis, a noncapital case, the defendant sought to subpoena his

former trial counsel for a deposition relating to his claim of ineffective assistance of trial counsel. Relying on both civil and criminal discovery rules, Davis claimed that he had an unfettered right to prehearing discovery regarding such a claim. Relying on the absence of any provision for discovery in Rule 3.850, and on the fact that it was a collateral proceeding, the State argued that the defendant was not entitled to discovery. Rejecting "both extreme views," the Third District held that "[o]n a motion which sets forth good reason, . . . the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope." Id. at 284. No legal authority was cited for such a conclusion.

Nevertheless, because there was no opinion from this Court or any other court to the contrary, the trial courts in Lewis' and Smith's cases were required to follow Davis. State v. Pardo, 596 So.2d 665 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). As a result, the State did not argue that Lewis and Smith were not authorized to engage in discovery. Rather, the State argued that Lewis and Smith failed to seek leave of court to engage in discovery and failed to show "good cause" for such request. Both trial courts allowed the defendants, however, to justify their sua sponte issuance of deposition subpoenas to the former trial court judges at the hearing on the State's motion to quash the subpoenas. No written motions seeking leave to engage in discovery were ever filed with the trial courts.

As a threshold matter, Lewis and Smith undoubtedly will claim that the issue is not one of "discovery," but, rather, one of "investigation." In his response to the State's petition for writ of common law certiorari, Lewis alleged that "[t]he issue in this appeal is not discovery. CCR agrees with the State; there is no formal discovery in post-conviction. The issue is CCR's obligation to diligently investigate and pursue collateral relief. . . . Here, Mr. Lewis' attorneys are simply trying to use due diligence to investigate all claims that Mr. Lewis may have in challenging his conviction and sentence of death. If the State wishes to call investigation an effort 'to "fish" for information,' . . . so be it." In other words, Lewis has conceded that he wants to depose Judge Kaplan in order to support the otherwise unsupported, or as yet unpled, allegations in his 3.850 motion.

Calling his efforts "investigation," however, does not change the character of the means used to obtain the information sought. Lewis seeks to depose Judge Kaplan to discover information to pursue his claims. The State submits, however, that capital defendants in post-conviction proceedings should not be allowed the unfettered discretion to subpoena for deposition any person, especially a judge, who the defendant suspects might have information to support a claim for relief.

Traditionally, there has been no discovery in capital post-conviction proceedings. Florida Rule of Criminal Procedure 3.850 makes no provision for discovery, and, until Davis, no other legal authority authorized it. Davis, however, has set dangerous precedent. In effect, the Third District has modified Rule 3.850

and has authorized discovery without the authority to do so. Article V, section 2(a), of the Florida Constitution specifically vests this Court with the sole and exclusive authority to promulgate, rescind, and modify the rules of practice and procedure for all of the courts in Florida. The trial and lower appellate courts only have authority to construe existing rules. These lower courts are powerless to amend or waive the rules promulgated by this Court. State v. Lott, 286 So. 2d 565 (Fla. 1973); Ellett v. Ellett, 546 So. 2d 1108 (Fla. 2d DCA 1989); Berkheimer v. Berkheimer, 466 So. 2d 1219 (Fla. 2d DCA 1985); State v. Battle, 302 So. 2d 782 (Fla. 3d DCA 1974); State v. Bryant, 276 So. 2d 184 (Fla. 1st DCA 1973); Kinsey v. State, 179 So. 2d 108 (Fla. 1st DCA 1965); Ser-Nestler Inc. v. General Finance Loan Co. of Miami Northwest, 167 So. 2d 230 (Fla. 3d DCA 1964). Yet, the Third District has done just that in Davis.

Second, by allowing for limited discovery in post-conviction proceedings, the Third District has potentially opened Pandora's box. Although it authorized "limited discovery," it did not define the limitations, other than to require leave of court upon a showing of "good reason," relevance, and materiality. Numerous questions, however, remain unanswered. For example, (1) When can a defendant engage in discovery--upon the filing of the 3.850 motion or only once an evidentiary hearing has been granted? (2) Rule 3.220, the pretrial discovery provision, allows for reciprocal discovery only if the defendant elects to engage in discovery. In post-conviction proceedings, the defendant becomes the plaintiff/movant with the burden of proof. Can the State "elect" to engage in discovery or must the defendant "elect" to

engage in discovery before the State can do so? If the State elects not to engage in discovery, is the defendant precluded from doing so? (3) Who is subject to being deposed? Can a defendant depose prosecutors and judges? (4) Assuming an evidentiary hearing has been granted, can the State seek a witness list from the defendant? Can it depose those persons on the list?[6] (5) What sanctions, if any, should be available for discovery violations, i.e., if the defendant attempts to call a witness at the evidentiary hearing that was not disclosed on the witness list, can the State move to exclude the witness or move for other relief? (6) Can a party obtain interlocutory appellate review of discovery orders? (7) Should the county absorb the cost of the defendant's discovery? (8) Although capital defendants are represented by counsel, many noncapital defendants are not. How do pro se defendants engage in discovery, e.g., take depositions, etc.? Will counsel have to be provided to every post-conviction litigant?

This list of considerations is by no means exhaustive, but it demonstrates the need for precise guidelines and limitations for discovery in post-conviction proceedings. Post-conviction proceedings were not meant to be a second trial for the defendant. However, at least in capital cases, evidentiary hearings can involve numerous witnesses who have been newly discovered or newly procured by the defendant. For example,

---

[6] This Court just recently denied a petition for writ of prohibition filed by William Van Poyck, a capital defendant, who sought to quash an order by the trial court that the parties exchange witness lists prior to an evidentiary hearing. (App. Q).

mental health experts who have interviewed the defendant since the original trial often testify, as do friends, acquaintances, and family members of the defendant who did not testify in the original trial. In addition, original trial witnesses sometimes change their testimony and appear at an evidentiary hearing.

There is no question that the State would benefit greatly by the advent of discovery in post-conviction proceedings. "Hearing by ambush" would no longer be the rule. The ramifications of providing for discovery, however, mandate that limitations be set and procedural formalities be required. At the very least, the parties should have to seek leave of court to engage in discovery. And they should not be allowed to circumvent the process by claiming that the relevance and materiality of the witness' testimony cannot be determined until the witness has been deposed.[7]

In both of these cases, the defendants subpoenaed circuit court judges to appear for depositions. In neither case did the defendant seek leave of court to do so. In Lewis, the only claim relating to Judge Kaplan in Lewis' motion to vacate alleged the following:

> 3. The county fund from which Special Assistant Public Defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements. Judges receive moneys from this fund to purchase items including but not limited to computers, telephones, law books, and other necessary office equipment.

---

[7] This was Lewis' claim when asked to justify his need to depose Judge Kaplan. (App. ___).

> 4. To resolve these conflicting uses of county funds, many Broward Circuit Judges, including Judge Kaplan, engage in the practice of negotiating lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes. Because expert witnesses are also paid from this same fund, Special Assistant Public Defenders appointed to capital cases are also expected to 'shop for the best deal' before the Court will approve an expert. The experience or competence of the attorney and/or expert takes a backseat to economy in the judge's determination of appointment in capital cases.
>
> 5. This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Because Mr. Lewis was tried in Broward County, was represented by a Special Assistant Public Defender, and was allowed to consult with court-appointed experts, this situation is clearly relevant to Mr. Lewis' case.

(Appendix E).

In its response to the motion, the State asserted that these allegations (1) were conclusory in nature and wholly unsupported, which made them legally insufficient as a claim for relief, and (2) could have been, and should have been, raised on direct appeal, since the information upon which this claim is based was available to Lewis at or before his trial. In other words, Lewis was procedurally barred from raising this claim in a motion for post-conviction relief. (Appendix R).

Moreover, when asked at the hearing what its purpose was in deposing Judge Kaplan, CCR initially claimed that it did not have to disclose its purpose,[8] but then claimed that it was trying to avoid the appearance of impropriety because Judge Kaplan was

---

[8] "I don't know that a showing has to be made of necessity." (Appendix I at 4).

presiding over other cases involving CCR; thus, it wanted the State present when it spoke to Judge Kaplan. (Appendix I at 8-11). Ultimately, CCR admitted that it wanted to depose Judge Kaplan in order to support the otherwise unsupported allegations in its 3.850 motion. In other words, it could not know how Judge Kaplan's testimony would be relevant and material until it had deposed him.

Despite the fact that Lewis could not show how Judge Kaplan's testimony was relevant and material to any nonbarred issue raised in his motion for post-conviction relief, Judge Lebow authorized Lewis to depose Judge Kaplan regarding this funding issue. In fact, by denying the State's motion to quash, Judge Lebow authorized Lewis to depose Judge Kaplan regarding any issue he sees fit to inquire into. Judge Lebow made no restrictions upon the sources and scope of discovery, thereby giving Lewis carte blanche to "fish" for information.[9]

Not only should Judges Lebow and Speiser have been cautious in allowing for discovery in a post-conviction proceeding (especially in Lewis where no evidentiary hearing had been set), but they should also have been especially vigilant in protecting the judiciary from potential abuse of process. The burden for seeking and obtaining the recusal of trial judges is relatively easy since the judges may not pass upon the merits of the motions. If the judges, once recused, are then automatically

---

[9] At the hearing on the State's motion to quash, Judge Lebow even went so far as to say, "[I]f I find you have a right to take the deposition, you have the right to take the depositions of anybody that could have any information relating to this." (Appendix I at 17).

available as potential sources of information for 3.850 claims, the incentive to seek their disqualification increases and the burden on the circuit courts becomes overwhelming.[10]

Post-conviction motions present an added burden to the already high circuit court caseload. Those filed in death penalty cases are particularly time-consuming, especially where, as here, the judge who presided over the trial has recused himself, leaving the replacement judge to familiarize herself with the facts from the voluminous, but cold, record. The original trial judge, once recused, should then not be subjected at the whim of the defendant to a deposition, especially one unjustified in substance and unlimited in scope.

Like the deliberations of a jury, or the work product of a prosecutor, the mental thought processes of a trial judge should not be the subject of inquiry by a defendant. See Harris v. Rivera, 454 U.S. 339, 344-45 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule." (footnotes omitted)). Judge Kaplan's decisions regarding the appointment of counsel and expert witnesses, and the fees authorized for their services (if such are even determined by the trial judge as opposed to the county's fiscal officer), are discretionary matters which should

---

[10] The incentive in collateral proceedings to seek disqualification of the original trial judge is already great, since most post-conviction motions raise a claim of ineffective assistance of counsel. Defendants generally do not want the original trial judge, who saw and heard the defendant's trial counsel in action, to consider a later ineffectiveness claim. Thus, disqualification is already becoming a common practice.

not have to be justified to Lewis via a deposition. Every decision that a trial court makes during the course of a case has fiscal implications, e.g., the denial of co-counsel, the denial of a continuance, the denial of expert witnesses. Taken to its extreme, the denial of any defense motion could be said to be fiscally motivated--and in some respects it is. Although it is the trial court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter," Makemson v. Martin County, 491 So.2d 1109, 1113 (Fla. 1986), the trial court still has an obligation to be fiscally responsible. It should not, however, have to detail and justify the mental processes that it used to make these decisions. Rather, such decisions are reviewed on appeal upon an abuse of discretion standard.

As in Lewis, the trial court Smith should have been cautious in allowing the defendant to depose Judge Tyson. This case was remanded back to the trial court "for the purpose of getting the facts" surrounding a claim that Judge Tyson and the prosecutor engaged in ex parte communications in preparing the order denying Smith's motion for post-conviction relief. Such a limited remand should not have given Smith "good reason" to depose Judge Tyson prior to the hearing. The "facts" would have been developed at the hearing. Commanding Judge Tyson to appear for a deposition prior to the hearing was unnecessary and well beyond the scope of the limited remand.

Given the nature of post-conviction proceedings and the ramifications of allowing discovery in such a proceeding, this Court, not the Third District, should be responsible for

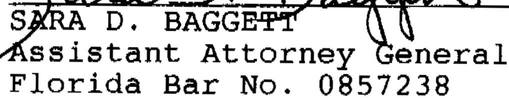
authorizing discovery and setting the limitations necessary to prevent an abuse of process. In the present cases, the trial courts erred in failing to require Lewis and Smith to file written motions seeking leave of court to engage in discovery depositions, especially of circuit court judges, and to establish good reason for doing so, and the relevance and materiality of their testimony. Consequently, this Court should quash the orders of the trial courts denying the State's motion to quash the deposition subpoenas issued to Judges Kaplan and Tyson.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court quash the orders of the trial courts denying the State's motion to quash the deposition subpoenas issued to Judges Kaplan and Tyson.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



SARA D. BAGGETT
Assistant Attorney General
Florida Bar No. 0857238

DEPARTMENT OF LEGAL AFFAIRS
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Martin J. McClain, Chief Assistant CCR, and Stephen Kissinger and Todd Scher, Assistant CCRs, Office of Capital Collateral Representatives, 1533 South Monroe Street, Tallahassee, Florida 32301, this 25th day of February, 1994.

SARA D. BAGGETT
Assistant Attorney General