IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, vs. LAWRENCE FRANCIS LEWIS, Appellee.	CASE NO. 82,930
FRANK LEE SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 78,199

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of the case and facts as detailed in its initial brief.

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 its answer brief, opposing counsel [hereinafter CCR] counters the State's arguments with the following two replies: (1) By issuing deposition subpoenas to Judges Kaplan and Smith, CCR was not engaging in "discovery;" rather it was "investigating" potential claims for relief, and (2) CCR was deposing the judges in order to avoid the appearance of impropriety that would result from consulting with these judges outside the presence of the State. For the following reasons, neither of these contentions, either singularly or together, authorizes CCR to issue deposition subpoenas sua sponte to circuit court judges.

First, CCR's distinction between "discovery" and "investigation" is purely semantical. Black's law dictionary contains the following definition of "investigate": "To follow step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry. See also **Discovery; Inspection.**" Black's Law Dictionary 740 (5th ed. 1979). "Discovery" is defined as follows: "In a general sense, the ascertainment of that which was previously unknown; the

disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts . . . . Id. at 418-19. As is apparent from the foregoing definitions, "investigation" and "discovery" are synonymous.

In trying to maintain a distinction, CCR emphatically states numerous times in its answer brief that "discovery" is not authorized in post-conviction proceedings. See, e.g., AB at 9-13, 24. Curiously, however, in Lewis' motion to vacate, and every amendment and supplement thereto, Lewis requests that "[h]e be provided subpoena power for the production of witnesses, and full and fair pre-hearing discovery. IB App. A at 25, App. C at 58, App. E at 7; AB App. 9 at 35.[1] In addition, CCR fails or refuses to acknowledge that Davis v. State, 624 So.2d 282 (Fla. 3d DCA 1993), authorizes limited prehearing discovery in post-conviction proceedings. Moreover, CCR makes no mention that this Court has recently denied a petition for extraordinary relief/prohibition/common law certiorari wherein a capital defendant in post-conviction litigation sought to quash a trial court's order mandating the exchange of witness lists prior to an evidentiary hearing, and authorizing further discovery with leave of court upon the showing of good cause. See IB App. Q at 1-14.[2]

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[1] In the interest of judicial economy, the State will reference its appendix to its initial brief or to the appendix to Lewis' and Smith's answer brief when necessary, instead of duplicating pleadings previously provided. Reference to the State's appendix will be as follows: "IB App. [letter] at [pg. no.]." Reference to Appellee's appendix will be as follows: "AB App. [no.] at [pg. no.]."

[2] Mr. Van Poyck was represented by attorneys associated with the Volunteer Lawyer's Resource Center, not CCR. However, Mr. Van Poyck's counsel cited extensively to pleadings in this cause in support of their petition.

Thus, while CCR may agree with the State that Rule 3.850 does not provide for discovery, the fact of the matter is that authority for such discovery exists and CCR has previously requested it.

Nevertheless, the State's concern is that Rule 3.850 does not provide for discovery, and discovery has traditionally not been allowed in post-conviction cases. While the State would benefit the most from discovery, it is imperative that this Court decide the issue and set the parameters for discovery. There is tremendous potential for abuse, and there are implications far beyond these two cases. Thus, through its exclusive authority to modify Rule 3.850, this Court should expressly decide whether and to what extent parties should be allowed to engage in discovery in capital post-conviction proceedings.

In the trial courts, the State was in a difficult position because of the Davis decision. Although the State believed that the Davis court had no authority to modify Rule 3.850 and authorize prehearing discovery, the trial courts, especially in Lewis, were compelled to follow Davis. The State was in no position to argue that the district court was in error in rendering its decision since the trial court has no authority to question the propriety of a district court opinion. The only argument available was that CCR had failed to follow the procedural requirements set forth in Davis. It is upon this basis that the State seeks review, since the trial courts refused to enforce these procedural requirements, namely, that the party seeking to engage in discovery file a motion with the court setting forth good reason for engaging in discovery, including a showing that the information sought was relevant and material to

an issue in the case. Davis, 624 So.2d at 284 ("On 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.").

Although the State maintains that Davis was wrongly decided because the district court had no authority to modify Rule 3.850 to allow for discovery, the State was precluded from arguing this before the trial courts. Again, the State was limited to arguing that CCR had failed to follow the mandates of the Davis opinion. CCR contended, however, especially in Lewis' case, that it did not have to file a motion because it was not engaging in discovery. Rather, it issued a deposition subpoena to Judge Kaplan merely to foreclose any accusations of ex parte communication. What CCR fails to realize is that it does not have the authority to subpoena at whim anyone it chooses, especially a judge. Under its rationale, there would be nothing to prevent CCR from issuing deposition subpoenas to any or all of the members of this Court. CCR would merely have to say that it is "investigating" a potential claim. After all, under its theory, CCR cannot possibly know what information members of this Court might have until it deposes them. CCR would not have to justify the inquisition, nor have a good faith basis for doing so.

While CCR has the duty to "investigate" potential claims for relief on behalf of its client, its discretion should not be absolute. Whether under the guise of "investigation" or "discovery," CCR should be required to seek leave of court to

subpoena a judge and show a good faith basis for believing that the subject of the subpoena has relevant and material information relating to a justiciable claim for relief.

In Lewis, CCR made nothing more than conclusory allegations in its first supplement to the amended motion to vacate that Lewis was deprived of his constitutional rights because of the alleged conflict of interest relating to the funding issue.[3] There is absolutely no allegation that Judge Kaplan "bargained" with Lewis' appointed attorney over his fees or in any way precluded Lewis' counsel from obtaining expert witnesses of his choice. In fact, trial counsel moved to have two named experts appointed for guilt-phase testimony: Dr. Fred Fricke, an addictionologist from Boca Raton, Florida, and Dr. Martin Binder, a specialist in drug perception and memory retention from San Francisco, California. (App. A). Both motions were granted. (App. B). At the motion hearing, the trial court specifically stated, "I'm going to appoint these people or I'll pay for them. Let's put it that way. I'm not vouching for their abilities by appointing them. You want these people to be witnesses and I will pay for it." (App. C at 346). Now, on post-conviction review, CCR has made no factual allegation in Lewis' motion to

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[3] See, e.g., IB App. E at 4-5 ("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."); id. at 6 ("As a result of the fact that Broward County judges are engaged in the practice of appointing attorneys and expert witnesses, regardless of experience, competence, or ability, who are willing to work at "bargain" rates so as to ensure that county funds will be available to purchase necessary office equipment, a conflict of interest of the most serious nature exists.").

vacate that Judge Kaplan resolved the alleged budgetary conflict against Lewis. In fact, CCR seems to believe that it does not have to make any factual allegations before deposing Judge Kaplan because Judge Kaplan is the source of the facts, and it can amend its motion to vacate as many times as it chooses.[4] CCR should not be able to use such circular reasoning and piecemeal pleading practice to justify its otherwise unauthorized discovery methods.

Moreover, before CCR is allowed to depose Judge Kaplan, it should explain why this funding issue is not procedurally barred, which would render any "investigation" moot. Lewis was tried in 1988. The county's fiscal plan is public record. If Lewis' court-appointed counsel believed that he was being denied adequate compensation or that he was precluded from hiring expert witnesses because the trial court (county) refused to pay for them or allotted an inadequate sum, then defense counsel could have raised such an issue on direct appeal. The alleged conflict of interest could have been discovered by counsel prior to the trial or direct appeal. Just because Judge Tyson made statements regarding the budget at a hearing in an unrelated case in 1993 does not mean that this alleged conflict of interest could not have been discovered sooner. In effect, CCR is "investigating" an issue that is procedurally barred.

CCR claims, however, that this issue could not have been raised on direct appeal because "Judge Kaplan never disclosed the conflict of interest to anyone, including Mr. Lewis' trial

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[4] In fact, CCR has filed a motion to vacate, an amended motion to vacate, a first supplement to the amended motion to vacate, and a second supplement to the amended motion to vacate.

counsel." AB at 18. Moreover, CCR claims that this issue is based on newly discovery evidence because CCR "recently learned of information" relating to the claim. Id. at 19. This is not the test, however, for newly discovered evidence. The newly discovered facts must have been unknown by the court, the defendant, or counsel at the time of trial, and neither the defendant nor counsel could have discovered them by due diligence. Scott v. Dugger, 604 So.2d 465 (Fla. 1992). Again, the judiciary's budget is public record. Trial counsel could have determined how appropriations were made for the appointment of court-appointed counsel and could have raised an issue on direct appeal. The fact that CCR was recently given the transcripts from Judge Tyson's hearing does not relieve Lewis of showing that this alleged conflict of interest could not have been discovered sooner.

Likewise, in Smith, CCR should not be allowed to hide behind the pretense of "investigation" and depose Judge Tyson at its discretion. CCR has already pled its allegation of wrongdoing in its initial brief to this Court. Believing that additional facts were necessary in order to resolve CCR's allegations properly, the State moved to relinquish jurisdiction to develop the facts more fully. Because CCR had alleged an improper ex parte communication between Judge Tyson and the prosecutor regarding the preparation of the order denying Smith's 3.850 motion, Judge Tyson was going to be a witness at the hearing. CCR merely wanted to have potential ammunition for cross-examination by deposing Judge Tyson prior to the hearing. There was no pending post-conviction motion. Rather Smith was on limited remand to

get the "facts" surrounding the preparation of the order denying relief. The question becomes then: under what authority can CCR subpoena Judge Tyson? Can CCR also subpoena for deposition Paul Zacks, the assistant state attorney who drafted the proposed order denying relief which Judge Tyson signed? Can the State depose Smith's attorney(s) at CCR who represented Smith throughout the pendency of the motion for post-conviction relief?

If CCR has the authority to depose Judge Tyson, can it inquire into matters extraneous to the limited remand? For example, in his supplement to disqualify Judge Kaplan, Lewis appended the transcripts of a hearing wherein Judge Tyson discussed this alleged conflict of interest regarding the funding issue. IB App. D. Under the guise of "investigation," can CCR question Judge Tyson in Smith's case regarding this funding issue even though this Court relinquished Smith's case solely to get the facts surrounding the preparation of the order denying relief?[5] Such an inquiry would be well beyond the scope of the limited remand.

In sum, the State submits that the trial courts erred in denying the State's motions to quash the deposition subpoenas issued sua sponte by CCR to Judges Kaplan and Tyson. In Lewis, the funding issue raised in the first supplement to the amended

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[5] In its answer brief, CCR complains that the State sought to quash the subpoena issued to Judge Tyson after the State remarked at a hearing in Lewis' case that Judge Kaplan was not the only source of information regarding the funding issue--Judge Tyson might also have relevant information, as would a host of other persons involved in the judiciary's budget. AB at 14-15 n.6. See also AB at 20 n.9 (Smith intends to "supplement[] his claims for postconviction relief," i.e. file a second 3.850, raising this funding issue once these interlocutory appeals are resolved).

motion to vacate was procedurally barred. Even if it were not, however, CCR was not authorized to issue a deposition subpoena sua sponte to Judge Kaplan. Lewis' allegations were too conclusory in nature and were wholly unsupported by facts. CCR should have been required to seek leave of court upon a written motion which alleged good cause for taking Judge Kaplan's deposition. In showing good cause, CCR should have been required to provide a good faith basis for believing, i.e., factual allegations, that Lewis was prejudiced by this alleged conflict of interest and that absent this conflict of interest the jury's verdict and recommendation, and the trial court's ultimate sentence would have been different.

In Smith, on the other hand, the State maintains that CCR was not entitle to subpoena Judge Tyson for a deposition. This Court relinquished jurisdiction for the limited purpose of getting the facts surrounding the preparation of the order denying relief. CCR's attempt to depose Judge Tyson was "discovery" in the truest sense of the word. CCR wanted to know exactly what Judge Tyson was going to testify to at the hearing, and it wanted to have a prior sworn statement in order to prepare for its presentation of the "facts." Regardless of what CCR chooses to call it, taking Judge Tyson's deposition constitutes prehearing discovery. Although Davis now allows for limited prehearing discovery in post-conviction proceedings, the State maintains that the Davis court was not authorized to modify Rule 3.850. Only this Court has the authority to do so. Thus, this Court should overturn the decision in Davis and overturn the trial courts' denials of the State's motions to quash the subpoenas in Lewis and Smith.

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 motions to quash the deposition subpoenas issued to Judges Kaplan and Tyson.

Respectfully submitted,

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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, Todd Scher, and John Sommer, Assistant CCRs, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 5th day of April, 1994.

SARA D. BAGGETT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, vs. LAWRENCE FRANCIS LEWIS, Appellee.	Case No. 82,930
FRANK LEE SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 78,199

APPENDIX TO REPLY BRIEF OF APPELLANT

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INDEX TO APPENDIX

APPENDIX A

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

NO. 87-9095 CF

Judge Stanton S. Kaplan

STATE OF FLORIDA

vs

LAWRENCE FRANCIS LEWIS

Defendant

_____/

MOTION TO APPOINT EXPERT WITNESS

The Defendant, LAWRENCE FRANCIS LEWIS, moves this court for the appointment of DR. FRED FRICKE, a specialist on drug addiction, on the following grounds:

1. One of the State's key witnesses and the only eye witness to place the Defendant at the scene of the alleged crimes is James Mayberry. James Mayberry is an admitted drug addict and was using cocaine on the night the alleged crimes occurred.

2. Another of the State's witnesses, David Ballard, is an admitted alcoholic and drug user, and has admitted that on the night the alleged crimes occurred he was using cocaine and drinking excessive amounts of beer.

3. In addition, several other witnesses which the State may call, namely: Charles Heddon, Stacy Johnson a/k/a "Bama," Martin Martin and Wendy Rivera, are also known to be heavy users of alcohol and/or drugs. The Defendant has been informed that Charles Heddon, Stacy Johnson and Martin Martin were drinking large amounts of alcoholic beverages on the night the alleged crimes occurred.

4. Dr. Fricke, being an addictionologist, can testify as to the effects of a long term usage of alcohol and/or drugs on a person's ability to perceive, observe, and identify, and various other factors which would affect the reliability and credibility of these witnesses' testimony.

5. With respect to all of these witnesses, Dr. Fricke's testimony would be most material to the defense of this action, especially since the State's case is based largely on circumstantial evidence, and the credibility or lack thereof of

these witnesses is an important factor to be considered by the jury in arriving at a decision in this case.

WHEREFORE, the Defendant prays this court for the appointment of Dr. Fred Fricke, a specialist on drug addiction, as an expert witness to testify at the trial of this cause, and ordering the State to pay for the costs of such expert witness,together with the cost of transporation of said expert witness to and from Boca Raton,Florida.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion to Appoint Expert Witness has been furnished the office of the State Attorney, Broward County Courthouse, Fort Lauderdale, Florida, this 23 day of May, 1988.

RICHARD R. KIRSCH, P.A.
Attorneys for Defendant
2242 Southeast Ninth Street
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Tel: 463-0631

By Oliveann Lancy
OLIVEANN LANCY
FLA. BAR #0655589

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

NO. 87-9095 CF

Judge Stanton S. Kaplan

STATE OF FLORIDA

vs

LAWRENCE FRANCIS LEWIS

Defendant

_____/

MOTION TO APPOINT EXPERT WITNESS

The Defendant, LAWRENCE FRANCIS LEWIS, moves this court for the appointment of DR. MARTIN BINDER, a specialist on drug perception from San Francisco, California, on the following grounds:

1. Since James Mayberry is the only person who can place the Defendant at the scene of the alleged crimes, it is essential that the jury be informed by way of expert testimony as to the various factors that may affect a person's ability to perceive, observe and identify, and how these various factors can affect a person's memory or ability to recall specific facts and identifications.

2. James Mayberry, at the time of the commission of the alleged crimes, was an admitted drug addict and, in fact, on the date of the alleged crimes admitted having used cocaine.

3. Further, James Mayberry's actions, both preceding and following the commission of the alleged crimes, were bizarre, to say the least, and are factors which should be considered in determining the reliability of his later identification of the Defendant as the perpetrator of the alleged crimes.

4. Dr. Martin Binder is an expert in the field of perception and the factors which influence perception and reliability of memory, and his testimony would therefore be vital to the defense in this case.

WHEREFORE, the Defendant, LAWRENCE FRANCIS LEWIS, prays the court enter an Order appointing Dr. Martin Binder as an expert witness to testify at the trial of this cause, and ordering the State to pay for the cost of such expert testimony, together with the cost of transportation of said expert witness

to and from the State of California. It is estimated tht the total cost, including transportation, would not exceed $3000.00.

I CERTIFY that copy of the foregoing has been mailed to Assistant State Attorney Ralph Ray, Broward County Courthouse, Fort Lauderdale, Florida this 23 day of May, 1988.

LAW OFFICES OF RICHARD R. KIRSCH
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224 SE 9 St.
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By Oliveann Lancy

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APPENDIX B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY FLORIDA

STATE OF FLORIDA	:	
Plaintiff,	:	STANTON S. KAPLAN
vs.	:	CASE NUMBER: 87-9095CF
LAWRENCE FRANCIS LEWIS	:	
Defendant,	:	ORDER

. . . . . :

THIS CAUSE having come to be heard on the Motion of the Defendant to Appoint Expert Witnesses and the Court having considered argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Defendant may obtain the services of Dr. Martin Binder of San Francisco, California and Dr. Fred Fricke of Boca Raton, Florida, provided however, that the Court defers ruling as to the admissibility of the testimony anticipated by the Defendant from either witness.

FURTHER, IT IS ORDERED AND ADJUDGED that the Board of County Commissioners, Broward County, Florida shall pay the reasonable costs of obtaining the services of these two witnesses pursuant to Chapter 939, Florida Statutes.

Dated:
June 13, 1988

HONORABLE STANTON S. KAPLAN
Circuit Court Judge

APPENDIX C