IN THE SUPREME COURT OF FLORIDA

PAUL WILLIAM SCOTT,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 88,551
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0656879
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

Rules

IN THE SUPREME COURT OF FLORIDA

PAUL WILLIAM SCOTT,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 88,551
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

PRELIMINARY STATEMENT

Appellant, PAUL WILLIAM SCOTT, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or “ST[vol.]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement to the extent it is an accurate account of what transpired in the trial court. However the state rejects any editorialization or argumentative rendition of the proceedings below. The following procedural history as well as an account of the evidence presented by the defense and the state is warranted.

This case was remanded to the trial court on August 22, 1995. After numerous judges recused themselves Judge Mounts was assigned to hear this case. On November 1, 1995 Judge Marvin Mounts ordered both sides to provide the court with a chronology of the case and an outline of the issues to be litigated. Due to Mr. McClain's participation in an active death warrant, the evidentiary hearing was scheduled for January 23, 1996. (R 1132). On December 14, 1995, Scott filed a motion to depose the prosecutor, Ken Selvig, and a motion to disqualify Mr. Selvig from prosecuting the evidentiary hearing. The state filed a response, on December 22, 1995 objecting to both motions. A hearing was held on the motions on December 27, 1996. (R 1147-1151, T 2-44). The trial court orally denied the motion at the hearing and entered a written order to that effect on January 9, 1996. (R 1152, T 43). On January 10, 1996, Ms. Anderson, co-counsel with Mr. McClain, filed a Motion To Take Deposition In Order To Perpetuate Testimony and Motion To Continue. (R 1153-1155). A hearing was held on the motions on January 18, 1996. (T 46-63). The motions were denied. (T 63).

On January 19, 1996, Scott filed a petition for extraordinary relief in this Court based on the trial court's denial of his motion to disqualify Mr. Selvig. Also on January 19, 1996 Scott filed his first Motion To Disqualify Judge Mounts. (R 1174-1183). The motion to disqualify was denied on the morning of the evidentiary hearing, January 23, 1996. A second motion to disqualify the judge was filed on January 22, 1996. A motion to dispose the trial judge was also filed. (R 1198-1212). Both were denied at the beginning of the evidentiary hearing on January 23, 1996. The evidentiary hearing proceeded as scheduled. (T 69-133). The following day, January 24, 1996, the court set the remainder of the evidentiary hearing for February 14-15, 1996. (R 1256). A third motion to disqualify the judge was filed on January 26, 1996. (R 1250-1251). A motion to continue the evidentiary hearing/motion to withdraw was filed on January 30, 1996. (R 1256). On February 1, 1996 a notice of taking deposition of Robert Dixon and a fourth motion to disqualify the judge were filed. (R 1261-1262, SR 16-23). A hearing was held on the motion to continue/withdraw and the motion for disqualification on February 12, 1996. (T 286-323). The motion was denied. (T 311). The remainder of the evidentiary hearing was concluded on February 14, 1996. (T 324-401). On February 16, 1996, appellant filed his fifth motion to disqualify the judge. (R 1353). On April 16, 1996 appellant filed his sixth motion to disqualify the judge. (R 1844-1845). And on May 17, 1996 appellant filed his seventh motion to disqualify the judge. (R 1959-1960).

The evidentiary hearing commenced on January 23, 1996. As his first witness Scott called the prosecutor, Ken Selvig. Mr. Selvig was the original prosecutor on the case. (T 137). He stated that he has never seen any statement by Dexter Coffin regarding this case. (T 138, 142, 154). Mr. Selvig was aware that Coffin told Captain Donnely that he had something to say. However Mr. Selvig was not interested in anything Coffin had to say about this case unless he was an eyewitness to the crime. (T 153, 193, 197). Coffin had a terrible reputation for truthfulness. (T 359-361). Selvig was aware of this through the deposition of Detective Collins. (T 143, 198). The deposition was taken in preparation for the co-defendant Richard Kondian's trial. Scott's attorney George Barrs had a copy of this deposition and filed in open court on the first day of Scott;'s trial. (T 153, 186-189, 192).

With respect to the alleged statement of Robert Dixon, Selvig testified Dixon was listed as a state witness. (T 169, 211-214). His name was also provided in discovery through a police report that was given to the defense. (T 157, 206-210).

Mr. McClain then questioned Mr. Selvig regarding the photograph of the circle of blood. Mr. Slevig stated that the photograph was the subject of a motion in limine filed by Scott's attorney George Barrs. (T 238-245). The photograph had been enlarged by the prosecution in anticipation of its use at the trial because Scott had admitted to using the bottle to hit the victim. (T 245-248, 361-362). The hearing concluded for the day with Mr. McClain indicating that he only had a few more questions of his

witness. (T 281-282).

At the continuation of the evidentiary hearing, Ms. Anderson refused to complete the direct examination of the witness. (T 355). On cross-examination Mr. Selvig testified that the state attorney's office turned over the entire file pursuant to Scott's public record request. (T 357-358). Mr. Selvig reiterated that Scott gave two statements admitting that he hit Mr. Alessi with a champagne bottle. (T 361-362). The champagne bottle was never found. (T 362). Mr. Slevig has never seen any statement by Coffin or Dixon that was exculpatory of Scott. (T 364). At the conclusion of the state's cross-examination, Ms. Anderson refused to redirect the defense witness. (T 364-365). The evidentiary portion of the hearing was then concluded. (T 367). Both sides were then given an opportunity to present closing argument. Ms. Anderson stated that she was not prepared to make a statement and that she was unable to contact either co-counsel or her client. (T 370). The state argued that no Brady violation ever occurred. The defense had actual knowledge or notice of the photograph and the existence of Dixon and Coffin. (T 371-377).

The trial court entered its original order on April 23, 1996. (R 1849-1851). The Court found that the defense was aware of the existence of all the potential information and therefore all relief was denied. The state filed a proposed order addressing an outstanding motion to disqualify the judge. (R 1844-1846). The trial court adopted the proposed order and again denied relief. (R 1932-1933).

SUMMARY OF ARGUMENT

Issue I - The trial court properly denied appellant's motion to disqualify the prosecutor Ken Selvig. Appellant's claim that Mr. Selvig was a was a necessary and material witness for the defense was not borne out by the evidence. The fact that the defense chose to call him as a defense witness regardless of that fact does not warrant relief.

Issue II - The trial court properly denied as legally insufficient all of appellant's motions to disqualify the court.

Issue III - The trial court properly denied appellant's motion to continue the remainder of the evidentiary hearing.

Issue IV - The trial court did not err in conducting the remainder of the evidentiary hearing in appellant's absence. Scott was represented by competent counsel at the hearing. Furthermore his presence was not required given that he did not posses any personal knowledge regarding the factual dispute at issue that would have been relevant.

Issue V - The trial court did not abuse its discretion in denying appellant's motion to take deposition to perpetuate testimony given that appellant failed to demonstrate that either witness was unavailable.

Issue VI - The trial court properly granted the state's motion to preclude any witness from testifying with regard to the materiality prong of the Brady claim. The issue of materiality became moot when the record clearly demonstrated that defense counsel had been in possession of or should have known the

existence of the evidence prior to trial.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DETERMINED THAT ASSISTANT STATE ATTORNEY KEN SELVIG'S INVOLVEMENT IN SCOTT'S THIRD POSTCONVICTION MOTION DID NOT DEPRIVE SCOTT OF DUE PROCESS AND A FAIR HEARING

This cause is before this Court for the sixth time.[1] Paul William Scott filed his third motion for postconviction relief in the circuit court in October 1994 while Scott was under an active warrant. The trial court summarily denied the motion on November 3, 1994. In Scott's appeal to this Court, he alleged that the trial court erred in summarily denying his claim that the State withheld material information in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Scott alleged that the State failed to disclose a statement by Dexter Coffin that Scott's coperpetrator, Richard Kondian, admitted killing the victim; a statement by Robert Dixon that he told a police officer that Kondian was angry at Scott for running out on him at the murder scene; and a medical examiner's photograph which suggested that Kondian struck the fatal blow to the victim with a champagne bottle. Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). Noting that the recommendation for death was seven to five and that

[1] A chronology of the appellate history of this case appears in this Court's most recent opinion. Scott v. State, 657 So. 2d 1129, 1129-1130 (Fla. 1995).

Kondian received a 45-year sentence for his plea to second-degree murder, this Court reversed the trial court's summary denial of this claim and remanded this case to the trial court for an evidentiary hearing. Id. at 1132. Scott's motion for rehearing was denied by this Court on July 20, 1995, and mandate issued on August 22, 1995.

After several judges recused themselves from this case, Judge Mounts was appointed and issued an order on November 1, 1995, directing both parties to submit a procedural history of the case, a summary of the issues that needed to be considered, proposed dates for the hearing, and the estimated time needed for the hearing. Although tentatively set for December 14, 1995, Scott's counsel Martin McClain opposed that date due to his involvement in an active death warrant in the case of Jerry White. White v. State, 663 So. 2d 1324 (Fla. 1995). Co-counsel, Mary Anderson, filed a Notice of Agreed Order which stated that the parties agreed to conduct the evidentiary hearing on January 23, 1996. (R 1132).

On December 14, 1995, Scott filed a motion to depose the prosecutor, Ken Selvig, and a motion to disqualify Mr. Selvig from prosecuting the evidentiary hearing. Appellant claimed that Mr. Selvig had become a "necessary and material" witness because of his Brady claim. Scott also complained that Mr. Selvig had a personal interest in the outcome of the litigation and should be disqualified. (R 1135-1141). The state filed a response, on December 22, 1995 objecting to both motions. A hearing was held on the motions on December 27, 1996. (R 1147-1151, T 2-44). The

trial court orally denied the motion at the hearing and entered a written order to that effect on January 9, 1996.[2] (R 1152, T 43).

In this appeal, appellant claims that Mr. Selvig's dual participation at the evidentiary hearing was both an ethical and a constitutional violation of Scott's right to due process. In support of his claim that Mr. Selvig's participation was an ethical violation, Scott relies on rule 4-3.7 of the Rules of Professional Conduct and the "witness-advocate" rule. Scott's reliance on rule 4-3.7 is misplaced, however, as the rule only addresses situations where an attorney is an advocate and a witness for his own client: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where . . . ." The comment to this rule directs one's attention to rules 4-1.7 and 4-1.9 to determine when such testimony creates prejudice to the client. Again, both of these rules deal exclusively with the potential prejudice that such testimony would create for either an existing or former client.

Paul Scott called Ken Selvig as a witness. The state did not. Since Scott cannot demonstrate that Mr. Selvig's "testimony" was prejudicial to Selvig's client--the State of Florida--Scott's argument must fail. State ex rel. Oldman v. Aulls, 408 So. 2d 587, 589 (Fla. 5th DCA 1982) (removal of attorney from continued

[2] Subsequent to that denial, Scott sought relief in this Court. He filed a petition for extraordinary relief/writ of mandamus on January 16, 1996. Following a response by the state, this Court denied the petition on January 22, 1996. Scott v. Mounts, Case No. 87,174 (January 22, 1996). The evidentiary hearing proceeded the following morning.

representation is not warranted absent a finding that such representation is unfair to either current or former client); Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st DCA 1986) (attorney's testimony is prejudicial only when it is adverse to the factual assertions or accounts of events offered on behalf of the attorney's client).

Secondly, Scott cannot demonstrate that Selvig was or ever became a "necessary and material" witness to his defense. Absent that showing, a conflict does not exist. See State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993) (disqualification of prosecutor not warranted where defense fails to specifically demonstrate prosecutor is material to defense). Scott has not indicated how Selvig's testimony established anything that might be deemed remotely favorable to the defense" Id. at 1229. To the contrary, Mr. Selvig's testimony was extremely damaging to Scott's Brady claim. (Selvig's testimony).[3] Consequently the trial court properly denied Scott's motion to disqualify Mr. Selvig, as his participation as a witness for the defense in this cause was not necessary or material.

Thirdly, Scott argues that Mr. Selvig's dual role was improper because he had a personal interest in the outcome of the

[3] Appellee requests that this Court take judicial notice of the exhibits A-D attached as an appendix to the state's response to Scott's petition for extraordinary relief/writ of mandamus. Scott v. Mounts, Case No. 87,174 (Fla. January 22, 1996). Therein the state presented record evidence to prove that Mr. Selvig's testimony would be devastating to Scott's Brady claim should Scott chose to call the prosecutor.

proceedings and thus his active participation as prosecutor and defense witness was a violation of Scott's constitutional rights. Again, Christopher is dispositive. The defendant Christopher was being prosecuted for perjury. The assistant state attorney prosecuting the case was present for the taking of Christopher's original statement. Christopher sought to have the assistant state attorney disqualified because he might be a witness for the defense and generally his participation in the case violated his due process rights. The district court held that the prosecutor's "mere presence at the giving of the statement does not, without more, disqualify him from prosecuting the case. '[M]ere first-hand knowledge of facts that will be proved at trial is not a per se bar to representation.'" Christopher, 623 So. 2d at 1229 quoting United States v. Hosford, 782 F. 2d 936, 938 (11th Cir.), cert. denied, 476 U.S. 1118, 106 S. CT. 1977, 90 L. Ed. 2d 660 (1986).". To the contrary, the district court went on to hold that the prosecutor's participation was proper:

> While we share the trial judges concerns with assuring that Christopher receives a fair trial, we do not see Kastrenake's participation as an obstacle to that end. Rather, we see it as the State proceeding with the assistance of the most qualified and prepared lawyer available to it, an aspect of this case not considered in the trial judge's order.

Id

By seeking to disqualify Selvig, Scott was attempting to gain a tactical advantage by depriving the state of the most qualified attorney to prosecute this case. Scott's argument carried to its

logical conclusion would require the disqualification of the original prosecutor in every evidentiary hearing involving a Brady claim. This Court has rejected that same faulty logic in a related situation. In State v. Clausell, 474 So. 2d 1189 (Fla. 1985), a defendant charged with perjury moved to disqualify an entire state attorney's office because two of the assistants were to be called as witnesses for the state. This Court held as follows:

> To accept Clausell's position would require disqualification of the state attorney's office and the appointment of a special prosecutor in every prosecution for perjury that results from a state attorney's investigation and in all other criminal offenses in which an assistant state attorney is required to be a witness because of his presence during a confession, lineup, or other disputed stage of the investigation. Such a result is contrary to the weight of established authority.

Id. at 1191.(citations omitted).[4]

Likewise in the instant case, Scott cannot demonstrate that Selvig was a material witness, or was otherwise involved with the facts or outcome of the case, and that his continued participation was prejudicial. Id. Scott insisted on going through with this strategy knowing that Mr. Selvig's testimony would not be material

[4] The trial court also denied Scott's motion to depose Mr. Selvig. Scott relied upon the same conclusory allegation and faulty logic that he presents to this Court in seeking to disqualify Mr. Selvig as he did in seeking to depose him. Scott argues that due to the nature of claim, i.e., the state withheld exculpatory information, he is automatically entitled to depose the prosecutor. Scott's argument is directly at odds with this Court's requirement that a defendant must demonstrate good cause which would warrant his request for discovery. State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1995).

to his defense. The fact that Mr. Selvig was an active participant at the evidentiary hearing as the lead prosecutor for the state and that he was called as a witness by the defense was a situation created solely by Mr. Scott. He cannot now complain that the evidentiary hearing was unfair because Mr. Selvig played a "dual" role. Cf. Allen v. State, 662 So. 2d 323, 328 (Fla. 1995)(precluding appellate review of prosecutor's comments where defense counsel emphasized same information to jury as part of defense strategy). Relief must be denied.

In Claim I.B. Scott alleges that the state and the judge engaged in ex parte communications in order to ensure that Mr. McClain would not be available for the remainder of the hearing. This claim also appears in issue II.B. of appellant's initial brief. **Initial brief at 46-47.** The state's response appears in that portion of the answer brief. **Answer brief at 14-17.**

In claim I.C. Scott alleges that the judge conducted extra-judicial investigations and considered matters outside the record. This claim also appears in issue II.C. of appellant's initial brief. The state's response to this claim appears in the corresponding portion to that claim. **Answer brief at 18-19.**

In claim I.D. Scott alleges that Mr. Selvig interviewed jurors in violation of the Code of Ethics. Scott presented this claim to the court prior to the start of the evidentiary hearing. The court stated that such interviews were to be conducted if at all in open court. (T 31-33). Irrespective of whether Mr. Selvig should have interviewed the jurors, Scott cannot demonstrate how this fact

adversely affected the conviction and sentence. The judge's ultimate disposition of Scott's Brady claim centered on the fact that Scott was in possession or was on notice of the existence of all the information that was claimed to have been withheld. (R 1849-1851). The actual count of the jury's recommendation for death was not relevant to resolution of the case. Consequently relief is not warranted.

ISSUE II

THE TRIAL COURT PROPERLY DENIED AS LEGALLY INSUFFICIENT APPELLANT'S SEVEN MOTIONS TO DISQUALIFY THE JUDGE

Throughout the course of the proceedings below, Scott filed seven motions to disqualify the judge. The trial court denied all of the motions finding them to be legally insufficient. A review of the factual allegations presented in the motions demonstrate that trial court's rulings were correct.

When assessing the legal sufficiency of such a motion, the following principle applies:

> We also hold here that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient.

Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986). As will be demonstrated below, none of the motions made the requisite showing that Judge Mounts was actually biased or prejudiced against Scott.

The first three motions to disqualify Judge Mounts were all based on the fact that Judge Mounts presided over a criminal case of Dexter Coffin in 1979. Judge Mounts disclosed this information at a hearing on January 18, 1996. (T 47-48). The specific allegations contained in the various motions[5] were: (1) Coffin's

[5] In addition Scott argues that the judge impermissibly denied his request at the January 23rd hearing to either recess or allow Scott to call Mr. Roth as a witness in order to further amend the factual allegations in his motions. The judge's denials were in violation of Rogers v. State, 603 So. 2d 513 (Fla. 1993). The record indicates however that both requests were denied without prejudice to allow for any further interviewing or investigation

criminal case before Judge Mounts was pending around the same time that Scott and co-defendant Richard Kondian were being held in connection with Mr. Allessi's murder; (2) Judge Mounts received a letter from Captain Donnely[6] in May of 1979; (3) Judge Mounts received a letter from Dexter Coffin; (R 1198-1209);(4) Coffin, testified for the state in 1978-1979 in the prosecutions of Mark Herman and Roger Beach; (5) Coffin received "sentencing consideration" in connection with his testimony in the Mark Herman case; and (6) Judge Mounts was "displeased" with any lenient treatment received by Coffin in exchange for his testimony in the Herman trial. (R 1250-1251). Based on the above, Scott claims that the judge "had already formed a negative opinion regarding Mr. Coffin's character and veracity based on his prior association with Mr. Coffin on maters unrelated to Mr. Scott's case." (R 1175). He further alleges that the "direct and significant contact with Captain Donnelly", required further investigation into the nature of their relationship and the contents of their correspondence/conversations. **Initial brief at 44.**

Based on the relevant case law, Scott's motions were properly denied as legally insufficient. The fact that Judge Mounts presided over Coffin's trial; received a correspondence from a jailer or from Coffin; or communicated any thoughts regarding Coffin's

---

into the matter. (T 88-89).

[6] This the same Captain Donnelly Scott claims was in possession of statements from Dexter Coffin and Robert Dixon which tended to exculpate Scott.

sentencing, do not set forth a well-grounded fear that the judge possessed any personal bias or prejudice against appellant. See Walton v. State, 481 So. 2d 1197, 1199 (Fla. 1985)(rejecting claim that trial judge should have been disqualified because judge presided over trial of codefendant and therefore would be predisposed to reject contrary evidence heard and defendant's trial); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)(finding legally insufficient motion to disqualify judge simply because judge presided over defendant's previous trials and is alleged to have expressed an opinion regarding defendant's guilt); Dragovich, 492 So. 2d at 352(rejecting claim that presiding over trial of co-defendant and sentencing him to death created reasonable fear that judge was biased); Jones v. State, 446 So. 2d 1059 (Fla. 1984)(same).

The next two motions to disqualify Judge Mounts were based on a claim that the state and judge engaged in ex parte communications regarding the date for completion of the evidentiary hearing. (R 1353-1362, SR 16-22). The alleged communications were motivated to ensure that the hearing be set for a day that Mr. McClain would not be able to attend. (T 289-290, 295 ,R 1353-1360, SR 16-22). In response to the motion the state pointed out that at the close of the evidentiary hearing on January 23, 1996, Judge Mounts made it very clear that he intended to set the hearing as soon as possible and without any further input from either side.[7] The hearing was

[7] In setting the hearing, Judge Mounts did take into consideration the fact that Mr. McClain had vacation plans which

to be scheduled on the next available date as determined by the Court's judicial assistant and not the parties. (T 278-281, 290-292). Mr. Selvig complied with the judge's order and spoke to the judge's judicial assistant regarding the Court's next available date for a hearing. Such communication is not a sufficient basis for disqualification. In Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) this Court recognized that discussions between the state and the judge which merely involve the setting of a hearing do not amount to improper ex parte communications. A motion to disqualify the judge based on such factual allegations is legally insufficient. Id at 692. See also Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)(finding that communication with court on administrative matters is not improper).

In the remaining two motions to disqualify Judge Mounts, Scott alleged that: (1) ex parte communications took place between the judge and the state regarding a proposed order submitted by the state; and (2) the trial court engaged in extra-judicial investigations concerning the issues in this case. With regards to the proposed order, Scott relies on Rose. He assumes that since there was no "on the record" directive from the judge, the "inescapable conclusion is that the [proposed] Order was the product of an ex parte communication between Ken Selvig and Judge Mounts." **Initial brief at 47.** Such an assumption is not reasonable under these facts.

---

precluded scheduling of the hearing before February 1, 1996. (T 278-281).

In Rose, this Court emphasized the fact that the state had originally conceded that an evidentiary hearing was required on certain issues, yet the state then filed a proposed order in contradiction of that position. Id, 601 So. 2d at 1183. In the instant case the order denying Scott's postconviction motion had already been entered. (R 1849-1851). The proposed order only addressed an outstanding motion to disqualify the court and did not in any way attempt to address the merits of the case. (R 1932-1933). The motivation behind the state's initiative in filing the proposed order was apparent on its face given that the trial court was required to rule on the sufficiency of the pending motion to disqualify prior to exercising any further judicial authority. Florida law is clear on this point:

> First, we conclude that when a judge is presented with a motion to disqualify, the judge should immediately rule upon the sufficiency of the motion. Section 38.10, Fla.Stat. (1991); Fla.R.Crim.P. 3.230(d). The judge is allowed to determine only the legal sufficiency of the motion. It was error for the trial judge in this case to enter written orders finding Berkowitz in indirect criminal contempt and continuing the injunction for one year before determining the sufficiency of the motion to disqualify. The judge further judicial functions.

Berkowitz v. Reiser, 625 So. 2d 971 (Fla. 2d DCA 1993). Consequently, once the state recognized that a pending motion to disqualify had not been ruled upon, the state submitted the proposed order. (R 1844-1846). Contrary to the facts in Rose, it was unreasonable to assume that an improper ex parte communications took place. The facts in the instant case are similar to those in

Barwick. Therein the state had requested that it be allowed an opportunity to respond to a pending request for appointment of a psychiatrist. Although the request was granted, no response was ever filed. Ultimately the trial court denied the defense motion without benefit of any response by the state. Based on those facts the appellant claimed that the court denied the defense motion after engaging in ex parte communication with the state. In rejecting this claim this Court determined:

> However, the allegation as set forth in the motion simply does not support an inference that there was an ex parte communication between the trial judge and the assistant state attorney as to anything other than a request by the assistant state attorney for another hearing on the motion. While we recently cautioned, and again caution here, that a judge is not to have any substantive communication with counsel for any party, including counsel for the State, unless such communication is expressly authorized by statute or rule, (FN12) we find that the conclusory allegation in Barwick's motion for disqualification was not sufficient to allege that such an ex parte communication occurred.

660 So. 2d at 692. See also Hardwick v. State, 648 So. 2d 100 (Fla. 1994)(same). Similarly in the instant case, it is unreasonable to assume that an ex parte communication regarding the merits of the case ever took place.

In any event Scott cannot demonstrate that any prejudice resulted from the alleged lack of notice regarding the proposed order. Scott was able to object to the trial court's original order denying relief by filing a motion for rehearing. (R 1934-1951). Subsequent to receiving notice that the judge had signed

the proposed order, Scott then filed a second motion for rehearing. (R 1975-1997). A comparison of the motions for rehearing demonstrate that they are identical. Consequently, Scott cannot demonstrate that he was denied an opportunity to respond to the proposed order due to lack of timely notice. Relief was not warranted. Hardwick (finding no impropriety in state's filing of a proposed order as appellant filed extensive response to same).

Finally Scott accuses the judge of conducting extra-judicial investigations regarding the issues in this case. (R 1844-1846). In support of this claim, appellant relies on a letter submitted by judicial assistant Robert Hesse written on April 4, 1996. The letter was as follows;

> Dear Judge Mounts:
>
> You have invited me to review and respond, at my option, to several references to statements attributed to me in the course of this case.
>
> As you know, I have worked as a clerk in the federal and state criminal courts until joining you as judicial assistant in 1987. Since the start of my work in the courts it has been my effort to be impartial and courteous to all who have business with the court.
>
> I do not think it is proper for me to disagree or agree with what the attorneys may claim. Also, I do not attend most hearings and have no personal knowledge of them.
>
> Accordingly, I do not have any comment except to offer that I hope I have not offended or misled the Court or these attorneys.

(R 1834). The Judge sent a copy of the letter to all parties and

placed the original in the court file. (R 1834). Scott does not explain how he was prejudiced by the judge's inquiry of his own judicial assistant. Nor can Scott point to any evidence that could possible be considered prejudicial to his case. Appellant's unsubstantiated conclusory allegations in this claim border on the frivolous and must be denied.

Equally without merit is appellant's claim that the judge conducted extra-judicial investigations into the interviewing of jurors. (R 1958-1963). The record reveals that Judge Mounts was approached by a juror's husband who complained that someone from the Office of the Capital Collateral Representative attempted to contact the juror in 1994. In response Judge Mounts advised the parties of the complaint and simply reiterated his earlier position that the Court would prefer any questioning of a juror be conducted in open court with permission from the Court. (R 1931, T 31-32). Appellant has not apprised the Court as to how the judge's actions impacted on the court's ability to remain impartial regarding the merits of Scott's Brady claims. This is especially so given that the Judge Mount's disposition of the matter was simply to reinforce Scott's earlier demand that the state refrain from interviewing jurors unless the matter is addressed in open court. (R 1096).

In summation, the trial judge properly denied all of appellant's motions for disqualification based on the fact that were all legally insufficient. Barwick; Jackson; Hardwick.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S SECOND MOTION FOR CONTINUANCE

During an active warrant, Scott filed a third postconviction motion, claiming, among other things, that the State withheld material, exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), namely, statements by Dexter Coffin and Robert Dixon, and a medical examiner's photograph. According to his motion, he was prepared at that time to prove his claim at an evidentiary hearing. (Record cite). One was not granted, however, and Scott appealed the denial of his motion. Ultimately, this Court remanded for an evidentiary hearing on Scott's Brady claim. Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). Given this history, Scott's counsel, Martin McClain and Mary Anderson, should have been intimately familiar with this claim and relatively prepared to present evidence on it.

Mandate issued from this Court on August 22, 1995. After several judges recused themselves from this case, Judge Mounts began presiding and ordered the parties on November 1, 1995, to submit a procedural history of the case, a summary of the issues that needed to be considered, proposed dates for the hearing, and the estimated time for the hearing. He also set a tentative date for the hearing for December 14, 1995. (T 120). Scott's counsel, Mr. McClain, informed the court that he was lead counsel for Jerry White, whose execution was scheduled for the first week of December, and that he could not be prepared for Scott's December 14

hearing. (R 1110-1109). The State agreed informally to reschedule the hearing for January 23, 1997, and Judge Mounts reset the hearing accordingly. (R 1132, T 63, 119).

On December 14, 1995, four months after this case was remanded, Scott's counsel moved to depose Ken Selvig, the assistant state attorney who had prosecuted Scott in 1979 and who was actively involved in the postconviction proceedings. (R 1136-40). He also moved to disqualify Mr. Selvig from the case because Mr. Selvig was allegedly going to be a "necessary and material" witness regarding Scott's Brady claim. (R 1136-40). The trial court denied both motions at a hearing on December 27, 1995. (R 1152; T 1-24).[8]

On January 11, 1996, twelve days before the scheduled hearing, Scott's counsel moved to perpetuate the testimony of Robert Dixon, who was on parole in California, and Dexter Coffin, who was incarcerated in Virginia. Counsel also moved to continue the hearing in order to perpetuate their testimony. (R 1161-63). At a hearing on the motions, on January 18, the trial court denied the motion to perpetuate because Scott's counsel had failed to establish the two witnesses' unavailability, which was a prerequisite for perpetuating testimony.[9] (T 46-63). The trial

[8] On January 16, 1996, Ms. Anderson filed a Petition for Extraordinary Relief, For A Writ of Prohibition, And For Writ of Mandamus in this Court. (R 1185-1193). Relief was denied on January 22, 1996). (R 1248).

[9] To support their claim of unavailability, Scott's counsel indicated that Mr. Dixon could not leave California because a condition of his parole was to remain in the state. (T 50). Counsel had made no attempt, however, to extradite Dixon, or

court also denied counsels' motion for a continuance, presumably because counsel would no longer need the additional time to perpetuate the witnesses' testimony, which was the basis for the motion. (T 63).

Having been denied a continuance, Scott's counsel filed motions to disqualify Judge Mounts on January 19 and again on January 22, one day before the scheduled evidentiary hearing. The motions were based on Judge's Mounts disclosure at the January 18 hearing that he had presided over one of Dexter Coffin's trials many years before. (R 1174-83, 1198-1212). On the day of the evidentiary hearing, Scott's counsel also moved to depose Judge Mounts based on the judge's previous disclosure. (R 1244-49). Judge Mounts denied all three motions, and the hearing began. (T 69-133).

Scott called the prosecutor, Ken Selvig, as a witness. Mr. Selvig established by evidence in the trial record that Scott's trial counsel either knew of, or could have discovered, the statements of Dexter Coffin and Robert Dixon, and the medical examiner's photograph. (T 153-154, 157, 169, 186, 187, 192, 198, 201-203, 206-210, 238-241, 364). Near the end of the day, the judge realized that additional time would be needed for the evidentiary hearing. Despite Mr. Selvig's testimony, which

---

otherwise arrange for his temporary absence through the parole officials. (T 54-55). As for Mr. Coffin, counsel claimed that Dixon had been moved around within the Virginia Department of Corrections and had been difficult to locate. (T 51). However, counsel knew where to find him to perpetuate his testimony.

conclusively showed that the State had not withheld Brady material, Scott nevertheless wanted to call Coffin and Dixon, and three other witnesses to establish the "materiality" prong of Brady. (T 275-277). The State, however, indicated that it intended to move to preclude such witnesses' testimony because the "nondisclosure" prong of Brady had been disproved. (T 277). When the trial court asked counsel if they could return the following afternoon to argue the issue, Mr. McClain indicated that he was beginning a week-long vacation the following day and would not be available. (T 278-79). The trial court expressed its intention to resolve the entire matter quickly and asked Mr. Selvig to confer with his judicial assistant and reset the hearing for the next two available days:

> THE COURT: And just-- Mr. Selvig will obtain the two days.
>
> MR. SELVIG: Can I just ask for a little guidance on what time frame for the two days, as soon as possible or you want it down the road?
>
> THE COURT: Well, I would say as soon as Mr. Hesse has it in his book. How long is your vacation?
>
> MR. MCCLAIN: Until the 1st of February, Your Honor. I do have an evidentiary hearing set in February in the Leroy Porter case in federal court in Fort Meyers. I don't remember specifically the date. It might be like the 15th or something like that.
>
> THE COURT: All right, I'll leave that up to you. I don't -- I don't want to leave cases like this undisposed of. I don't want to be an advocate for moving it, you know, but I would like--I think it's helpful to have your objections to the calling of these witnesses in advance so we don't spin around and sputter and so forth on the date of the hearing. So

> get two full days and I'll set that as soon as we can.

(T 281-282) (emphasis added).

As ordered, Mr. Selvig conferred with Judge Mounts' judicial assistant, reserved the next two available days, February 14-15, and notified Scott's counsel of the hearing. (R 1256). On January 30, Scott moved to continue the hearing and, in the alternative, moved to withdraw.[10] To support the motion, Scott's counsel cited conflict with unspecified "previously set hearings," and the newly signed death warrant for Rickey Roberts. (R 1256). The following day, Scott's counsel also moved to disqualify Judge Mounts for the third time, claiming that the state engaged in improper ex parte communication with the court in order to intentionally set the evidentiary hearing at a time when counsel could not attend. (T 289-290, 298-300).[11]

The trial court held a hearing on the above-referenced motions two days prior to the continuation of the evidentiary hearing. (T 286-323). At the hearing, Mr. McClain reiterated his position and told the court that he would not attend the evidentiary hearing because of the scheduling conflict:

> MR. McCLAIN: I have no choice but to treat Mr. Roberts as a top priority. This warrant was set after consulting with the Attorney General. The party opponent here creates a conflict for me. The fact of the

[10] Also on January 30, 1996, Ms. Anderson filed a Notice of Taking Deposition of Robert Dixon. That deposition was conducted by Ms. Anderson on February 10th, 1996. (R 1261-1262).

[11] Also on January 31, 1996, the state filed its Motion To Preclude Testimony Of Witnesses. (R 1263-1265).

> matter is, I am unavailable on February 14 and 15 because there is a hearing in Maryland on February 16 and I have to prepare for it.

(T 301). After the Court denied the third amended motion to disqualify, the Court heard additional argument regarding the motion to continue. Mr. McClain again stated that he would not be attending the evidentiary hearing:

> MR. McCLAIN: I am not available and will not be able to attend on February 14 or 15 and I ask for a continuance. In the alternative, I am asking to withdraw because of the conflict that has been created between Mr. Roberts' case and Mr. Scott's case and I am having to choose between two clients; therefore, I ask for a continuance. In the alternative, I ask for leave to withdraw.

(T 305). He further informed the Court that Ms. Anderson was not competent to conduct the evidentiary hearing, and she would not participate in the hearing, irrespective of the court's ruling:

> MR. McCLAIN: Ms. Anderson is not qualified to do the evidentiary hearing, she will not do the evidentiary hearing; if you force here to attend she'll simply say she's not qualified to do the evidentiary hearing, and if that's what Your Honor wants, that's how we are going to proceed.
>
> In this instance the February 14 and 15 scheduled hearings cannot be done by any attorneys from CAR; first, I am not available. I don't know any attorney that has the knowledge, the history, background to do the evidentiary hearing. I ask that you continue the case and in the alternative I ask that you allow CAR to withdraw.

(T 309-310).

In response to those assertions, the state presented documentation that no hearing had been scheduled on <u>February 15</u>,

1996, in the Roberts case, or in the Porter case). (T 297, R 1314-1316). However, there was a hearing set for February 16, 1996, on a motion to transport Roberts to Maryland where he was challenging his prior convictions.[12] That hearing had been scheduled by counsel for Roberts, Ms. Jennifer Corey, on December 20, 1996. (R 1311-1313). Thus, the state argued that the court should deny the motions to continue/withdraw because: (1) the scheduling "conflict" involved a hearing for nothing more than a motion to transport; (2) no actual "conflict" existed between the date of the evidentiary hearing and the hearing date in Roberts' case; (3) the evidentiary hearing in the instant case was a continuation of the hearing from the previous month, which should take precedence; and (4) there was available competent co-counsel, Mary Anderson, to represent Scott for the remainder of the hearing should Mr. McClain insist on not attending. (T 296-297, 306-311). In response, Mr. McClain insisted that he needed to be in Maryland because he intended to transform the motion to transport hearing into an evidentiary hearing.[13] (T 300). The trial court denied Scott's motion to continue,[14] as well as the third amended motion to disqualify the court. (T 302, 311).

The court then addressed the state's pending motion to

[12] An evidentiary hearing on Roberts' motion to vacate his prior convictions was set for March 22, 1996. However, Roberts was set to be executed in late February 1996. (R 1525).

[13] Transcripts of that hearing, totaling 14 pages, reveal that no such transformation occurred. (R 1524-1537).

[14] It is the denial of this motion to continue that Scott challenges in this appeal.

preclude Scott's "materiality" witnesses. After hearing argument, the Court granted the state's motion. (T 311-318). See Issue VI, infra. The hearing concluded with the understanding that the evidentiary portion of the case would resume as scheduled on February 14, 1996. However, Mr. McClain did not appear at the hearing, as he had indicated he would not. Moreover, he had failed to have Mr. Scott returned to the circuit for the hearing.[15] Mary Anderson did appear, but as Mr. McClain had promised, she refused to participate in the hearing, claiming that she was unprepared and incompetent to conduct the hearing. (T 338-341, 355). After discussion and argument regarding the necessity of appellant's presence vel non, the court addressed the question of Ms. Anderson's involvement/knowledge about the case. The record indicated that Ms. Anderson had been involved with this case since at least March of 1994. (T 340). She has filed substantive pleadings in this case, argued motions without co-counsel's presence, attended the first portion of the evidentiary hearing, and took the deposition of Robert Dixon. (T 341-345, 346-353). Ultimately, the Court concluded that the hearing should proceed: (T 338-351).

Since Mr. McClain had indicated at the close of the prior

[15] Scott's counsel had secured by motion Scott's presence at the initial hearing. (R 1156, see exhibit A). At the end of the hearing, the trial court gave Scott's counsel the option of having Scott remain in the county jail until the next hearing or having him returned to Union Correctional. (T 282-283, 334-335). Apparently, Scott's counsel opted for the latter, but failed to assure his return.

hearing that he had a few more brief questions for Mr. Selvig (T 281-82), the prosecutor returned to the witness stand. However, Ms. Anderson refused to conduct the continued direct examination of the witness. (T 355). Undersigned counsel then cross-examined Mr. Selvig briefly and released him as a witness. (T 356-365). When asked if she was going to present any other witnesses, Ms. Anderson again claimed that she was unable to represent Scott. (T 365-366). The trial court afforded the state the opportunity to call witnesses, which it declined to do (T 367-368), and then recessed to allow Ms. Anderson an opportunity to communicate with her office prior to making any closing argument. (T 367-368). Ultimately, Ms. Anderson again refused to participate, and Mr. Selvig gave a closing argument before the hearing concluded. (T 370).

On March 13, 1996, a month after the hearing, Scott's counsel filed a Motion For Reconsideration of the Denial of Motion For Continuance. (R 1467-1511). The state responded with exhibits that rebutted counsel's continued and repeated assertions regarding both the existence and nature of the alleged scheduling conflict for February 15, 1996. Those exhibits included a motion filed by Ms. Corey, Rickey Roberts' attorney, on February 9, 1996, which requested that the time set aside for the original transport hearing of February 16 be used to argue Robert's request to expedite the evidentiary hearing currently set for March 22, 1996:

> WHEREFORE, Mr. Roberts respectfully requests that the Court grant a hearing on Mr. Roberts' emergency request for expedited hearing at the time previously set for hearing on Mr. Robert's motion to transport, February

16, 1996, at 9:00 a.m.

(R 1518). As demonstrated from this pleading, the hearing scheduled for February 16 in Maryland did not possess the importance Mr. McClain attached to it. The 14-page transcript from that hearing further belies his claim, as only a brief mention was made of their desire to expedite the later hearing:

[excerpt if helpful]

(R 1524-1537).

As noted at the outset of this claim, the legal issue presented in this argument is whether the trial court abused its discretion in denying Mr. McClain's motion to continuance the February 14-15 hearing. The appropriate legal standard on appeal is as follows:

> "While death penalty cases command [the Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976); see also Rose v. State, 461 So. 2d 84, 87 (Fla. 1984), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 706 (1985). The denial of a motion for continuance should not be reversed unless there has been a palpable abuse of discretion; this abuse must clearly and affirmatively appear in the record. Magill v. State, 386 So. 2d 1188 (Fla.1980), cert. denied, 450 U.S. 927, 101 S. Ct. 1384, 67 L. Ed. 2d 359 (1981).

Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996).

Scott cannot make that showing. Mr. McClain established no good-faith need for a continuance of the February 14-15 hearing. Jennifer Corey represented Rickey Roberts. Even if Mr. McClain

were co-equal or lead counsel, Ms. Corey could have represented Roberts at the February 16 hearing in Maryland on a motion to transport, and she could have pursued an expedited hearing on Roberts' postconviction motion. Moreover, Mr. McClain could have left at the end of Scott's hearing on February 15 to attend Robert's February 16 hearing. Scott's case had been on remand for six months and needed to be resolved expeditiously. Absent a good-faith basis for a continuance, the trial court properly denied his request. Mr. McClain made a willful decision not to attend the evidentiary hearing and not to ensure his client's presence at the evidentiary hearing, in total defiance of the trial court's ruling. Such contemptuous behavior should not be countenanced by this Court. Cf. Spaziano v. State, 660 So. 2d 1363, 1369 (Fla. 1995) (determining that defendant's desire to be represented by particular counsel does not take precedent over the fair administration of justice). See also Landry v. State, 562 So. 2d 843 (Fla. 4th DCA 1990) (finding that trial court has discretion to refuse request for continuance from a defendant whose bad faith and dilatory behavior has been established); United States v. Gates, 557 F.2d 1086 (5th Cir. 1977) (same).

And even if Mr. McClain's presence in Maryland took precedence over Scott's hearing, Ms. Anderson should have been prepared to continue the hearing. She had been co-counsel for quite some time and had been actively involved in Scott's case. Under the circumstances, it was highly inappropriate for Mr. McClain to order Ms. Anderson's silence, and highly inappropriate for Ms. Anderson

to oblige. Her self-imposed claim of ineffectiveness was a blatant disregard of the trial court's authority and, as well, should not be countenanced. Given both counsel's contemptuous behavior and their failure to assure Mr. Scott's appearance, the trial court did not abuse its discretion in concluding the hearing. See Carter v. State, 469 So. 2d 775, 781 (Fla. 1st DCA 1984) (finding no abuse of discretion in denial of motion for continuance as evidence of counsel's knowledge of the case belied claims of unpreparedness); Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991) (upholding denial of request for continuance where counsel's unpreparedness for penalty phase was result of his own actions).

Even assuming, however, that the trial court should have catered to counsels' schedules, there was no harm to Scott by its failure to do so. See Richardson v. State, 604 So. 2d 1107, 1108-1109 (Fla. 1992) (holding that erroneous denial for continuance was harmless given that the precluded evidence, if presented, would not have changed the outcome of the proceedings given the overwhelming evidence of guilt). Although not challenged anywhere in this appeal, the trial court ultimately rejected appellant's Brady claim on the merits:

> It is clear and without doubt that the defense had notice of all three [allegedly withheld pieces of evidence]. The State's Memorandum of February 14th is correct and incorporated herein. There is no evidence, by affidavit or otherwise, that Dixon or Coffin ever made a written or recorded statement during the time frame prior to the trial.
>
> This record demonstrates that there is no concealment, no failure to disclose.

(R 1851). Since the record unequivocally established that the state did not commit a Brady violation, appellant was not prejudiced by his counsel's "inability" to proceed with the evidentiary hearing on February 14. (R 1851).

In order to establish that a Brady violation occurred, appellant was required to prove

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991). Irrespective of the testimony of George Barrs, Dexter Coffin, Robert Dixon, Dr. Cuevas or Mr. Nute, the record conclusively demonstrated that all of the information, i.e., alleged statements by Coffin or Dixon and the medical examiner's photograph, was available to Scott. (R 1164-1168). Consequently, Scott's "inability" to present the testimony of his witnesses was harmless error since the Brady claim could not have been established. Richardson, 604 SO. 2d at 1108-09.

With respect to the first alleged Brady material, a statement by Dexter Coffin, the record establishes that Scott's trial, George Barrs, was aware of the fact that Coffin allegedly made a statement

to corrections officer Captain Donnely.[16] This information was contained in a deposition of Detective Collins taken on March 15, 1979. The deposition was filed in open court on the first day of Scott's trial on October 1, 1979. (T 190, 192). The deposition was taken by the attorney for Richard Kondian and is contained in the record on appeal from Scott's first evidentiary hearing in Case no. (T 138-139, 191). The deposition testimony was as follows:

> [Question]: "[D]o you know the names of any other persons to whom Richard Kondian is alleged to have given a statement in regard to this incident? There were two people."
>
> "Answer: There were two people in the county jail that were in his cell. One that I know I believe was Kenneth Budlong and the other was Dexter Coffin."

(T 201) (quoting deposition of Detective Collins at 19). Consequently the record is unrefutable that Scott's attorney was aware of the fact that Kondian may have talked to Dexter Coffin about this case. Because Scott's attorney had such notice and therefore equal access to any potential information, there was no Brady violation. Hegwood, 575 So. 2d at 172 (finding no Brady violation where defense had equal to witness); Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)(same); Melendez v. State, 612 So. 2d 1366, 1367-1368 (Fla. 1993)(same).

The second Brady violation involves an alleged statement by Robert Dixon. Again the record is unrefutable that Scott was aware

---

[16] The state was not interested in speaking to Coffin unless he was an eyewitness to the crime. Coffin had a reputation for dishonesty and the state would not interested in any information he claims to have possessed. (T 192-193, 196-197).

of Dixon's existence. At the evidentiary hearing below, Scott's counsel presented to defense witness Ken Selvig, a police report[17] which contained Dixon's name. (T 157, 169). Regarding the contents of police report, Mr. Selvig testified as follows:

> "In the early morning hours of Wednesday, December 5th, a subject Dixon was staying at the Jolly Roger Motel on Fort Lauderdale beach. At this time he was invited to leave the state of Florida, possible heading to California with the subjects Rick and Sunshine;" that's reference to Rick Kondian and Paul and Valerie. That reference is to Paul Scott."

(T 207). (Quoting from police report). The remainder of Dixon's statement contained in the report refers to the activities of Kondian, Scott, and Valerie once they left Florida. Dixon's name was also appears on the state's witness list which was also provided to counsel prior to trial. Since Scott was well aware of the fact that Robert Dixon may have information regarding the facts of this case no Brady violation occurred. Hegwood, 575 So. 2d at 172; Provenzano v. State, 616 So. 2d at 428, Melendez v. State, 612 So. 2d at 1367-1368.

Finally the record also is unrefutable that Scott was well aware of the existence of the picture of the circle of blood. The record reveals that Scott's attorney, George Barrs, filed a motion in limine on September 26, 1979 in order to preclude the presentation of a number of photographs taken from the scene. The contact sheets referred to at that hearing were presented at the

[17] See defense exhibit 1. (T 206).

evidentiary hearing as defense composite exhibit 8. (T 241).[18] Included in those photographs is the picture of the circle of blood. (R 1267-1278, T 237-247). Again the record conclusively demonstrates that no Brady violation occurred. Scott's attorney was well aware of the existence of the picture, as counsel attempted to have the picture excluded from the trial. See Hunter v. State, 660 So. 2d 244, 250 (Fla. 1995)(rejecting Brady claim where record undisputedly demonstrates alleged withheld photographs were presented at deposition attended by defense counsel). Since the record conclusively establishes that Scott's attorney had sufficient notice or knowledge of all the alleged evidence, there can be no prejudice regarding the "inability" to present any witnesses.

Finally appellant is unable to demonstrate that the photograph was material under Brady. This Court has defined "materiality" in the following manner:

> Not all evidence in the possession of the State must be disclosed to the defense under Brady. Evidence is only required to be disclosed if it is material and exculpatory. Evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S. CT. 3375, 3383-84, 87 L. ED. 2D 481 (1985). In making this determination,

[18] The state ask this Court to take judicial notice of exhibit C attached to the response in Scott v. Mounts, Case No. 87, 174. Therein is a property receipt from the Boca Raton Police department lists as evidence a blood stain of a circle of blood.

> the evidence must be considered in the context of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S. CT. 2392, 2401-02, 49 L. ED. 2D 342 (1976).

Cruse v. State, 588 So. 2d 983, 987 (Fla. 1991). The record clearly demonstrates that Scott cannot met this burden. The photograph of the circle of blood would have been anything but exculpatory. To the contrary, the photograph would have been highly incriminating of appellant's participation in the brutal beating of Mr. Alessi. Prior to trial, appellant unsuccessfully attempted to suppress statements he made to the police. In those statements, appellant admitted to striking Mr. Alessi with a champagne bottle. (R 123, 129-130, 1280).[19] To the extent appellant is correct in asserting that a champagne bottle was one of the weapons used to kill Mr. Alessi, his statements admitting that he used that bottle as a weapon would have further inculpated him in the crime. Consequently appellant has failed to establish the requisite materiality prong under Brady. See Cruse, 588 So. 2d at 986 (finding state's failure to disclose names of doctors not to be in violation of Brady given that there findings would have contradicted the defense and supported the state's theory of the case).

In conclusion, any error in failing to grant Scott any further continuance was harmless. Irrespective of any potential witness's testimony, the record conclusively demonstrates that appellant had

[19] See also deposition of Detective Collins at 33-34. Scott v. State, 513 So. 2d 653 (Fla. 1987) and police report of Collins attached as exhibit D in Scott v. Mounts, Case no. 87,174

either notice or was in possession of all of the alleged Brady material. In addition, the photograph would not have been material to Scott's defense. Appellant has not established any prejudice which would warrant relief on this claim. Richardson, 604 So. 2d at 1108.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING THE REMAINDER OF THE EVIDENTIARY HEARING IN APPELLANT'S ABSENCE SINCE IT WAS COUNSEL FOR APPELLANT'S RESPONSIBILITY TO ENSURE THEIR CLIENT'S PRESENCE AND THEY FAILED TO DO SO

Scott alleges that he was denied due process and a full and fair hearing when the remainder of his evidentiary hearing was conducted in his absence. Scott alleges that his absence was orchestrated by the state: "Mr. Selvig, the State's witness-advocate, manipulated the process to exclude Mr. Scott and his counsel of five years, Mr. McClain." **Initial brief at 67.** Appellant further alleges that the court was also responsible in failing to transport Mr. Scott to the hearing. **Initial brief at 70.** Therefore appellant claims that the alleged actions of the state and the trial court mandate reversal of the trial court's order denying postconviction relief based on Clark v. State, 491 So. 2d 545 (Fla. 1986).

A review of the record and relevant case law will clearly establish that Scott's claim is both factually and legally erroneous. In assessing whether or not a trial court properly conducted an evidentiary hearing in the absence of the defendant the following principles are applicable:

> Whether a prisoner should be physically present at a 3.850 proceeding is discretionary with the trial court except when evidence is to be presented and the prisoner is not represented by counsel. State v. Reynolds, 238 So. 2d 598 (Fla.1970). This discretion

> must be exercised with regard to the prisoner's right to due process.

Clark, 491 So. 2d at 546 (Fla. 1986). Even when a defendant is represented by competent counsel his presence may still be required:

> Rule 3.850 does not require that a defendant must always be present on a motion for post-conviction relief. Nevertheless, where, as here, there are questions of fact within the defendant's own knowledge which must be resolved, the defendant must be afforded an opportunity to testify and cross-examine witnesses.

Smith v. State, 489 So. 2d 197, 198 (Fla. 1st DCA 1986). In the instant case, appellant was represented by counsel and he did not possess any personal knowledge regarding the Brady claim. COnsequently since he was represented by counsel at the hearing, Scott's presence was not mandatory.

The following facts will demonstrate that the trial court did not abuse its discretion in proceeding with the evidentiary hearing without the appellant: (1) Scott's absence was the result of his attorneys' actions; (2) Scott was represented by competent counsel at the hearing irrespective of that attorney's protestations otherwise; (3) the issue being litigated at the hearing, i.e., a Brady violation, was not a claim wherein Scott possessed any relevant personal knowledge that would impact on the merits of the claim.

As for Scott's absence at the February hearing, the following discussion occurred at the conclusion of the hearing on January 23, 1996:

> MR. McCLAIN: Your Honor, do you wish to have Mr. Scott transported back to UCI in the interim?
>
> THE COURT: I don't know how long. I'm not sure that the county would want to house him for that. I don't know. I think the security-- the sheriff's office usually makes that decision and they are guided, I think, primarily by you lawyers. I don't have any special interest in keeping him here or--
>
> MR. McCLAIN: My experience is usually that they will not transport back without an order from the judge and I will check on that and if an order is necessary I will let the state know and provide a draft of an order to you.
>
> THE COURT: I would appreciate an agreed order in which the sheriff and the state and you CCR folks are all in agreement on something. That would be refreshing.

(T 282-283). On January 24, 1996, the remainder of the hearing was set for February 14-15, 1996. Ms. Anderson and Mr. McClain filed a motion for continuance on January 30, 1996. (R 1256-1260). That motion was denied on February 12, 1996. (T 311). Ms. Anderson appeared at the scheduled evidentiary hearing on February 14, 1996. Her client, Paul Scott, was not in attendance. The Court recessed for an hour in order that both the state and Ms. Anderson look into why Mr. Scott was not present. (T 326-332). Mr. Selvig apprised the court that he spoke to the sheriff's office, and, that it was Mr. McClain who "ordered" that Scott be sent back to prison. Mr. McClain's conversation with the deputy occurred "sometime shortly after the January 23 hearing." (T 334-335). Although Mr. McClain assured the deputy that an order would be forthcoming, no such order was entered. Consequently, in complete contradiction of the

above exchange that occurred between Mr. McClain and Judge Mounts, Mr. McClain did not discuss the matter with the state, nor did he draft an order for the court. Scott was simply transported without input or notice to anyone else.

The Court then made inquiry of Ms. Anderson. She stated that she had no information concerning why Scott was not present for the remainder of the hearing or why he had been transported back to prison after the January 23rd hearing. (T 334-336). Ms. Anderson's claimed ignorance is illogical in light of the following facts: (1) Ms. Anderson was counsel for Scott; (2) Ms. Anderson was present for the January 23rd discussions regarding whether or not Scott would be transported back to prison or remain in West Palm Beach; (3) Ms. Anderson's co-counsel, Marty McClain, was responsible for "ordering" that the sheriff's office transport Scott back; and (4) Ms. Anderson was quite successful in securing Scott's presence at the initial hearing date, as she filed a "Motion To Transport Defendant" two weeks before that hearing (see attached exhibit A).

This record demonstrates that counsel deliberately chose not to secure Scott's presence at the hearing in a blatant attempt to circumvent the trial court's denial of his motion to continue. All the parties were aware that the hearing would go forward on February 14, 1996. Counsel for Scott was very capable of securing his attendance at that hearing, as she had done so in the past. However, counsel chose not to do so, irrespective of the knowledge that the judge intended to proceed with the hearing. Unlike the

facts in Clark, where neither the defendant nor his counsel were ever notified of the evidentiary hearing, Mr. Scott's absence was the direct result of counsels' decision. Counsels' actions should not be condoned by this Court and should be viewed as a waiver of Scott's presence. Cf. Spaziano v. State, 660 So. 2d 1363, 1369 (Fla. 1995)(determining that defendant's desire to be represented by particular counsel does not take precedent over the fair administration of justice); Landry v. State, 562 So. 2d 843 (Fla. 4th DCA 1990)(finding that trial court has discretion to refuse request for continuance from a defendant whose bad faith and dilatory behavior has been established); United States v. Gates, 557 F.2d 1086 (5th Cir. 1977)(same).

Scott also maintains that his presence became more necessary in light of the fact that he was unrepresented at the hearing. Again, there is no factual support for this claim. As counsel, Mary Anderson's extensive participation in the proceedings belied any contention that she was incompetent to participate in the remainder of the hearing. (T 338-351). See Issue III. Again, unlike the facts of Clark, counsel was present but chose not to participate. Counsel's actions amount to a waiver of this claim. See Carter v. State, 469 So. 2d 775, 781 (Fla. 1st DCA 1984)(finding no abuse of discretion in denial of motion for continuance as evidence of counsel's knowledge of the case belies claims of unpreparedness). Ms. Anderson's refusal to participate was unwarranted. Cf. Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991)(upholding denial of request for continuance where counsel's

unpreparedness for penalty phase was result of his own actions).

Finally, and most importantly, Scott was in no way prejudiced by his absence from the hearing. As noted above, Scott's presence would only have been critical if he possessed any information regarding the factual dispute at issue. Smith, 489 So. 2d at 198. In an attempt to persuade this Court that Scott's presence was critical, collateral counsel alleges that "Mr. Scott has personal knowledge of whether George Barrs had ever advised him that Dexter Coffin or Robert Dixon had made statements exculpatory as to Mr. Scott." **Initial brief at 67.** However, any relevant information Scott possessed regarding this particular point was not an issue. Scott has continually maintained since 1994 in his verified motion, that the defense was unaware of the existence of the alleged evidence because the state intentionally withheld it. Therefore according to Scott himself, Mr. Barrs could not have possibly told Scott about the existence of any exculpatory statements made by Kondian to Coffin or Dixon. To the extent counsel is now admitting that Scott possessed "personal knowledge" that his attorney was aware of such statements, this Court must dismiss this Brady claim. See Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991)(finding no Brady violation where defense had equal access to witness); Provenzano v. State 616 So. 2d 428, 430 (Fla. 1993)(same).

Furthermore the record unequivocally demonstrated that the photograph and the statements were either known of could have been known to the defense. Consequently, whatever Barrs may have advised Scott about with reference to this information is totally

irrelevant. The fact remains that the defense could have or should have been aware of the information irrespective of whether the defense was actually aware of the information.

In summation appellant's claim is without merit. His absence as well as the "absence" of his attorney, from the evidentiary hearing was orchestrated by his attorneys. Furthermore, Scott's presence was not required, given that even if he possessed any personal knowledge it was irrelevant to resolution of the Brady claim. And more importantly any knowledge he may have possessed was irrelevant to the claim.

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO TAKE DEPOSITION TO PERPETUATE TESTIMONY

During the active death warrant in 1994, appellant claimed that the state withheld a photograph of a circle of blood, and two statements which allegedly exculpated him in the murder of James Alessi. Scott v. State, 675 So. 2d 1129, 1130 (Fla. 1995). The statements were made by Dexter Coffin and Robert Dixon. Scott requested that he be allowed to present these two witnesses at an evidentiary hearing. That request was granted by this Court in August of 1995 when the case was remanded for resolution of this specific claim. Scott, 657 So. 2d at 1130. Appellant therefore knew that two of his prime witnesses for the upcoming evidentiary hearing would be Dexter Coffin and Robert Dixon. Three months after remand and citing to scheduling conflicts, Mr. McClain stated that he could not conduct the hearing in December of 1995. The state and Scott's counsel agreed to set the hearing for January 23, 1996.[20] Thirteen days prior to the start of the evidentiary hearing, appellant's attorney, Mary Anderson, filed a Motion To Take Deposition To Perpetuate Testimony. (R 1153-1155).[21] A hearing on the motion was conducted five days before the start of

[20] On November 23, 1995 Scott's counsel agreed to set the evidentiary hearing for this date. Yet on January 18, 1996 that same also claimed that one of the defense's star witnesses had a prior court date on January 23, 1996 in California.

[21] She also filed a motion for continuance of the evidentiary hearing. (T 53).

the evidentiary hearing. Ms. Anderson appeared on behalf of Scott. (T 48-61). After hearing argument, the trial court denied the motion. (T 63).

The basis for the motion to take deposition was that both witnesses were outside the territorial jurisdiction of the court. (R 1135-1137). The only facts offered in support of the witnesses' unavailability was the following:

> MS. ANDERSON: Judge, to continue, we have located Mr. Dixon and Mr. Coffin. Mr. Dixon is currently residing in California but he is on parole. One of the conditions of his parole is that he not leave the State of California, among other things.
>
> He also has a court date of January 23rd which he will be required to attend.
>
> Mr. Coffin is in Virginia. He has been recently incarcerated. It is my understanding that he is in the reception center and they are deciding what to do with him. And we were told any day he can be moved to wherever they are going to move him permanently.
>
> For that reason I am not exactly sure today where he might be or what institution he is in Virginia. Because it is my belief that it is not possible for these witnesses to be here for the January 23rd hearing, I filed this to be able to have these persons' testimony.

(T 50-51). In response the state challenged the defense to demonstrate what efforts hade been made to secure the presence of the witnesses. It was noted that transportation of such witnesses through the interstate acquisition of witnesses would have secured the witnesses presence if counsel had made any attempts to do so. (T 54-55). Furthermore given the amount of time that these witnesses had been known to the defense, August of 1994; the fact

that case had been remanded for at least five months; and the fact that the hearing date was agreed upon by the parties, the state objected to the motion. (T 53, 58). Ms. Anderson simply countered that her lack of effort was caused by the fact that Mr. Scott was not her only case and that two death warrants were given priority over Scott. (T 61). Thereafter, the trial court denied the motions . (T 63).

On appeal, appellant challenges the trial court's ruling arguing that the trial court did not have any discretion to deny the motion. Scott claims that by simply alleging that a witness is unavailable the trial court must grant the motion to perpetuate testimony. However this is not law in Florida. Prior to perpetuating the testimony of a witness, the moving party must demonstrate that the witness is unavailable:

> Florida Rule of Criminal Procedure 3.190(j)(6) requires more than a perfunctory attempt to contact a witness whose testimony has been perpetuated. While the question of how far a party must go to satisfy the requirements of the rule will be susceptible to different answers depending on the circumstances of each case, the party offering the deposition must show it has exercised due diligence in its search.

Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). Contrary to appellant's assertion otherwise, more is required that simply stating that the witness is unavailable. The moving party must detail the efforts made to establish unavailability. See McMillon v. State, 552 So. 2d 1183 (4th DCA 1989)(finding prosecutor's statement that witness was unable to travel was insufficient to

justify use of deposition as substantive evidence especially in light of the fact that opposing counsel disagreed with that assessment).; When challenged to establish the unavailability, Ms. Anderson failed to detail what efforts. In fact Ms. Anderson conceded that virtually no efforts had been made to secure either witness' presence given that she and Mr. McClain had other pressing matters. Counsel's active caseload did not excuse them from making a diligent effort into obtaining the presence of their witnesses. Hernandez v. State, 608 So. 2d 916 (3dr DCA 1992)(upholding trial court denial of request to perpetuate testimony since the defense failed to diligently procure witness' attendance). Regardless of counsels' active caseloads, the witnesses could have been procured with relative ease as argued by the state through the Uniform Act To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. Counsel's continued reliance on the fact that they a busy caseload does not justify the total lack of effort to proceed with the hearing. The trial court did not abuse its discretion in denying the motion. See Arizona v. Ratzlaff, 552 P.2d 461 (1976)(finding that because witness resided outside territorial jurisdiction did not satisfy "unavailability" requirement given the relative ease associated with procuring attendance of witness through proper procedure). Releif is not warranted.

ISSUE VI

THE TRIAL COURT PROPERLY PRECLUDED ANY TESTIMONY RELATING TO MATERIALITY UNDER BRADY v. MARYLAND, OF EVIDENCE WHERE THE RECORD CONCLUSIVELY DEMONSTRATES THAT THE EVIDENCE HAD BEEN DISCLOSED TO THE DEFENSE WELL IN ADVANCE OF TRIAL

Appellant claims that the trial court erred in granting the state's "Motion To Preclude Testimony of Witnesses." Specifically, the state requested that Scott be precluded from presenting the testimony of any witness whose testimony was related solely to whether or the not the picture of the circle of blood was "material"[22] under Brady.[23] (T 311-312) The state's motion was based on the fact that under Brady the appellant must establish that the state withheld evidence that could not have otherwise been obtained by the defense. Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991). In the instant case, Scott could not make that showing since the record unequivocally demonstrated that defense attorney, George Barrs, was well aware of the existence of the circle of blood. (R 1263-1265). Given the record evidence that conclusively refuted the nondisclosure prong of Brady, it would have been futile to allow the defense to present testimony regarding the "materiality" prong. Cf. Kennedy v. State, 547 So. 2d 912, 913-914 (Fla. 1989) (when determining ineffective

[22] Included in Scott's motion for postconviction relief are affidavits of Dr. Cuevas, the medical examiner, and Mr. Dale Nute, a forensic consultant. The substance of the affidavits addresses the alleged materiality of the photograph.

[23] Brady v. Maryland, 373 U.S. 83 (1963).

assistance of counsel claim, court need not make a specific ruling on performance component when it is clear that prejudice component is not satisfied); Garcia v. State, 622 So. 2d 1325 (Fla. 1993) (trial court is allowed discretion when deciding to cut off questioning when it is determined that further inquiry is irrelevant).

In support of this factual argument, the state attached to the motion a copy of the transcript of a pre-trial hearing that was conducted on September 26, 1979. Scott's attorney George Barrs had filed a motion in limine regarding photographs from the crime scene. The transcript revealed that eight contact sheets were reviewed at that hearing. Included in sheet number four are two photographs of a bloody circle. (R 1276-1307). Consequently, the record demonstrated that the state did not withhold the photograph of the circle of blood. In actuality, the photographs were the subject of a motion in limine filed by Scott's attorney. Therefore this portion of Scott's Brady claim was totally refuted by the record. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993) (no Brady violation exists when information is equally accessible to defense or could have been obtained through the exercise of due diligence); Hunter v. State, 660 So. 2d 244, 250-251 (Fla. 1995)(same); Melendez v. State, 612 So. 2d 1366 (Fla. 1993)(same).

In response Scott argued (1) that the state was procedurally barred from arguing that the record refuted the claim that the photograph had been withheld since this Court had remanded the case for an evidentiary hearing on the Brady issue (T 315); (2) that the

record does not refute the fact that rather than a Brady issue the relevant issue was possibly a claim of ineffective assistance of trial counsel (T 316); and (3) that "materiality" is relevant not just to Brady but also to the alternative claims of ineffective assistance of counsel or a claim of newly-discovered evidence (T 317-318). The state responded that the Florida Supreme Court remanded the case to resolve a Brady claim and nothing else. A claim of ineffective assistance of counsel had been litigated many years ago in a prior motion for postconviction relief. (T 316). Thereafter the trial court properly granted the state's motion. (T 318).

On appeal, Scott reiterates his contention that by precluding any testimony regarding the materiality of the photograph under Brady, "Mr. Selvig's argument completely ignored Mr. Scott's contention that if Mr. Barrs had been apprised of the existence of the photograph, then he was ineffective in failing to understand its significance and present it." **Initial brief at 78.** Scott's argument is unpersuasive. This Court remanded this case for a determination of Scott's Brady claim. Scott v. State, 657 So. 2d at 1130 (Fla. 1995). Consistent with that directive, Scott repeatedly acknowledged that the scope of the remand was to resolve the Brady claim. (T 10, 24, R 1110). Scott has never argued, let alone presented evidence to refute the fact, that he was aware of the photograph's existence. Consequently, any evidence offered to establish materiality of that photograph remains irrelevant. The trial court properly precluded testimony on an irrelevant issue.

See Kennedy, 547 So. 2d at 913-914; Garcia, 622 So. 2d at 1326.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to MARTIN MCCLAIN,Office of the Capital Collateral Representative, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this **5th** day of **SEPTEMBER,** 1997.

CELIA A. TERENZIO
Assistant Attorney General