IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,551

PAUL WILLIAM SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The State's Answer Brief is written in a style akin to a horse wearing blinders. The State's only hope for an affirmance is if this Court ignores the realities of what occurred and simply stays focused on the narrow path the State has chosen to proceed. The State relies upon the testimony of the State's advocate below as completely disposing of the case and exonerating the State, i.e. the witness, of violating Mr. Scott's constitutional rights. The State ignores the reality that Mr. Scott has contended that Mr. Selvig (the State's advocate below and the trial prosecutor) was not credible. The State ignores that Mr. Selvig admitted that while he was wearing his hat as the State's counsel arranged for the evidentiary hearing to reconvene at a time that Mr. Scott's counsel had stated he was not available. Thus counsel-Selvig arranged for witness-Selvig to not be questioned any further by Mr. Scott's counsel, Mr. McClain.

The State relies upon the testimony of its own advocate below, at a proceeding that did not comply with due process, that was not a full and fair hearing as establishing that Mr. Scott suffered no prejudice from the lack of due process. Surely it is beyond question in this day and age that a proceeding that was not fair cannot be relied upon to establish that there was no harm suffered from the proceeding not being fair. Mr. Scott was not able to present his witnesses because of the actions of Mr.

Selvig (both a witness and an advocate below), Mr. Scott was deprived of the presence of his counsel through the actions of Mr. Selvig, Mr. Scott was not present for the evidentiary hearing because Mr. Selvig scheduled the hearing in an ex parte fashion. Judge Mounts presided over the proceeding after revealing that he knew information that undersigned counsel should investigate and learn. The proceeding below, from one end to the other made a mockery of due process, yet the State relies upon the testimony of Mr. Selvig--both a witness and an advocate as establishing no harm. The State's position must be rejected.[1]

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[1]The State has filed a bar grievance against undersigned counsel and Ms. Anderson Mills alleging that their handling of the February 14, 1996, hearing was sanctionable because they asserted they were not prepared to go forward and presented no evidence upon Mr. Scott's behalf. Mr. McClain was in Maryland representing Rickey Roberts who was then under an active death warrant. Ms. Anderson Mills covered the hearing pursuant to a court directive but was not prepared to go forward on behalf of Mr. Scott and so stated on the record. Mr. McClain has sought to withdraw from this appeal believing that the pending bar grievance created a conflict of interest.

Despite having filed the bar grievance, Assistant Attorney General Celia Terenzio asserts in her Summary of Argument on Issue IV; "Scott was repesented by competent counsel at the [February 14th] hearing." If Mr. Scott received the assistance of competent counsel at the February 14th hearing, it is unclear why the bar grievance was filed.

It was undersigned counsel's understanding from the bar grievance that the State accepted that the February 14th hearing was sham and a mockery, but asserted that it was due to undersigned counsel's conduct. Undersigned counsel's position has always been that the situation was created by the actions of witness-advocate Mr. Selvig who scheduled the hearing on an ex parte basis for a time that undersigned counsel was not available.

Of course, Mr. Scott's point of view is that he does not care whose fault it is that his hearing was a sham. However, undersigned counsel is hamstrung by his own personal interest and his own personal belief that he did absolutely everything he could when presented with a choice between his two clients--Paul

(continued...)

ARGUMENT I

The issue that Mr. Scott had raised in his 3.850 upon which the remand occurred was whether he had received an adequate adversarial testing when exculpatory evidence did not reach the jury. The defense attorney at trial gave an affidavit saying that the exculpatory evidence had not been disclosed to him. Of course to the extent that trial counsel was not diligent in seeking it out, under this Court's decision in State v. Gunsby, 670 So. 2d 920 (Fla. 1996)("To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that this performance was deficient under the first prong of the test for ineffective counsel"). Undersigned counsel sought to learn the trial prosecutor's position as to whether he provided the defense attorney access to the exculpatory access. However, the State convinced the judge to deny all discovery depositions.

Judge Mounts recognized in another case that the situation which occurred here warranted special care:

> "Before you begin questioning, I wish to suggest it is a special situation in any case when an attorney, particularly one who is an adversary, is called as a witness. I understand it to be the law of our state.
>
> "It may have changed now but that was a procedure to be undertaken with care, caution and some delicacy. If the law has changed, I would like to have you share that change with me.
>
> "If our believe that is still the law, I would like you to confirm our agreement."

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[1](...continued)
Scott and Rickey Roberts. What arguments another counsel would make at this juncture on behave of Mr. Scott undersigned counsel does not know. However, this Court previously refused to allow undersigned counsel withdraw due to the perceived conflict created by the State's filing of a bar grievance.

Young v. State, November 30, 1996, p. 352-53.

Undersigned counsel advised the lower court early on that Mr. Selvig was an individual who possessed information that may be relevant to the issues at hand. Undersigned counsel sought to depose Mr. Selvig because Mr. Scott had no other means of learning what Mr. Selvig would testify to. Mr. Scott also sought to disqualify Mr. Selvig under Rule 4-3.7 well in advance of the evidentiary hearing.

First, the State argues that Rule 4-3.7 applies only when an attorney is both an advocate and a witness for his own client. The argument overlooks the fact that Mr. Selvig was called by Mr. Scott as a hostile witness because the discovery deposition had been denied, the judge had refused to exclude Mr. Selvig from the courtroom, and Mr. Selvig would be able to tailor his testimony for the State after the testimony of the other witnesses. The argument overlooks the fact that the State relies entirely upon Mr. Selvig's testimony; in fact, Mr. Selvig's closing argument was the he, Mr. Selvig, was a credible witness. Mr. Selvig was a both a witness and an advocate within the meaning of the rule.

The State also argues that Mr. Scott's argument fails because Mr. Selvig's testimony was not prejudicial to his client, the State. The inconsistency in the State's position seems to escape the State's notice. The reason the testimony was not prejudicial to the client is because the reality was that Mr.

Selvig was testifying for the State.[2] Undersigned counsel's testimony in Smith v. State or in Lightbourne v. State was not prejudicial to either his client Frank Lee Smith or Ian Lightbourne, yet the Attorney General's Office moved to disqualify Mr. McClain.

The cases cited by the State in support of its interpretation, State ex rel. Oldman v. Aulls, 408 So. 2d 587 (Fla. 5th DCA 1982), and Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st DCA 1986), address a different situation arising under the Code of Professional Conduct Disciplinary Rule 5-102(B) concerning an attorney's duty to withdraw when he anticipates that he may be a material witness in the same matter on which he is currently working. Further, the State also cites cases that undermine its argument that Rule 4-3.7 does not apply when an attorney is a material witness for the opposing party. State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), is cited by the State for the proposition that "disqualification of prosecutor [is] not warranted where [the] defense fails to specifically demonstrate prosecutor is material to defense." Appellee's Brief at 11-12 (emphasis in original). Clearly, this case explicitly contradicts the State's argument about the Rule's inapplicability to Mr. Scott's claim. The court in Christopher denied the motion to disqualify based on the defendant's failure to show the relevance of the state attorney's testimony; the court considered

[2]Of course, to the extent that Mr. Selvig's testimony indicates that trial counsel was ineffective under State v. Gunsby, the testimony was prejudicial to the state.

the merits of the defendant's motion and noted that "the record that exists in this case indicates that [the prosecutor] will not testify." 623 So. 2d at 1229. The court did not state that the rule is inapplicable when a state attorney may be a material witness for the defense only that the requirements of showing prejudice had not been met. In fact, the court in Christopher noted the importance of preventing situations where a prosecutor is also a witness:

> We recognize that the functions of a witness and a prosecuting attorney must be kept separate and distinct and that "the practice of acting as [both] prosecutor and witness is not to be approved and should be indulged in only under exceptional circumstances."

Id. (quoting Shargaa v. State, 102 So. 2d 809, 813 (Fla. 1958)). See also, Fleitman v. McPherson, 691 So. 2d 37 (Fla. 1st DCA 1997)(granting motion to disqualify one attorney from law firm representing defendants in defamation suit because attorney would be called as witness for the plaintiff).

In the alternative, the State argues that Mr. Scott's motion to disqualify is deficient because Mr. Selvig is not a material and necessary witness and therefore a conflict does not exist. Of course, the State's entire brief is premised upon Mr. Selvig's testimony as refuting any allegation that Mr. Selvig, on behalf of the State failed to disclose any exculpatory evidence. Clearly, the State's reliance upon Mr. Selvig's testimony establishes its relevance; the testimony was material to the issues at hand. However, these obvious inconsistency in the State's position seems to escape the its own notice.

Appellee's brief states that "Scott has not indicated how Selvig's testimony established anything that might be deemed remotely favorable to the defense." Appellee's Brief at 12. The State completely ignores this Court's ruling in State v. Gunsby and the fact that Mr. Scott has always asserted that to the extent that trial counsel was in error in his recall and that he should have learned of the exculpatory evidence his performance at trial was deficient.

The determination that Mr. Selvig is a necessary witness to Mr. Scott's claim that he did not receive an adequate adversarial testing should be based on his role as the state attorney who prosecuted Mr. Scott and who therefore has relevant information about the unpresented exculpatory evidence at the time of Mr. Scott's trial. Moreover, it must be remembered that counsel for Mr. Scott had not completed his examination of Mr. Selvig when the hearing was continued and then rescheduled for a later date when counsel was unavailable to attend.

In addition, the cases relied on by the State in support of its argument that Mr. Scott's motion to disqualify is insufficient do not apply to this situation. The State primarily relies on Christopher where the court held that "mere presence at the giving of the statement does not, without more, disqualify him from prosecuting the case." 623 So. 2d at 1229. In that case, the defendant was being charged for perjury arising from a statement given in the presence of the prosecuting attorney, but the court noted that "the record is completely devoid of any

proffer, suggestion, or intimation as to what possible knowledge, if any, that [the prosecutor] might possess about which Christopher could have him testify in furtherance of Christopher's defense." 623 So. 2d at 1230. The court in Christopher relied on United States v. Hosford, 782 F.2d 936, 938 (11th Cir. 1986), where the court also recognized that "a prosecutor must not act as both prosecutor and a witness," but held that "mere first-hand knowledge of facts that will be proved at trial is not a per se bar to representation." These cases do not support the State's argument where Mr. Selvig's involvement goes far beyond "mere presence" or "mere first-hand knowledge." Far from being a bystander or even a passive recipient of relevant information, Mr. Selvig was actively involved in the circumstances that have given rise to Mr. Scott's Brady claim.

The State also argues that granting a disqualification in this case would set a precedent requiring the "disqualification of the original prosecutor in every evidentiary hearing involving a Brady claim."[3] Appellee's Brief at 13. In support of its argument that this Court has rejected this "faulty logic" in a related situation, the State cites State v. Clausell, 474 So. 2d 1189 (Fla. 1985), a perjury case in which the defendant moved to disqualify the entire state attorney's office because two state attorneys would be called as witnesses for the State. That case in inapposite for two compelling reasons. First, Mr. Scott has

[3]The State conveniently overlooks the fact defense counsel at trial is in essence disqualified from representing the client in postconviction by this very principle.

not moved for the disqualification of the entire state attorney's office, but only the disqualification of the one state attorney who is a material witness to his claim. Second, in Clausell, the state attorney witnesses called by the defense were not playing the dual role of attorney/witness because they were not in fact involved in the perjury prosecution of Mr. Clausell; therefore, their only role in the trial would be as witnesses. That case has no relevance here where Mr. Selvig persists in prosecuting Mr. Scott's case despite his role as a material witness.

Despite the State's scheduling of the continuation of the evidentiary hearing on the one day that Mr. McClain was unavailable, the State alleges that by filing a motion to disqualify, "Scott was attempting to gain a tactical advantage by depriving the state of the most qualified attorney to prosecute this case." Appellee's Brief at 13. According to the State's standards, the presence of "the most qualified attorney" is necessary only to the State, while Mr. Scott should take whatever attorney is available without regard to that attorney's familiarity with his case or competence to represent him. The State's disregard of Mr. Scott's right to the effective assistance of post-conviction counsel and to a full and fair hearing is also revealed in its suggestion that Mr. Scott is not entitled to relief because he is to blame for the conflict created by Mr. Selvig's dual role:

> 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.

Appellee's Brief at 15 (emphasis in original).[4] To penalize a litigant for calling a material witness would essentially deny his right to a full and fair hearing and preclude his ability to prove the claims that entitle him to relief. Mr. Scott called Mr. Selvig as a witness in order to prove his Brady claim, not to create the basis for his disqualification motion as the State alleges.

Mr. Selvig is a material witness to the substance of Mr. Scott's no adversarial testing claim on which this Court felt that an evidentiary hearing was required, and he should therefore be disqualified from further involvement in this case.

ARGUMENT II

The State argues that Judge Mounts properly denied Mr. Scott's motions to disqualify him because they are legally insufficient. However, the cases cited by the State do not support its argument that Judge Mounts' ex parte communication with the State Attorney's Office and his familiarity with a key witness in Mr. Scott's case are insufficient to require disqualification.

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[4]Inexplicably, the State cites Allen v. State, 662 So. 2d 323, 328 (Fla. 1995), for the proposition that this Court denies "appellate review of prosecutor's comments where defense counsel emphasized same information to jury as part of defense strategy," but fails to explain how this supports its argument that Mr. Scott is not entitled to relief because he "created" the conflict at the evidentiary hearing.

Mr. Scott first sought the disqualification of Judge Mounts based on his familiarity with and prejudice against Dexter Coffin, a witness whom Mr. Scott planned to call pursuant to this Court's order remanding this case for an evidentiary hearing. The State argues that this familiarity with Mr. Coffin and his role as an informant, which includes the receipt by Judge Mounts of correspondence from Mr. Coffin, "do[es] not set forth a well-grounded fear that the judge possessed any personal bias or prejudice against appellant." Appellee's Brief at 19. In support of this argument, the State cites four cases denying motions to disqualify based on the fact that the judge presided over either a co-defendant's trial or prior trials of the defendant. None of these cases addresses the situation where the judge is privy to nonrecord information that could influence his evaluation of a witness's credibility.

Judge Mounts presided over Mr. Coffin's trial at the same time that Mr. Kondian, Mr. Scott's co-defendant, made the incriminating statements to Mr. Coffin that are the subject of this Court's order remanding for an evidentiary hearing. Because Judge Mounts received correspondence from both Mr. Coffin and from Captain Donnelly, who used Mr. Coffin to obtain information against Mr. Kondian, it is possible that Judge Mounts knew of Mr. Kondian's statements to Mr. Coffin. The cases cited by the State are irrelevant in this situation because the basis for Mr. Scott's motion to disqualify is not solely the fact that Judge Mounts presided over Mr. Coffin's trial. He had further contact

with and knowledge of this witness specifically in regard to Mr. Coffin's role as an informant against Mr. Kondian. In addition, the information provided to counsel for Mr. Scott by Mr. Roth, who represented Mr. Coffin in 1978 and 1979, which hinted at another possible connection between Judge Mounts and Mr. Coffin, could provide further support for Mr. Scott's motion to disqualify. Judge Mounts improperly denied a recess to allow counsel to pursue this area of inquiry further.[5]

The State also argues that Mr. Scott's motions to disqualify Judge Mounts based on his ex parte communications with the State Attorney's Office are legally insufficient. The State argues that ex parte communication on scheduling matters is permissible and denies that any ex parte communication regarding the State's proposed order denying the motion to disqualify ever occurred. In support of its first argument, the State cites Barwick v. State, 660 So. 2d 685 (Fla. 1995), and Rose v. State, 601 So. 2d 1181 (Fla. 1992). In Barwick, this Court found that communication from the State Attorney's Office to the judge requesting a hearing was not prohibited, and in Rose, this Court stated that the rule against ex parte communication "would not

[5]The State relegates a discussion of Rogers v. State, 630 So. 2d 517 (Fla 1993), to a footnote. In that footnote, the State fails to explain how the clear and unambiguous language in Rogers ("Where a party discovers mid-trial or mid-hearing that a motion for disqualification is required, he or she may request a brief recess--which must be granted--in order to prepare the appropriate documents.")can be ignored. Judge Mounts denied the request continuance. The State only response is that it was denied without prejudice.

include strictly administrative matters not dealing in any way with the merits of the case."

The issue in this case is more serious than whether the State contacted Judge Mounts on a purely administrative matter. Following the January 23rd hearing, the State Attorney's Office intentionally scheduled the continuation of the hearing on a date when counsel for Mr. Scott specifically stated that he was unavailable. The State Attorney's Office contacted Judge Mounts to schedule the hearing without contacting Mr. McClain, despite Judge Mounts' explicit instruction at the January 23rd hearing that the State should consult with Mr. Scott's counsel regarding possible hearing dates. After the hearing was scheduled for the one day that Mr. McClain informed the court and the State that he could not attend, Judge Mounts refused to grant counsel's motion for a continuance.

In addition, Judge Mounts again engaged in ex parte communication with the State following the February 14th hearing. On April 29, 1996, the State submitted a proposed order although there is no request on the record for proposed orders. The State's proposed order was not received by counsel for Mr. Scott until May 2, 1996, one day after it was signed by Judge Mounts. The State argues that there was no ex parte communication regarding this order and that the State Attorney's Office submitted the proposed order on its own initiative because Judge Mounts had violated Florida law by ruling on Mr. Scott's motion to vacate without first addressing the motion to disqualify.

Inexplicably, the State cites Hardwick v. State, 648 So. 2d 100 (Fla. 1994), in support of its argument that the ex parte communication that occurred in this case was permissible. Although this Court in Hardwick affirmed the denial of the motion to disqualify, the discussion of the particular facts indicates that Mr. Scott's case is more like Rose in which the ex parte communication was impermissible. In that case, as in this one, the trial court adopted the State's proposed order denying relief without providing the defense notice of receipt of the proposed order or an opportunity to review and object to its contents. This Court in Rose also recognized that even ex parte communication regarding a proposed order is prohibited by the rule:

> The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not mindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety.

601 So. 2d at 1183.

The State tries to argue that this case is more like Barwick than Rose. However, in Barwick, the State requested the opportunity to respond to the defense request for a psychiatrist and this Court found the facts insufficient to justify an inference of ex parte communication. Notably, in Barwick the

State requested an opportunity to be heard on a pending motion, while in Mr. Scott's case and in Rose, the defense was deprived an opportunity to respond after the State engaged in ex parte communication with the judge. In Barwick, this Court cited In re Miller, 644 So. 2d 75 (Fla. 1994), in which this Court explained the purpose of the prohibition against ex parte communication: "no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties." Id. at 78. In Mr. Scott's case, the State gained the advantage of scheduling a hearing when counsel for Mr. Scott could not attend. Although the State may argue that its communication with Judge Mounts concerned merely a scheduling matter, it resulted in the denial of Mr. Scott's right to the effective assistance of counsel and to a full and fair hearing.

This Court in Rose reiterated that the purpose of the prohibition against ex parte communication is not only to prevent prejudice to one party but also to guard against the appearance of impropriety: "We are not concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question." 601 So. 2d at 1183. After his repeated ex parte communications with the State, Judge Mounts' impartiality clearly is not "beyond question" and he should be disqualified.

ARGUMENT III

The State argues that Judge Mounts did not abuse his discretion when he denied Mr. Scott's motion for a continuance when his attorney could not be present at the hearing that was scheduled for the only day that counsel informed the court and the State that he was unavailable. The State argues both that Ms. Anderson was competent to act as counsel to Mr. Scott at the evidentiary hearing and that Mr. McClain "made a willful decision not to attend the evidentiary hearing." Appellee's Brief at 37. The State's suggestion that Mr. McClain and Ms. Anderson "should have been intimately familiar with this claim and relatively prepared to present evidence on it," Appellee's Brief at 26, ignores that Mr. McClain was both familiar with the pending claims and prepared to present evidence but that the hearing was conducted when he was unavailable. In regard to Ms. Anderson, the State has repeatedly ignored counsel's argument regarding her incompetence to proceed on her own as Mr. Scott's counsel without citing any evidence in support of its contention that Ms. Anderson could render the effective assistance of counsel. Finally, both the caselaw regarding post-conviction representation and the Rules of Professional Responsibility would require an attorney in a capital case to be more than "relatively prepared" to conduct an evidentiary hearing on complex issues such as those involved in this case.

Although Ms. Anderson had been involved in Mr. Scott's case prior to the hearing, she was not qualified to conduct the

evidentiary hearing in Mr. McClain's absence. The State's allegation that because Ms. Anderson had filed pleadings, argued motions, taken a deposition, and attended the first evidentiary hearing in Mr. McClain's presence, she is therefore competent to proceed unassisted at the evidentiary hearing is unsupported. The State ignores that Ms. Anderson attended her first evidentiary hearing on January 1, 1996, and that she was present as a third chair and did not participate beyond observing and assisting lead counsel. The State has ignored counsel's argument that Ms. Anderson was incompetent, both in her experience and her lack of familiarity with Mr. Scott's case, to render the effective assistance of counsel to which he is entitled. See Spaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). The State accuses Ms. Anderson of "refus[ing] to participate," Appellee's Brief at 35, but cites no evidence in support of its allegation that her behavior was anything other than ethical conduct required by the Rules of Professional Conduct.

The State makes similar accusations against Mr. McClain, implying that he misrepresented his responsibilities in other cases and lied to the court about his schedule. Mr. McClain informed the court that he had a scheduled hearing in Maryland on the Rickey Roberts case. Because a warrant had been signed on that case, Mr. McClain told the court that he intended to attempt to transform the scheduled hearing into a full-blown evidentiary hearing and that he had to be prepared to present witnesses in

the event that the Maryland court granted his request. The State misrepresents Mr. McClain's statements about his "alleged scheduling conflict" when it states that "the hearing scheduled for February 16 in Maryland did not possess the importance Mr. McClain attached to it." Appellee's Brief at 35-6. The State implies that Mr. McClain knew in January that the hearing in Maryland would not be a full evidentiary hearing when Mr. McClain specifically told the court of his intention to request a full evidentiary hearing in that case because of the impending warrant.[6] Mr. McClain did not tell the court or the State that the Roberts hearing was already scheduled to be a full evidentiary hearing, and the State's allegation that Mr. McClain misrepresented his schedule is unjustified. And the State completely overlooks the fact that because of his work in Maryland on February 14th and 15th he was in a position to file a lengthy federal habeas petition in Baltimore, Maryland, on Saturday, February 17th, and was prepared to go forward with an evidentiary hearing in federal court which only did not occurred because this Court stayed Mr. Roberts' execution.

[6]The State also argues that Ms. Corey, who was also assigned to Mr. Roberts' case, could have handled the hearing on her own or that Mr. McClain could have attended Mr. Scott's hearing on February 15th and still be able to attend Mr. Roberts' hearing on February 16th in Maryland. Appellee's Brief at 37. The State ignores that Ms. Corey was incompetent to represent Mr. Roberts on her own and that Mr. McClain was unavailable on February 15th because of the need to prepare for Mr. Roberts' hearing in the event that the Maryland court granted his request to conduct a full evidentiary hearing because of the impending warrant.

The State describes Mr. McClain's "willful decision not to attend the evidentiary hearing" and Ms. Anderson's "self-imposed claim of ineffectiveness" as "contemptuous behavior," Appellee's Brief at 37-8, and implies that counsel for Mr. Scott requested a continuance for illegitimate reasons. To the contrary, counsel for Mr. Scott requested a continuance only to protect his right to the effective assistance of counsel that would be denied if the hearing occurred without the presence of his attorney. Judge Mounts abused his discretion in denying this motion. The State cites several cases regarding a judge's discretion in denying a motion for continuance;[7] however, these cases do not support the State's argument in this case. In Landry v. State, 562 So. 2d 843 (Fla. 4th DCA 1990), cited for the proposition that the "trial court has discretion to refuse request for continuance from a defendant whose bad faith and dilatory behavior has been established," the court remanded for retrial because the defendant was prejudiced by his lack of counsel in a DUI case and the trial was a miscarriage of justice. In Carter v. State, 469 So. 2d 775 (Fla. 1st DCA 1984), the court held that the trial court had not abused its discretion because counsel's knowledge of the case belied his claim of unpreparedness. However, the court noted that the denial of a continuance would constitute an abuse of discretion if it infringed the defendant's right to the

[7]Of course, the State's position completely overlooks the fact that the situation was entirely a creation of Mr. Selvig, both a witness and an advocate below. Mr. Selvig set the evidentiary hearing on an ex parte basis for a day that undersigned counsel had indicated he was not available.

effective assistance of counsel. See also, Kimbrough v. State, 352 So. 2d 925, 927 (Fla. 1st DCA 1977)(finding abuse of discretion in denial of motion for continuance when it resulted in representation at trial by an attorney unfamiliar with the case). In Richardson v. State, 604 So. 2d 1107 (Fla. 1992), also cited by the State, the court held that an erroneous denial of a motion for continuance was harmless error because the evidence precluded by the denial would not have changed the outcome given the overwhelming evidence of guilt. That case has no bearing here where the issue is not only the denial of the effective assistance of counsel, but a complete denial of any representation. There can be no question but that the outcome of the hearing would have been different had Mr. Scott been represented by competent counsel.

Finally, the State argues that Mr. Scott suffered no prejudice from Judge Mounts' denial of his motion for a continuance because he did not prove the elements of his claim. This argument fails because the court's denial of the motion for a continuance deprived Mr. Scott of a full and fair hearing and the effective assistance of counsel; therefore, it was the situation caused by the court's denial that prevented Mr. Scott from proving the elements of his claim. Mr. Selvig was Mr. Scott's first witness and counsel was unable to finish questioning him because the hearing was scheduled for the only day on which counsel was unavailable. Mr. Scott's other witnesses and evidence were not presented to the circuit court,

and therefore the State cannot argue that Mr. Scott did not prove the elements of a Brady claim. This Court must order a new hearing so that counsel for Mr. Scott can present the evidence that would support his claim for relief.

ARGUMENT IV

The State argues that counsel for Mr. Scott is responsible for his absence from the February 14th hearing and, in the alternative, that Mr. Scott's presence was not necessary and that he was not prejudiced by his absence. However, Judge Mounts in the case of Young v. State took a different position than was taken here:

> "Now, as sort of a pure legal argument, you undertook to acquire the presence of your client for this hearing and on a personal private level, whenever I have my own choice as judge, I want the defendant present in court.
> "I like that better than the defendant not being present, but I think we need to address the legal question of whether he has the right to be present and I realize you said a couple of questions, Huff doesn't say he has the right to be present, I don't believe you're going to argue me, but you cited cases that you think support the position that he does.
> "So if the State wants to argue that, then I want you all to proceed on it, but if the State sort of agrees with me, that they just soon have the defendant here, I mean it's fine with me, that's my personal preference. I like defendants to be present, but that's a little sort of a side issue, but nevertheless, one of some significance it seems to me."

State v. Young, November 12, 1996, p. 489-90.

The State accuses counsel of "deliberately [choosing] 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." Appellee's Brief at 50. The State also argues that his presence was unnecessary because he was represented by counsel and had no personal knowledge regarding the claims that were the subject of the hearing. The State admits that if a defendant has personal knowledge relevant to the issues being litigated or is not represented by counsel, his presence is necessary; however, the State fails to recognize that both conditions apply in Mr. Scott's case. Mr. Scott was only nominally represented by counsel because Ms. Anderson, the only attorney present on his behalf, was incompetent to defend Mr. Scott's interests. See Clark v. State, 491 So. 2d 545 (Fla. 1986). Due to Ms. Anderson's inability to proceed with the hearing, her presence did not constitute representation.

In addition, Mr. Scott has personal knowledge relevant to the issues on which this Court ordered the hearing. The State's argument that Mr. Scott's presence was unnecessary ignores the caselaw establishing that a defendant must be present at hearings when ineffective assistance of counsel claims are presented. The State seems to admit that the facts giving rise to Mr. Scott's Brady claim may in the alternative support an ineffective assistance of counsel claim when it insists that the exculpatory information was "either known or could have been known to the defense . . . the defense could have or should have been aware of the information irrespective of whether the defense was actually aware of the information." Appellee's Brief at 52 (emphasis in

original). See State v. Gunsby. Counsel for Mr. Scott wanted to present the testimony of George Barrs, Mr. Scott's trial attorney. Mr. Barrs' testimony would either contradict that of Mr. Selvig, creating a disputed issue to be settled by the circuit court, or his testimony would reveal that he rendered ineffective assistance if Mr. Selvig did disclose exculpatory evidence and he failed to use it in defending Mr. Scott. Contrary to the State's contention that Mr. Scott has no personal knowledge regarding the Brady claim, the issues to be determined at the hearing pertained to exculpatory evidence that was not presented to his jury, possibly due to the ineffectiveness of his trial attorney. Mr. Scott's presence was necessary to assist in his defense and he was prejudiced by his absence.

ARGUMENT V

The State argues that Judge Mounts properly denied the motion to take the depositions of Dexter Coffin and Robert Dixon because counsel made an insufficient showing of their unavailability. However, the State misrepresents the law when it argues that "[p]rior to perpetuating the testimony of a witness, the moving party must demonstrate that the witness is unavailable." Appellee's Brief at 56. This argument relies on Rule 3.190(j)(6), Florida Rules of Criminal Procedure, which determines whether a deposition may be admitted in lieu of live testimony: "No deposition shall be used or read into evidence when the attendance of the witness can be procured." The State also relies on Pope v. State, 441 So. 2d 1073 (Fla. 1983), in

which this Court interpreted the requirements of that section and indicated that it requires "more than a perfunctory attempt to contact a witness whose testimony has been perpetuated" and that "the party offering the testimony must show it has exercised due diligence in its search." 441 So. 2d at 1076 (emphasis added). Clearly, that section of the Rule and this Court's decision in Pope address the admission of testimony that has already been perpetuated in a deposition. Therefore, the State's reliance on this section of Rule 3.190(j) is misplaced; the issue before the circuit court was whether counsel for Mr. Scott could take the depositions of the witnesses, not whether counsel could offer the deposition testimony as evidence. Obviously, the Rule envisions the deposition may be the only way to prove the witnesses unavailablity. The refusal to permit the depositions denied Mr. Scott the ability to present the evidence proving the witnesses unavailability.

Rule 3.190(j) provides that either party may apply for an order to take depositions to perpetuate testimony. The Rule requires that the moving party demonstrate that "a prospective witness resides beyond the jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice." (emphasis added). The Rule does not require the moving party to show that the witness is unavailable to appear in court at the time the request to take the deposition is made; rather,

the Rule expressly states that a party can take a deposition if the witness "resides beyond the jurisdiction of the court." Contrary to the State's argument regarding counsel's failure to demonstrate the unavailability of its prospective witnesses, the Rule imposes no such requirement.[8]

Because the State's Answer Brief does not address the issue that was before the circuit court, the cases cited therein do not provide any guidance for this Court in reviewing the issues on appeal. However, McMillon v. State, 552 So. 2d 1183 (Fla. 4th DCA 1989), a case cited by the State for the proposition that "prosecutor's statement that witness was unavailable to travel was insufficient to justify use of deposition," Appellee's Brief at 57, indicates that different standards apply when the moving party requests an order to take a deposition and when the party later offers the deposition in lieu of live testimony. This case confirms that the party must demonstrate the witness's unavailability only in the latter situation. In McMillon, the State took the victim's deposition to perpetuate her testimony and then attempted to offer it at trial. On appeal, the State

[8]However, even if Mr. Scott were required to show the unavailability of his witnesses, the relevant caselaw establishes that he would succeed because witnesses who are incarcerated in other states are considered unavailable. In Henry v. State, 649 So. 2d 1366 (Fla. 1994), the defendant challenged the admission at the penalty phase of testimony from an earlier trial. This Court held that the testimony was admissible under the former testimony exception to the hearsay rule because the witness was "unavailable and incarcerated in another state." Id. at 1368. At the time the request was made in this case, Mr. Coffin was incarcerated in Virginia, and Mr. Dixon was on parole in California and unable to leave the state. PC-R. 1999-2001.

argued that the defendant had waived any objections to the admission of the deposition because he had consented to the taking of it. The court noted that the requirements for taking a deposition and offering it at trial are different and that "the mere taking of a deposition to perpetuate testimony does not ipso facto qualify it for admission at a subsequent trial or hearing unless waived by the opposing party." 552 So. 2d at 1184. In that case, the prosecutor's statement about the witness's unavailability was insufficient because he had not recently spoken to her doctors to determine her ability to travel to the trial. The same showing was not required when the State requested an order directing that the deposition be taken.

If the Rule's requirements are met, the court has no discretion to deny the motion. The Rule specifically states that "[t]he court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial." (emphasis added). Counsel for Mr. Scott made the preliminary showing necessary to obtain an order allowing the depositions of Mr. Coffin and Mr. Dixon. Judge Mounts abused his discretion in denying the motion.

ARGUMENT VI

The State argues that Judge Mounts properly precluded Mr. Scott from presenting testimony relevant to proving whether the picture of the bloody circle was material. The State argued that such testimony was unnecessary because Mr. Scott could not meet another requirement of Brady -- that the evidence was unavailable

to trial counsel. At the hearing, the State essentially urged Judge Mounts to determine the admissibility and relevance of Mr. Scott's witnesses based on conjecture by Mr. Selvig, who was acting as both prosecutor and witness, regarding their testimony. Mr. Selvig argued that his testimony that the picture had been disclosed was a sufficient basis on its own for Judge Mounts to exclude the testimony of Mr. Scott's witnesses. Contrary to the State's assertion in its Motion to Preclude Testimony of Witnesses, Mr. Selvig's testimony alone does not constitute an "indisputable" record that the picture was disclosed to Mr. Scott's trial attorneys. Because Mr. Selvig is a material witness to Mr. Scott's Brady claim who has an interest in the outcome of the hearing, his assertion about the irrelevance of Mr. Scott's witnesses is clearly in his own self interest.

In addition, the State continues to ignore Mr. Scott's argument that if his trial attorney knew of and failed to understand the significance of the picture of the bloody circle, then he was deprived of the effective assistance of counsel. In Smith v. Wainwright, 741 F.2d 1248, 1252 (11th Cir. 1984), the Eleventh Circuit Court of Appeals recognized the "interrelationship" of Brady and ineffective assistance of counsel claims. The court in that case ordered a hearing that it noted would concern both issues because the petitioner could not determine until after a hearing whether the evidence in question was withheld from his trial attorney or whether the attorney had but failed to use the evidence. Clearly, the questions

surrounding the picture of the bloody circle are not as simple as Mr. Selvig represented to the circuit court.

The State also ignores that the testimony of Mr. Scott's proposed witnesses, Dr. Cuevas and Dr. Nute, is relevant to other issues on which this Court ordered a hearing. Mr. Selvig urged the court to exclude their testimony because of his assertions regarding the picture of the bloody circle; he did not address the relevance their testimony would have for the other issues involved in the hearing.

Finally, if the record conclusively proves that a constitutional violation had not occurred, as the State asserts, this Court would not have remanded for a hearing on the claim, including the withholding of the bloody circle picture. Clearly, the State wanted Judge Mounts to make his decision on the basis of Mr. Selvig's testimony alone without benefit of Mr. Scott's witnesses. As a result, Judge Mounts' finding is unreliable because it is based on only one side of the evidence. Mr. Scott's due process right to a full and fair hearing was violated. See Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994).

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first class postage

prepaid, to all counsel of record on November 25, 1997.

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