IN THE SUPREME COURT OF FLORIDA

MONTAVIOUS DEAN JOHNSON,

Petitioner,

v. **CASE NO. 96,797**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I. PRELIMINARY STATEMENT

Petitioner will refer to the parties and the record in the same manner utilized in the *Petitioner's Initial Brief On The Merits* filed November 1, 1999. Reference to respondent's brief dated November 29, 1999, will be by use of the symbol "RB" followed by the appropriate page number in parentheses.

Counsel certifies this reply brief was prepared using Courier New 12 point.

II. ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO "IMPEACH" DEFENSE WITNESS ELIZABETH CLARK WITH FACTS NOT LATER PROVED, THEREBY DEPRIVING PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW SECURED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

The state argues the Court should not rule upon this issue because the district court did not write on it (RB-11), and because it falls outside the scope of the certified question (RB-12).

To fail to address this issue, petitioner respectfully contends, would run directly afoul of the Latin phrase found in the seal of this Court:

> The Latin phrase found in the seal of this court, "SAT CITO SI RECTE", has a literal translation of "sufficiently quickly if rightly". A smoother translation is that justice is "soon enough if correct".

Ter Kuerst v. Miami Elevator Company, 486 So.2d 547, 551 (Fla. 1986)(Justice Adkins, dissenting).

Petitioner timely raised the issue in both the trial court and before the district court, to no avail. That the trial court erred in overruling petitioner's trial objection and the fact that the district court erroneously did not write an opinion is hardly the defendant's fault. This Court unquestionably has jurisdiction and, in keeping with the motto "soon enough if correct," the Court

should not only rule on the issue but should reverse the convictions and sentences appealed from and remand for a new trial. “Soon enough” is now; “correct” is a reversal.

On the merits, in responding to petitioner’s argument that the state suggested Ms. Clark based her testimony upon information gained as a result of jail visits rather than the truth, respondent appears to argue that, at no time, did the prosecutor ever suggest in the presence of the jury that alibi witness Elizabeth Clark learned the alibi facts from either appellant or Tauras Flemming:

> [I]n the actual presence of the jury, the prosecutor only established the basic facts that the witness had a child by Petitioner’s cell-mate and that she had visited them together in jail prior to the trial.

(RB-15). As was evidently true in ***Bass v. State***, 547 So.2d 680, 682 (Fla. 1st DCA 1989), where the first district observed “...that the record we were furnished and the record reviewed by whomever prepared the state’s brief must be substantially different,” such must be the case here.

The record furnished to petitioner clearly reflects that, during summation, the prosecutor ***expressly*** argued that Ms. Clark’s testimony was not based upon the truth, but rather on information imparted to her by appellant and/or Tauras Flemming:

> PROSECUTOR: I asked a lot of questions to Mrs. Clark...as to any kind of activity or any

> contact from which they would have developed a bias or would have developed, indeed, fabricated testimony today....
>
> * * * * * * * *
>
> Look at Mrs. Clark who will say that the defendant was at her house that night. She doesn't know what time it was. It was late but, of course, she and Mrs. Marquisa Johnson have somehow figured out that this is what they were supposed to say....

(II-250, 276).

The state says they are allowed to impeach a witness to expose bias (RB-13). Petitioner has no quarrel with this proposition of law, so long as the supposed impeaching evidence is ***actually proved***. Showing that Ms. Clark knew the defendant and cared for him was permissible. But suggesting without a ***speck*** of evidence that Ms. Clark's trial testimony was fabricated is precisely the evil identified by Judge Daniel S. Pearson in ***Smith v. State***, 414 So.2d 7 (Fla 3d DCA 1982), and applied in both ***Marsh v. State***, 202 So.2d 222 (Fla. 3d DCA 1967) and ***Thorpe v. State***, 350 So.2d 552 (Fla. 1st DCA 1967). Since Tauras Flemming was in jail, the state certainly could have presented his testimony, but did not. That they failed to do so is reversible error under the present facts and circumstances.

It is interesting to note that, while petitioner argued the applicability of ***Smith***, ***Marsh*** , and ***Thorpe*** in his initial brief

(IB-20-21), the state has not even cited to those cases, or attempted to distinguish them.

The state also argues the error is harmless because of "overwhelming evidence" consisting two witnesses who made several out-of-court and in-court identifications(RB-16).

Under ***State v. DiGuilio***, 491 So.2d 1129 (Fla. 1986), "overwhelming evidence" is ***not*** the proper test in assessing harmless error. Moreover, in ***United States v. Wade***, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the Court cited with approval Wall's *Eyewitness Identification In Criminal Cases* wherein it was noted that "'[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more errors than all other factors combined.'" 388 U.S. 218, 229, 87 S.Ct. 1926, 1933.

In this case, counsel filed a *Motion To Suppress Pretrial Identification And In-Court Identification* (III-366-369). The hearing on the motion revealed several highly suspect factors in connection with the identifications made by the two alleged victims. While the denial of the motion has not been made a separate issue on appeal, it is sufficient to note here that the identifications are hardly free from doubt. When this is combined

with the fact that there was zero physical evidence tying petitioner to the offenses, the fact that he had an alibi defense, and the fact that the prosecutor argued the bogus impeachment several times in summation, *see* ***State v. Lee***, 531 So.2d 133 (Fla. 1988), it cannot be rightly maintained, beyond a reasonable doubt, that the bogus impeachment evidence had no effect on the jury verdicts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri T. Rollison, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to

Montavious D. Johnson, DOC# J04464, Hamilton Corr. Institution, 10650 S.W. 46th Street, Jasper, FL 32052, on this ____ day of December, 1999.

CARL S. McGINNES