IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. SC01-879

GREGORY MILLS,

Appellee.

_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

In its April 25, 2001 opinion, the Florida Supreme Court summarized the facts and procedural history of this case in the following way:

> Gregory Mills, a prisoner under sentence of death and for whom a death warrant has been signed, appeals the trial court's order denying postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), (9), *Fla. Const.* We affirm the trial court's denial of relief.
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> On February 13, 2001, Mills filed a consolidated petition for writ of habeas corpus, petition for extraordinary relief, and motion to reopen the direct appeal. Mills raised two issues: (1) that the recent decision in *Apprendi v. New Jersey,* 528 U.S. 1018 (2000), establishes that the override scheme under which Mills was convicted violates the United States and Florida Constitutions; and (2) *Tedder v. State,* 322 So. 2d 908 (Fla. 1975), was arbitrarily applied in this case as established by *Keen v. State,* 775 So. 2d 263 (Fla. 2000).
>
> On March 22, 2001, Governor Bush signed a death warrant ordering that Gregory Mills' sentence of death be carried out on May 2, 2001. The facts and procedural history leading up to the time the death warrant was signed are set forth in *Mills v. Moore,* 26 Fla. L. Weekly S242 (Fla. Apr. 12, 2001).
>
> Pending this Court's decision on Mills' consolidated petition for writ of habeas corpus, on or around March 27, 2001, Mills made several demands for public records in the trial court.
>
> On April 12, 2001, we released our opinion as to Mills' pending consolidated petition for writ of habeas corpus. We held that *Apprendi* is not applicable to this case since the majority opinion in *Apprendi* indicates that *Apprendi* does not affect capital sentencing schemes. We also held that *Tedder* was not arbitrarily applied in this case and that *Keen* is not new law, but merely an application of the long-standing *Tedder* standard.

On April 16, 2001, Mills filed in the trial court a motion to vacate judgments of conviction and sentence with request for leave to amend, for evidentiary hearing and for stay of execution. Mills raised three claims: (1) there is newly discovered evidence that Vincent Ashley, the codefendant in this case, gave false testimony at trial and lacked credibility, which establishes a reasonable basis for the jury's life recommendation thereby rendering the trial judge's override of the recommendation in error; (FN1) (2) the "during the course of a felony" aggravating circumstance constitutes an automatic aggravating circumstance and Mills is entitled to reconsideration of this issue and sentencing relief; and (3) Mills has been denied access to public records, which violates his right to due process and equal protection as well as the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

After an evidentiary hearing on April 17, 2001, on the newly discovered evidence issue, the trial court on April 18, 2001, issued an order denying Mills' request for postconviction relief. As to claim I, the trial court held that the new version of Ashley's statement was nothing more than another inconsistent statement made by this witness. The trial court concluded that the new version of Ashley's statement would not have made a difference in the outcome of this case, citing *Jones v. State*, 591 So. 2d 911 (Fla. 1991). As to claim II, the trial court held that the issue raised was considered by this Court on direct appeal and in two later petitions for writ of habeas corpus, and is therefore procedurally barred, citing *Medina v. State*, 573 So. 2d 293 (Fla. 1990). As to claim III, the trial court held that the demands for public records filed in this case were overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. For the reasons more fully set forth below, we affirm the trial court's denial of relief on the three issues raised in the postconviction motion.

> (FN1) In the motion for postconviction relief, Mills alleged that Ashley told Mills' attorney a version of the events for the night of the murder that differed from Ashley's trial testimony. At the evidentiary hearing Ashley refused to testify. The parties then stipulated that had Ashley testified his

testimony would be substantially as outlined in the postconviction motion.

On April 26, 2001, Mills filed another *Florida Rule of Criminal Procedure* 3.850 motion in the Circuit Court of Seminole County. The State of Florida filed a response on that day, and a *Huff* hearing was conducted by Circuit Judge O.H. Eaton, Jr., late in the afternoon of April 26. Judge Eaton determined that an evidentiary hearing was necessary on both claims contained in that Rule 3.850 motion. Those claims were: 1) "newly discovered evidence" that Vincent Ashley was the "real killer," and 2) "new evidence" of an "impermissible *ex parte* communication" with respect to the first order denying Rule 3.850 relief.[1] The evidentiary hearing was scheduled for 10:00 AM on April 30, 2001.

THE FACTS FROM THE EVIDENTIARY HEARING

Mills' former attorney, Billy Nolas, testified that he represented Mills in his first Rule 3.850 proceeding, and that he was not aware that the order denying relief on that motion "was drafted by the State." Mr. Nolas also testified that, had he known about the drafting of the order, he would have filed a motion to disqualify the presiding circuit judge.

Department of Corrections inmate John H. Anderson testified that he was incarcerated in the Seminole County Jail with Vincent Ashley at some time after Mills' capital trial, and that Ashley

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[1]That order was reversed by the Florida Supreme Court. *Mills v. Dugger*, 559 So. 2d 579 (Fla. 1990).

told him that he, rather than Mills, had fired the gunshot that killed the victim in this case. This testimony is different from Anderson's affidvit, which placed the date of the conversation at a point prior to Mills' trial. Anderson also testified, for the first time, that he had another conversation with Ashley "a year or so later" during which Ashley confirmed the earlier statement.[2] Anderson has been convicted of at least seven felonies, and is currently in the custody of the Department of Corrections.[3]

Senior Circuit Judge William Woodson testified that he was the presiding judge at Mills' capital trial, and also during his first *Florida Rule of Criminal Procedure* 3.850 proceedings. Judge Woodson testified that after receiving Mills' first Rule 3.850 motion and reviewing it, he determined that relief should be denied without an evidentiary hearing. After making that decision, he contacted the State Attorney's Office and directed them to prepare an order denying relief. Those directions were complied with, and Judge Woodson entered the order provided to him. Judge Woodson testified that he would not have signed that order unless it accurately reflected his ruling.

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[2]Anderson claimed that the second conversation took place at a pool hall in Sanford, Florida.

[3]Anderson, Ashley and Mills "all us growed up together." However, prior to April 2001, Anderson never told anyone of Ashley's remarks about who committed the murder, albeit, the remarks were made in 1979 or 1980 within a three day period when Ashley and Anderson "might" have been in jail at the same facility at the same time.

Nichole Pyle is a Records Management Analyst with the Florida Department of Corrections. She reviewed the records of the Department of Corrections and determined that Vincent Ashley was incarcerated in the state prison system from September of 1980 until January 20, 1984. Dianne Thompson is also a Department of Corrections employee -- she reviewed the Department's records with respect to John Henry Anderson, and determined that he was incarcerated from 1974 to 1976, and was not re-incarcerated until 1988. Mary Ames is a supervisor in the Seminole County Clerk of Court's Office. She reviewed the records maintained therein, and determined that Anderson was not in the Seminole County Jail in 1979, but that he was in that facility on June 15-16, 1980,[4] and again on September 18, 1980. Aside from those dates, Anderson was not in the Seminole County Jail.

Late in the afternoon of May 1, 2001, Circuit Judge O.H. Eaton, Jr. ordered that:

> 1. The judgment and order dated April 18, 2001 [sic], sentencing the defendant to death is set aside. The court will set a resentencing hearing by separate order.
>
> 2. The order dated January 3, 1991, denying the defendant's Consolidated Proffer in Support of Request for Evidentiary Hearing, Application for Stay of Execution and Motion for Fla. R. Crim. P. 3.850 Relief is set aside. A hearing required by the case of *Huff v. State*, 622 So.2d 982 (Fla. 1993) will be scheduled by separate order unless the provisions of paragraph 1 herein become final, making this portion of the order moot.

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[4]Anderson appeared in court at least twice on these dates.

3. The execution scheduled for May 2, 2001, is stayed until further order of this Court or the Supreme of Florida.

Order, at 13. The State gave notice of appeal on May 2, 2001, and filed a motion with this Court seeking expedited review.

SUMMARY OF THE ARGUMENT

The Seminole County Circuit Court committed reversible error when it granted relief on Mills' **third** *Florida Rule of Criminal Procedure* 3.850 motion without consideration of the procedural defenses that exist as to the two claims contained therein. This motion was not only successive and an abuse of process, but also contained claims that could and should have been discovered through the exercise of due diligence long before they were raised therein.

The Circuit Court abused its discretion when it granted sentence stage relief based on the testimony of John Anderson. The Court did **not** find that Anderson was credible, did not state in the order granting relief that two of the three versions of events purportedly related by Anderson were unquestionably false, and applied an incorrect (and non-existent) standard to its evaluation of the effect of Anderson's "testimony" on the *Tedder* inquiry.

The Circuit Court erred as a matter of law when it found that Mills was entitled to relief based upon his claim that the **first** order denying Rule 3.850 relief after remand by the Florida Supreme Court, was the "result of an improper *ex parte* communication." The procedure followed in connection with the production of the order

denying relief had not been held improper in 1989, and it is wrong as a matter of law to find error based upon a decision of this Court that came years later. Moreover, the Circuit Court's order setting aside the January 3, 1991, order is wrong as a matter of law in the unique context of this case. The remedy that the court seems to contemplate is a hearing, which is what Mills has already received (the result of which this Court upheld in 1992). There is no evidence nor even an allegation other than the fact that the State was asked to draft a summary denial order that any wrongdoing or erroneous findings resulted in the case. The Circuit Court has no power to overrule this Court and thereby usurp the Florida Supreme Court's authority, but yet that is what the lower court has done in the instant order. That result is wrong as a matter of law, and the improper derogation of this Court's jurisdiction and authority must be corrected.

ARGUMENT

I. THE "ANDERSON" CLAIM

The Circuit Court erroneously granted relief on Mills' "new evidence" claim based upon the proffered affidavit and testimony of John Anderson. This claim is not a basis for relief for the following independently adequate reasons. The Circuit Court abused its discretion in setting aside Mills' death sentence based upon this wholly incredible claim. Moreover, the Circuit Court neglected to address any of the multiple procedural bars to

consideration of this successive and abusive claim. Finally, the Circuit Court was wrong as a matter of law when it found that Anderson's testimony was a basis for sentence stage relief while at the same time not finding that Anderson's testimony was credible.

This claim is an abuse of process under *Florida Rule of Criminal Procedure* 3.850(f), which prohibits successive motions for postconviction relief on new and different grounds, and allows for dismissal of such claims if "the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." Dismissal on successive petition grounds is proper. *See, Bundy v. State,* 538 So. 2d 445 (Fla. 1989). Moreover, without waiving the successive petition defense, the following are additional, independently adequate, grounds for the denial of relief.

In addressing claims of newly discovered evidence in the context of under-warrant litigation, the Florida Supreme Court held:

> In *Jones v. State,* 709 So.2d 512 (Fla. 1998), this Court reiterated the standard that must be met in order for a conviction to be set aside based upon newly discovered evidence:
>
> > First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by use of diligence." *Torres-Arboleda v. Dugger,* 636 So.2d 1321,

1324-25 (Fla. 1994).

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So.2d at 911, 915. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."

Id. at 521.

Glock v. Moore, 776 So. 2d 243 (Fla. 2001). *See also, Demps v. State*, 761 So. 2d 302, 305-06 (Fla. 2000).

With respect to the timeliness of a claim of "newly discovered evidence," the *Glock* Court expressly reiterated the one-year requirement:

> **As to the first prong of *Jones*, any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence.** *See Buenoano v. State*, 708 So.2d 941, 947-48 (Fla. 1998); *see also Fla. R.Crim. Pro.* 3 .851(b)(4) (providing for extension of time for filing of motion for postconviction relief where counsel makes a showing of good cause for the inability to file the postconviction pleadings within the one-year time period).

Glock v. Moore, supra. [emphasis added].

This Court has specifically rejected any suggestion that a claim of "newly discovered evidence" operates to lift or remove an otherwise applicable procedural bar. *See, Jones v. State*, 709 So. 2d at 536 n.7 (rejecting Jones' argument that the court must consider all testimony previously heard at his earlier evidentiary

hearings, even if the testimony had previously been found to be barred or not to qualify as newly discovered evidence; Florida Supreme Court instead considered only that evidence found to be newly discovered); *Kight v. State,* 26 Fla. L. Weekly S49 (Fla. 2001) (same).[5]

The standard applied to a claim of newly discovered evidence is the same regardless of whether the "evidence" is applicable at the guilt or penalty phase of Mills' capital trial:

> In order to provide relief, "newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed." *Jones v. State,* 591 So.2d 911, 915 (Fla. 1991).

Kight v. State, 26 Fla. Law Weekly S49 (Fla. 2001).

The lower court found that Anderson's testimony was "newly discovered" because the purported statements were not made until after Mills' capital trial.[6] Order, at 7.[7] However, significantly,

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[5]A claim of newly discovered evidence is subject to the procedural bar rule. *Provenzano v. State,* 761 So. 2d 1097, 1100 (Fla. 2000).

[6]At the *Huff* Hearing, Mills' counsel represented that the statements from Ashley to Anderson were made prior to trial.

[7]This "finding" ignores the undisputed fact that Anderson's first affidavit, and the representations of Mills' present counsel, were that the statement took place in 1979, **before Mills' trial.** The Court also ignored the fact that Anderson claimed to have heard another statement by Ashley a "year or so" later. The evidence established, conclusively, that that testimony was false. The Circuit Court wholly ignored those discrepancies, and by doing so abused its discretion.

Mills' prior public records request was made some 10 years ago, and this case has been in virtually constant litigation (and Mills has been represented by counsel) since his conviction and sentence were affirmed on direct appeal. This "evidence" could clearly have been discovered in time to be presented in Mills' first Rule 3.850 proceeding. Mills cannot establish due diligence with respect to any claim of "new evidence." *See, Sims v. State,* 754 So. 2d 657 (Fla. 2000); *Buenoano v. State,* 708 So. 2d 941 (Fla. 1998). The lower court did not address Mills' lack of diligence in the proper context -- it did no more than conclude, erroneously, that Anderson's testimony was "newly discovered" because it related to a conversation that **possibly** took place after Mills' trial. The lower court was wrong as a matter of law when it refused to consider the timeliness of this claim in the proper context.

Moreover, Mills' theory of the case has apparently always been that Ashley was the "real killer." Mills can hardly show due diligence with respect to this "claim" by waiting until a death warrant is active before attempting to find evidence to support an assertion he has made since the time of trial. The fact that Mills may allege that Ashley did not mention Anderson until "one of [counsel's] discussions" with Ashley does not change that fact that this "information" could have been discovered in time to be included in Mills' first Rule 3.850 motion. Mills cannot establish the due diligence component of the *Jones* standard because this

"evidence" could have been discovered 20 years ago. This claim is not only successive, but also procedurally barred -- all relief should have been denied on this claim.

In addition to being foreclosed on procedural grounds, this claim is not a basis for relief on factual grounds, either. Mr. Anderson testified that he, Ashley, and Mills grew up together, and he was Mills' friend. He claimed to have met Ashley on the "yard" when the two of them were in the Seminole County Jail at the same time. Anderson said that he asked Ashley what happened with him and Greg. He claimed that Ashley said Mills helped him through the window and stayed on the porch. Allegedly, Ashley said he did not realize that the man was awake and was surprised by him. Ashley's gun "went off," killing the man. Ashley told him he felt bad to put it on Mills, but he figured Mills would put it on him.

However, in his affidavit, Mr. Anderson claimed that Ashley said he shot Mr. Wright "because he thought the dude was going to shoot him first." Thus, **Anderson's versions** of what Ashley allegedly said to him differ significantly, even though Anderson's affidavit and hearing testimony were separated in time by only two weeks.

Another difference was that in the affidavit, Anderson claimed that he talked to Ashley for the first time in 1979. At the evidentiary hearing, CCRC Investigator Atkinson testified that when he met with Anderson, Anderson provided the 1979 date and seemed

very sure of it. However, at the evidentiary hearing, Anderson's testimony changed,[8] and he claimed that the first confession from Ashley occurred in 1981 or 1982.

Also at the hearing, Anderson claimed to have had a second meeting with Ashley in which he again confessed that he was the shooter. He said this happened about a year after the first confession Ashley made to him at the jail and occurred in a Sanford pool hall. He did not mention this to the State's investigators who spoke with him on Sunday afternoon, but claims to have told CCRC Investigator Atkinson at their third meeting, which Mr. Atkinson said occurred on April 24th.[9]

Finally, the evidence admitted at the hearing showed that there were only three days when Ashley and Anderson could have possibly been in the Seminole County Jail together. During that time, Anderson was out to court twice. Thus, it is doubtful that the two men would have come in contact with each other on the "yard," or otherwise. Moreover, the evidence showed that Ashley was in DOC from September 1980 through January, 1984 -- he and Anderson could not have met in a pool hall "about a year" after the

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[8]As set out in the Statement f the Facts, Anderson was not in the Seminole County Jail in 1979. This opportune change in testimony is, to say the least, highly suspect.

[9]Both Anderson and Mr. Atkinson admitted that they never reduced the claim of a second Ashley confession to writing or disclosed it to the State until the hearing.

first alleged Ashley confession.[10] The circuit court ignored this fact, which establishes that Anderson testified falsely.

Thus, it is clear that Mr. Anderson's belated claim that Ashley confessed to being the actual shooter is unworthy of belief.[11] Certainly, it is not a sufficient basis on which to invalidate the trial testimony that established Mills was the shooter and that has not been challenged. Thus, the "actual killer" claim is without merit and should have been denied by the post-conviction court.[12]

The lower court appears to have credited the testimony of John Henry Anderson which was to the effect that co-defendant Vincent Ashley told Anderson that he (Ashley) fired the fatal shot. That court concluded, without legal support, that Anderson's testimony, standing alone, was sufficient to produce a different sentencing result. That decision was made without that court having had the benefit of observing Sylvester Davis' trial testimony, or without

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[10]The State also proved that Ashley was in the Seminole County Jail from June, 1980 until incarcerated with DOC in September, 1980.

[11]Indeed, Anderson correctly (though probably unintentionally) assessed his own credibility when he said that he never told this alleged Ashley confession story before because he knew he would not be believed.

[12]Of course, the determination of the credibility of an accomplice's version of the crime is for the jury to make. *See Carter v. State*, 560 So. 2d 1166, 1168 (Fla. 1990). Obviously, that resolution was adverse to Mills, and should not be second-guessed 22 years later in the exercise of the"father-knows-best" view taken by the Circuit Court.

having observed Ashley's trial testimony.[13] Regardless of the Circuit Court's present opinion of Ashley's credibility, just as that court did not have the opportunity to "observe or hear Sylvester Davis testify," it likewise did not have the opportunity to observe or hear Vincent Ashley testify before the sentencing judge. In fact, **the Circuit Court never heard Ashley testify because in his only appearance before Judge Eaton he refused to do so.** Such refusal to testify is not a basis upon which to determine that Ashley is "the least credible witness that has ever appeared" before the trial court. It is not possible for the post-conviction court to determine Ashley's credibility, and that court has inappropriately substituted its judgment of Ashley's credibility based upon events which occurred more than twenty years after his trial testimony. The Circuit Court has substituted its judgment for that of the sentencing judge based upon matters that the Court had no opportunity to observe *ore tenus*. There is no legal support for such a result. The most that Mills has done is present a highly suspect challenge to Ashley's credibility -- that challenge is, in most respects, no different from the attempted "impeachment" of Ashley that was the subject of the second *Florida Rule of Criminal Procedure* 3.850 motion, the denial of which was affirmed by this

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[13]Additionally, the court's conclusion was made without regard for the physical evidence presented at trial which revealed that Mills was the one with gunpowder residue on him, which refutes the notion Ashley fired the weapon, since if Ashley is believed, Mills would not have had any gunpowder residue traces on him.

Court on April 25, 2001. *Mills v. State,* No. SC01-775 (Fla. April 25, 2001).

Regardless of whether Vincent Ashley is the "least credible witness that has ever appeared before this Court," the fact remains that the post-conviction court did not observe Ashley's trial testimony. The jury and judge were well aware of the differing versions of events that Ashley had told law enforcement and of the immunity agreement that Ashley received. The "Anderson" statement is merely another alleged statement made by Ashley under suspect circumstances that the lower court has erroneously given credence. It was an abuse of discretion to do so.

Moreover, Anderson never stated that the alleged conversation between Ashley and Anderson took place after trial until he testified before the Circuit Court. In fact, in his sworn affidavit, Anderson said the conversation with Ashley occurred in 1979, and his attorney represented at the April 26th *Huff* hearing that it occurred prior to trial. The lower court erroneously failed to consider that glaring discrepancy. Moreover, the lower court completely ignored the fact that the Anderson testimony regarding a second conversation between himself and Vincent Ashley, (which as stated by the Court) took place "a year or so later," could not have occurred because Ashley was proved beyond doubt to

have been incarcerated in the Florida prison system.[14] The Court apparently credited Anderson's new and improved version of the statement, which was revealed for the first time at the evidentiary hearing, and is sandwiched between statements that are undisputedly false. There is no doubt that Anderson lied not only in his testimony, but also in his affidavit -- the Circuit Court erroneously credited his testimony, and abused its discretion in doing so. The lower court's apparent acceptance of Anderson's testimony concerning an alleged conversation from 20 years ago implicitly finds that Ashley's statements are somehow more credible when they take the form of hearsay from Anderson than when they were presented under oath at trial through Ashley himself.

Moreover, the Circuit Court does no more than speculate that the Anderson-Ashley conversation even took place -- the lower court stated "it is **possible** that the conversation occurred." Order, at 5. If it is only "possible" that the conversation occurred, it is absolutely impossible for the Court to have a legal basis for granting relief from Mills' death sentence. Moreover, the Court has wholly ignored the fact that according to the evidence presented (if it is to be believed) Ashley revealed Anderson to Mills' attorneys -- this requires acceptance of the absurd suggestion that Ashley would identify the one person to whom he had

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[14]No mention of this undisputed fact is to be found in the lower court's order. That omission causes the order to be misleading.

"confessed." Stated differently, it stands reason on its head to believe that Anderson's testimony about the Ashley "confession" is true because that requires acceptance of the notion that Ashley revealed the one person who could implicate him.[15] Regardless of the post-conviction court's present opinion of Ashley's credibility, his recent behavior in court indicates that he would not do so.

The lower court also employed the wrong legal standard in evaluating the sentencing order entered in this case. Whether or not that order, in the lower court's opinion, would "probably be summarily reversed as insufficient today," that speculative standard has no place in the administration of capital jurisprudence.[16] Instead, as the Florida Supreme Court held,

> Pursuant to the authority granted under the Florida Constitution, this Court is often called upon to interpret the laws. However, it is not the function of this Court to make new law on a case-by-case basis in order to reach a desired result. **Once the law has been established by this Court, it is our**

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[15]Ashley could have always "told the truth" since he received immunity and did not need a conduit, Anderson, to convey the different theory as to the "real murderer." Moreover, defense counsel did not need to wait 20 years to go talk with Ashley as to whether his testimony at trial was the truth.

[16]As Chief Justice Wells has noted, "Courts must not lose sight of the fact that the hearing is not meant to be a forum to relitigate issues which have already been fully adjudicated." *State v. Spaziano*, 692 So. 2d 174, 179 (Fla. 1997)(Wells, J. concurring). The lower court committed just such an error in this case when it set out to reverse the death sentence by ignoring this Court's prior decisions.

> **responsibility to apply that law uniformly in all cases, regardless of the status of the players or the stakes of the game. This adherence to the rule of law allows the judiciary to fulfill its obligation of providing stability and certainty for the citizens of this state.**

Mills v. Moore, 26 Fla. Law Weekly S242 (Fla. April 12, 2001), (Harding, J., concurring).[17] Regardless of the lower court's opinion of the sufficiency of the sentencing order, that issue was not before it. It was not contained in Mills' *Florida Rule of Criminal Procedure* 3.850 motion, nor was that motion orally amended in some fashion to include such a claim. The Circuit Court has ignored the fact that the sentence was affirmed on direct appeal by the Florida Supreme Court, and any attack on the sentencing order is procedurally barred under settled Florida law.[18] The lower court's reference to the adequacy and sufficiency of the sentencing order is erroneous, has no place in that Court's opinion, and should be stricken. Moreover, to the extent that the Circuit Court, on page two of its order, criticizes the Florida Supreme Court's *Tedder* analysis, such a claim was expressly rejected on direct appeal, has been repeatedly rejected on collateral attack, and was most recently rejected on April 12, 2001 by this Court when

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[17]The other three members of the majority in this case joined in Justice Harding's concurrence.

[18]The claim would also be time-barred under *Florida Rule of Criminal Procedure* 3.850.

it held that *Tedder* was properly applied in this case. *Mills v. Moore,* 26 Fla. Law Weekly S242 (Fla. April 12, 2001).[19]

The Circuit Court also erred when it stated, and applied as the legal standard, that "it is highly unlikely that this Court would have overridden the jury's recommendation had the verdict been returned today." Order at 6. That is not the standard, and such standard flies in the face of the respect for *stare decisis* mandated by the Florida Supreme Court in *Mills v. Moore,* 26 Fla. Law Weekly S242 (Fla. April 12, 2001). Whether or not the sentencing order would have been "sufficient today" is irrelevant to the issue before this Court. This Court upheld the sentence on direct appeal and upheld the determination that there were no mitigating circumstances. The lower court's opinion that "the trial court was simply wrong by not finding any mitigating circumstances" is contrary to the law as announced by this Court, and is a flagrant usurpation of this Court's authority.[20] *Mills v. State,* 476 So. 2d 192 (Fla. 1985). The lower court has sought to overrule this Court's decision on direct appeal. Such an untenable

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[19]Had the defendant raised such criticisms of this Court's opinion as a claim for relief, it would be subject to summary denial. *Eutzy v. State,* 536 So. 2d 1014 (Fla. 1988).

[20]As set out above, the "sufficiency" of the sentencing order was not an issue in Mills' Rule 3.850 motion, and the State had no notice or opportunity to respond to that claim. Consideration, *sua sponte,* of such a procedurally barred claim is disrespectful of this Court's authority as well as being unfair to the State and its citizens, which, like any other litigant, are entitled to due process.

result is clear legal error.

Likewise, the lower court's speculation as to the basis for the jury's recommendation of a life sentence is inappropriate. That issue has been decided adversely to Mills by this Court, and despite the arguments to the contrary, the dissenting opinions (which speculated with respect to such result) are merely that -- dissenting opinions which are not the law. Reliance upon such dissenting opinions is, as Justice Harding pointed out in *Mills v. Moore*, improper reliance upon an opinion that has no precedential value. This Court has rejected, unequivocally, the suggestion that the "views of past dissenters" should be adopted to dispose of this case. The lower court erred as a matter of law when it followed a course that has been expressly rejected. Moreover, contrary to the statement by the lower court on page 6 that Ashley's "disparate treatment" and the "incentives" given to Davis were not argued as mitigation, that finding is absolutely incorrect. These matters were argued in closing argument to the penalty phase jury and were before the sentencing judge. (R405-419; Supp. R.97-98). The lower court's determination to the contrary is contrary to the facts -- it is a palpable abuse of discretion which must be reversed.

In concluding that "the death penalty should not be imposed under the circumstances," the lower court has substituted its judgment for the judgment of the sentencing judge who heard all of the evidence - except Anderson's recent and highly suspect version

of events. The lower court did not considered the prior testimony, and its speculation about why the advisory jury recommended a life sentence is inappropriate.

Anderson's testimony is inconsistent with all of the other evidence at trial and is wholly inconsistent with Mills' own testimony. Mills testified that he was not involved in any way in this offense. In granting relief on this claim, based solely on Anderson's testimony, the lower court has reversed a death sentence that has withstood repeated challenges for twenty years.

This Court must, if it is to credit Anderson's testimony, accept that Anderson, who, in the words of the lower court, is a "long-time friend of the defendant," would hold information that would save his "long-time friend's" life until the very eve of his friend's execution. That assumption strains credulity and smacks of contrivance. The Circuit Court has ignored all of those circumstances in crediting Anderson's testimony, and its decision should be set aside.

The Circuit Court erred when it vacated the death sentence based upon nothing more than the testimony of John Anderson. That testimony was internally inconsistent. Moreover, with respect to two out of the three dates mentioned for his conversation with Ashley, it is unquestionably false. The lower court ignored those fatal inconsistencies in its rush to grant relief. The State recognizes that its burden with respect to this issue is a heavy

one under the precedent of this Court. *See State v. Spaziano,* 692 So. 2d 174 (Fla. 1997). However, the multiple, and unchallenged, falsehoods that Anderson has advanced demonstrate a clear abuse of discretion in granting relief.[21] This Court should correct that error and reverse the lower court.

In its order granting relief based upon the testimony, the lower court repeatedly invokes the incantation of "credibility determinations," apparently in an effort to insulate that portion of the order from appellate reversal. However, mere repetition of the mantra of "credibility" does not protect an order such as this one, which ignores the blatant falsity of Anderson's testimony in order to reach the clearly-intended result of setting aside the death sentence. It is ironic indeed that an order which repeatedly refers to the need for "the cold neutrality of an impartial trial judge" grants relief based upon such blatantly false testimony. The order leaves no doubt that the lower court did not believe that Mills deserved death -- it also leaves no doubt that the court intended to correct what it perceived to be error, despite this Court's multiple contrary rulings. The grant of relief is based upon false testimony, and the lower court abused its discretion to reach its result. The lower court should be reversed.

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[21]The lower court **never** directly addressed Anderson's credibility even though such is the cornerstone of the grant of penalty phase relief. Such an oversight is inexplicable and renders the lower court's order wholly deficient.

II. THE "*EX PARTE* ORDER" CLAIM

The Circuit Court also granted relief on Mills' claim that the order on his first *Florida Rule of Criminal Procedure* 3.850 claim was the product of an "improper *ex parte* communication." However, the "relief" granted by the lower court was to set aside the January 3, 1991 order which was entered by the Circuit Court following remand by this Court for an evidentiary hearing on specified ineffective assistance of counsel claims. The order which the lower court purports to have set aside has already been affirmed on appeal to this Court. *Mills v. State*, 603 So. 2d 482 (Fla. 1992). The lower court's attempt to set that decision aside is a direct infringement on this Court's authority. This claim is not a basis for relief.

Mills alleges that "newly discovered evidence establishes that an impermissible *ex parte* communication occurred between the State and the sentencing judge" during Mills' first collateral attack proceeding. He identifies the evidence as an "unsigned draft" of the first order denying Mills' first postconviction relief motion.[22] However, a state-prepared order denying Mills' 3.850 motion does not provide a basis for relief.

The Circuit Court totally ignored the procedural defenses

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[22]Mills attached some five documents to his pleading, but the order(s) at issue was not among them. However, he did file an unsigned order, which he represented to be the one at issue, in the post-conviction court after the April 26th *Huff* hearing.

pleaded by the State in response to this claim. It is error, as a matter of law, for the court to refuse to address, or even acknowledge, well-settled State procedural rules which preclude consideration of this successive, abusive claim. As is the case with Claim I, this claim is an abuse of process that is brought in an untimely manner because it could and should have been included in Mills' prior *Florida Rule of Criminal Procedure* 3.850 motion that was filed on April 16, 2001. By Mills' own admission on page 12 of the motion, the records of the Seminole County State Attorney's Office (which supply the basis for this claim), were sent to the records repository on April 6, 2001. The fact that Mills may not have printed those documents until April 17, 2001 makes no difference because, as even the Circuit Court has previously pointed out, **the records were available to counsel for review at the time they were received at the repository.** (PR52; 346-51).[23] Counsel apparently chose not to avail himself of that option, and in so doing, failed to act with due diligence. This claim could have been brought in a timely fashion. Having failed to raise it timely, Mills has abused the post-conviction review process and is entitled to no review, *Fla. R. Crim. Pro. 3.850(f)* ("A second or successive motion may be dismissed ... if new

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[23]"PR" refers to the record in the previous 3.850 appeal in this Court numbered SC01-775. According to counsel's statements in open court in his previous Rule 3.850 proceeding, he has an "agent" that is able to go to the repository. (PR52-53).

and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."); *See Bundy v. State,* 538 So. 2d 445 (Fla. 1989).

Moreover, this claim is not a basis for relief because it has not been brought in a timely fashion as required by *Jones* and its progeny. The basis for this claim could have been developed long ago, and it is untimely at this late date in the proceedings. *Buenoano v. State,* 708 So. 2d 941 (Fla. 1998).

The testimony of prior collateral counsel Nolas reflects that he was aware that the Court's order referred to a response that had not been served on him. **This was raised as an issue in Mills' motion for rehearing of the order denying relief.** If Mills' counsel was concerned about any possible *ex parte* communication with the Judge - such as a response not served on defense counsel but considered by the Court in making its ruling - he could and should have raised the issue then. Clearly, he was on notice of it.

In fact, the order summarily denying relief was entered on December 20, 1989. Mills' Motion for Rehearing was filed on December 28, 1989. His motion to recuse the trial judge was filed on October 18, 1990. Almost a year after being made aware of a potential *ex parte* communication issue, he failed to include it in his motion to recuse the judge. (See RDA1008-1026).[24] Thus, any

[24]"RDA" refers to the record on direct appeal.

claim that had he known of the potential *ex parte* issue, he would have included it in his recusal motion is without merit. This claim is procedurally barred.

Moreover, assuming *arguendo* the truth of the averments contained in Mills' motion, there is no basis for relief.

In *Swafford v. State*, 636 So. 2d 1309 (Fla. 1994), the defendant filed a first Rule 3.850 motion raising numerous issues. The postconviction judge "summarily denied the motion without an evidentiary hearing." 636 So. 2d at 1310. This Court affirmed the summary denial on appeal. *Id.* Thereafter, Swafford filed another 3.850 motion which the same trial judge also summarily denied. *Id.* The judge likewise denied the motion for rehearing and disqualification of himself which Swafford filed subsequent to denial of the second 3.850. *Id.* Swafford appealed from these orders, charging that the judge "engaged in improper *ex parte* communication with the state when he directed the attorney general's office to prepare the orders denying relief" as to both 3.850 motions. *Id.*

Pursuant to this Court's order, an evidentiary hearing was held on the *ex parte* communication issue. *Id.* The judge testified that "he, alone, decided how to rule in cases, after which he instructed his staff to contact the parties and request proposed orders." *Id.* The State's attorneys testified that the judge's law clerk had called and "told her what changes to make in her

previously filed order" as to the first 3.850 motion, and regarding the second, he called "and requested a proposed order setting out the state's position." Swafford's postconviction attorney testified that he never received notice that the State had been asked to prepare the order.

This Court distinguished *Rose* and *Huff*, both of which Mills relies on, because the judge had held a hearing prior to issuing the summary denial on the first 3.850 motion,[25] and Swafford had filed a motion for rehearing arguing "against the correctness of the order denying the postconviction relief." *Id.* at 1311. Moreover, this Court noted that due to the pending death warrant, "[t]his matter needed to be disposed of in a timely manner . . .." Since the judge had "simply requested the state to prepare an order," there was no improper *ex parte* communication. *Id.*

In the instant case, Judge Woodson testified that he was operating under the exigencies of a pending death warrant when the events at issue occurred. *Compare, Glock v. Moore*, 776 So. 2d 243 (Fla. 2001)(order prepared by State during exigencies of pending death warrant). He had received and considered both the defendant's allegations and claims for relief in the 3.850 motion and the State's response thereto. After determining that the motion had no merit, and determining to deny it summarily, he contacted the State Attorney's Office and asked that an order be prepared. The order

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[25]There was no hearing as to the second motion.

which was prepared tracked the State's response and summarily denied the motion. Judge Woodson testified that he read the order, and it said what he wanted it to say, or he would not have signed it. After the order was entered and served on the parties, Mills' postconviction counsel filed a motion for rehearing, arguing against the correctness of the order denying the 3.850 relief.[26] That motion was denied. Mills had all of the due process to which he was entitled, and his *ex parte* communication claim should have been denied by the lower court. This Court should reverse the lower court's order and deny the *ex parte* communication claim. *Swafford*.

Moreover, *Huff v. State*, 622 So. 2d 982 (Fla. 1993), upon which Mills and the lower court relied, was not decided until well after Mills' postconviction proceeding was concluded. At the time of this proceeding, the procedure alleged in Mills' motion, had not been held improper. Therefore, any motion to disqualify on that basis would have lacked caselaw support. In fact, at the time of this proceeding, the United States Supreme Court had recently held:

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. *See, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 1047-1048,

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[26]Of course, subsequently, this Court reviewed that order and concluded that only one claim merited an evidentiary hearing. That hearing was held, and the denial of relief on the claim was reviewed and affirmed by this Court.

> 12 L.Ed.2d 12 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n. 13, 94 S.Ct. 2856, 2866, n. 13, 41 L.Ed.2d 978 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, *The Nonjury Trial--Preparing Findings of Fact, Conclusions of Law, and Opinions*, Seminars for Newly Appointed United States District Judges 159, 166 (1962). **Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous**. *United States v. Marine Bancorporation, supra*, at 615, n. 13, 94 S.Ct., at 2866, n. 13; *United States v. El Paso Natural Gas Co., supra*, 376 U.S., at 656-657, 84 S.Ct., at 1047-1048.

Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985). [emphasis added]. Mills does not allege that the order at issue contains **any** error that was not corrected by the Florida Supreme Court.

In any event, *Huff* is not retroactively available to Mills. *See, Swafford v. State*, 636 So. 2d 1309 (Fla. 1994)(denial of motion to disqualify not error). Mills has not alleged any bad faith on the part of the state or the judge. Given that the complained-of practice in this case had not been ruled improper at the time of Mills' postconviction proceeding, there is no basis for relief.

Alternatively, should this Court conclude that this claim could not have been ascertained through the exercise of due diligence, the claim must be analyzed as newly discovered evidence which is subject to the "reasonable probability of a different

result" standard of *Jones*. In the context of a claim of improper drafting of a sentencing order, the Florida Supreme Court held:

> We believe that the allegations of the petition are sufficient to require an evidentiary hearing on the question of whether Card was deprived of an independent weighing of the aggravators and the mitigators. (FN2) Among the matters that can be developed at the hearing are the nature of the contact between Judge Turner and the prosecutors, when the judge was given the form of the sentencing order, and at what stage of the sentencing proceeding he gave copies to defense counsel. Further, an evidentiary hearing will permit a full exploration of the facts bearing upon the State's contention that all of the matters relating to Judge Turner's sentencing practices in death penalty cases were known or should have been known more than two years before this petition was filed. *See Adams v. State*, 543 So.2d 1244, 1247 (Fla. 1989).
>
> FN2. However, **we reject Card's contention that he will automatically be entitled to relief if Judge Turner's sentencing decision was made contrary to the procedural dictates of** *Spencer v. State*, 615 So.2d 688 (Fla. 1993), **because** *Spencer* **was not intended to operate retroactively in this respect.** *See Armstrong v. State*, 642 So.2d 730 (Fla. 1994).

Card v. State, 652 So. 2d 344, 346 (Fla. 1995). [emphasis added].

The stringent standard applied to sentencing orders is necessary because the sentencing order must reflect the judge's weighing of the aggravation and mitigation. An order in a Rule 3.850 proceeding serves a different purpose altogether. Moreover, in Mills' case, the order denying Rule 3.850 relief was reviewed by this Court to determine whether the "unpresented mitigation" would have precluded this Court from sustaining the sentencing judge's rejection of the jury's advisory sentence. As this Court found:

> Even assuming that Bickerstaff's performance was deficient, Mills has failed to demonstrate that her failings "actually had an adverse effect on" his sentence. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. An override of a jury's recommendation is not improper simply because a defendant can point to some mitigating evidence. Moreover, "even though the jury override might not have been sustained today, it is the law of the case." *Johnson v. Dugger*, 523 So.2d 161, 162 (Fla. 1988). As pointed out before, the trial court had information on Mills' serious criminal activity committed in the two months between his release from prison and the killing for which he received a death sentence that the jury knew nothing about. Given the psychologists' testimony that Mills' mental problems boiled down to his being impulsive, it is purely speculative that the currently tendered evidence would have carried sufficient weight to abrogate the judge's override of the jury recommendation. *Routly; Francis; McCrae v. State*, 510 So.2d 874 (Fla. 1987); *State v. Bolender*, 503 So.2d 1247 (Fla.), *cert. denied*, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987); *Lusk; Porter v. State*, 478 So.2d 33 (Fla. 1985). **Therefore, in addition to failing to show that counsel's performance was deficient, Mills has not demonstrated a reasonable probability that the currently tendered evidence would have produced a reversal of the judge's override of the jury's recommendation.** *Cf. Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071 ("there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case.")

Mills v. State, 603 So. 2d 482, 486 (Fla. 1992). In the context of this proceeding, Mills must establish that this Court would not have sustained his death sentence had a different judge heard the initial Rule 3.850 proceeding. Mills has not done, and cannot do, that because the evaluation of the evidence as it applied to the *Tedder* issue was conducted by the Florida Supreme Court. Moreover,

there is no suggestion that the evidence would have somehow been different had another judge presided at the evidentiary hearing. Because there is no reasonable probability of a different result, Mills is not entitled to relief.

Moreover, the lower court erroneously applied a "presumed prejudice" standard to the claim that the order denying Mills' first *Florida Rule of Criminal Procedure* 3.850 motion was part of "an improper *ex parte* communication." That Court found that the "due process violation becomes a matter of substance and actual prejudice is not required to be shown." Order at 12. However, the undisputed facts are that the complained-of order was vacated by this Court when it remanded a single issue for an evidentiary hearing, i.e., ineffectiveness of penalty phase counsel with respect to the presentation of mitigating evidence. *Mills v. Dugger,* 559 So. 2d 579 (Fla. 1990).

Analogizing the drafting of the 3.850 order to a sentencing order claim, Mills has already received the process he was due because he received Florida Supreme Court review of the summary denial and an evidentiary hearing on the only issue meriting one. Despite Mills' assertions to the contrary, cases that have been remanded by this Court for the proper entry of a sentencing order have not been reassigned to a different circuit judge. Even if this matter had been brought up on appeal from the denial of Rule 3.850 relief, the most that Mills would have been entitled to was

an evidentiary hearing - which is precisely what he received. *See Spencer v. State,* 615 So. 2d 688 (Fla. 1993); *Card v. State,* 652 So. 2d 344 (Fla. 1995). In any event, assignment of the rule 3.850 motion to the original trial judge is consistent with the requirement of *Florida Rule of Criminal Procedure* 3.851(c)(1). *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993,* 772 So. 2d 488 (Fla. 2000).

Moreover, the post-conviction court's finding that the trial judge would have been recused (presumably from the Rule 3.850 evidentiary hearing) "because he would have become a witness in the hearing to determine the propriety of the *ex parte* communication," is wholly speculative. That the original Rule 3.850 judge was called as a witness in this proceeding does not establish that he would have been so called at any hearing regarding the *ex parte* communication. In fact, there is no indication that such an evidentiary hearing would have occurred.[27] The instant post-conviction court relied on a completely speculative belief that an

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[27]For example, if the *ex parte* communication regarding the first rule 3.850 order had not been discovered until after the evidentiary hearing, there would have been no "automatic recusal" because the hearing was over. The postconviction judge would be available to testify as a witness without any impediment. Moreover, other witnesses might have been presented at such a hearing, negating any necessity of disqualification of the presiding judge. *See, e.g., Swafford v. State,* 569 So.2d 1264 (Fla. 1990)(numerous witnesses, which included the circuit judge, testified in the proceeding on the alleged *ex parte* communication. This Court found that the denial of the motion to disqualify was proper).

evidentiary hearing would have been conducted, and that the judge would have been a necessary witness at such a hearing, in order to grant relief in this proceeding. That result is wrong as a matter of law, and it should be reversed.

Moreover, as this Court has unequivocally held in the context of sentencing order error, Mills is not automatically entitled to relief even if the order denying Rule 3.850 relief was entered contrary to the requirements of *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and *Rose v. State*, 601 So. 2d 1181 (Fla. 1992). Those cases are not retroactively applicable to this proceeding, and to apply a presumptive prejudice standard (as the lower court has done) is contrary to the law as it has developed in this area. *See, e.g., Card v. State*, 652 So. 2d 344, 345 n.2 (Fla. 1995). Moreover, it is contrary to common sense to place the first postconviction judge in error based upon case law that did not exist at the time in question.

Apparently, the lower court has determined that Mills is entitled to relief based upon the circumstances of the preparation of the order summarily denying Rule 3.850 relief. Thus, the judge reasons, Mills is entitled to a *Huff* hearing, and possibly an evidentiary hearing, based upon the 1989 3.850 motion - the motion that this Court finally disposed of 1992. *Mills v. State*, 603 So. 2d 482 (Fla. 1992). Mills has not identified, and the lower court has not discussed, any purportedly erroneous rulings by the circuit

court in the first evidentiary hearing in this cause. Neither has he, or the lower court, discussed how the results of such proceeding would be different now. Absent a conclusion this Court would not have denied relief on the ineffective assistance of penalty phase counsel claim had another judge heard the Rule 3.850 evidentiary proceeding, there is no basis for relief. Mills has already received the process he was due in the form of an evidentiary hearing.

Despite the Constitutional pretensions of this claim, there is no Federal Constitutional issue presented. *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). Mills has shown no denial of due process, nor has he shown any prejudice. It makes no sense whatsoever to grant relief in the form of a *Huff* hearing because Mills has already received an evidentiary hearing. This Court has reviewed and approved the result of that hearing. The circuit court's instant order is an attempt to usurp this Court's authority and jurisdiction. Same is improper, and the order should be reversed.[28]

CONCLUSION

WHEREFORE, the State respectfully submits that the lower court's order should be reversed in all respects, the death sentence reinstated, and the stay of execution vacated.

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[28]Mills was not sentenced to death on April 18, 2001, as the post conviction court states on page 13 of the order.

Respectfully submitted,

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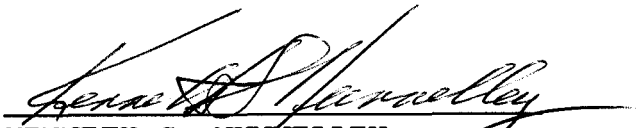

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail/facsimile to Todd Scher, Litigation Director, Office of the Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, on this 3rd day of May, 2001.

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CERTIFICATE OF COMPLIANCE

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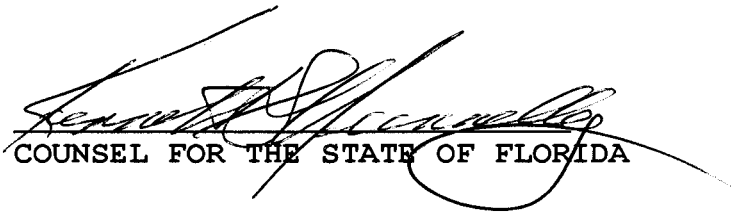

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