IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-879

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

GREGORY MILLS,

Appellee/Cross-Appellant.

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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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ARGUMENT IN REPLY

MR. MILLS IS ENTITLED TO A NEW TRIAL IN LIGHT OF THE LOWER COURT'S FINDINGS AND CONCLUSIONS WITH RESPECT TO THE SENTENCING PHASE.

A. FALSE ASSERTION OF PROCEDURAL BAR/ABANDONMENT.

In the first of the false assertions permeating the Appellant's brief, the State argues that "[t]his claim is procedurally barred because Mills did not request such relief from the Circuit Court" (RB at 15). In a footnote, the State acknowledges the utter falsity of its own argument:

> In his Rule 3.850 motion, Mills asserted that he should receive a new trial in the heading to Claim I. He made one similar reference in his closing argument, but, at the end of that argument, specifically requested an evidentiary hearing on the 1991 Rule 3.850 motion and a new sentencing proceeding (R. 168).

(RB at 15 n.13). Nonetheless, the State goes on to aver that "Mills abandoned his request for a new guilt phase proceeding by explicitly seeking only sentencing stage relief in his final argument" (RB at 15).

These assertions are unabashedly false.[1] That the State believes it helpful to its position to falsely represent this record is indicative of its lack of confidence in its position, not to mention its "win at all costs" mentality. It is one thing

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[1]Unfortunately, the State's tactic of providing false information to this Court is not limited to this argument. In the text of the other arguments in its Reply Brief, the State also makes false assertions about what Mr. Mills did and did not raise below with respect to the 1989 order at issue. See, e.g. RB at 13-14. Mr. Mills' counsel will be more than happy to address these additional falsities at the oral argument.

for advocates to have a disagreement about the effect of evidence, or how or what law applies to certain evidence. It is quite another, however, to make completely false assertions, as the State has chosen to do. The State's conduct is disturbing. Florida Bar v. Cox, No. SC96217 (May 17, 2001). See also Florida Bar v. Feinberg, 760 So. 2d 933, 939 (Fla. 2000) ("[t]ruth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing").

Because of the State's unfortunate tactics, Mr. Mills counsel must now expend time and effort to point out the utter falsity of the State's allegations.

That Mr. Mills "requested" a new trial below is indisputable, the State's false representations to this Court notwithstanding. The request made in the claim heading for Claim I (PCR. 9). In the text of the claim, Mr. Mills unambiguously stated: "Alone and cumulatively, Ashley's confession clearly establishes a reasonable probability of an acquittal. Jones v. State, 591 So. 2d 911 (Fla. 1992)" (PCR. 10). In his prayer for relief, Mr. Mills unambiguously requested, *inter alia*, "[t]hat his convictions and sentences, including his sentence of death, be vacated, and a new trial and/or sentencing proceeding be ordered" (PCR. 18).

Moreover, Mr. Mills did not "abandon" his request during the arguments that followed the evidentiary hearing, as the State falsely asserts (RB at 15-16). During the closing argument, counsel unambiguously stated that the claim relating to Anderson's

testimony "goes to both Mr. Mills' guilt phase as well as to the penalty phase" (T. Hearing 4/30/01 at 157). Counsel went on to discuss how the newly-discovered evidence affected the guilt phase, first addressing the State's contention that "other evidence show[ed] that Mr. Mr. Mills was, in fact, guilty of murder" (Id. at 157-61). Counsel also specifically discussed that "what's significant in terms of the deliberations of the guilt phase was the jury did ask for Ashley and Davis' testimony to be read back. Obviously, you know, to me, that indicates certainly that it was a matter of concern that they wanted to hear that testimony again, we don't know what was in their minds when they asked for that, but it simply shows that there was concern on the jury's part. And that was the only critical testimony against Mr. Mills in terms of Ashley and Davis" (Id. at 161). Counsel then went on to discuss the antimony tests and their insignificance in terms of the effect of the newly-discovered evidence on the guilt phase of Mr. Mills' trial (Id. at 161-63). Counsel then summed up the argument by unambiguously stating that "what Your Honor has to do is determine whether [] at a retrial, if there's a reasonable probability of an acquittal, a different result based on John Anderson's information in conjunction with the other information in the case" (Id. at 163). When Judge Eaton attempted to discuss the impact on the sentencing phase, Mr. Mills' counsel clearly stated "Well, I'm talking a new trial" (Id.). At that point, counsel then turned his attention to arguing the effect of the newly-discovered evidence on the issue of the jury override (Id.).

It could not be clearer that Mr. Mills did not "abandon" the issue of a new trial below, either in his pleading or during the closing argument. The State's fictionalized account of the proceedings has no merit. Mr. Mills' counsel does not understand why the State's representative would make such clearly false arguments to this Court other than to improperly focus attention from the merits of the case in the hopes of thwarting review. The State's tactics are unfortunate and, as demonstrated above, its arguments are devoid of any factual veracity.[2]

B. REPLY TO THE MERITS.

The State's own arguments opposing a new trial demonstrate the tenuous basis of the evidence on which Mr. Mills' conviction rests. In its statement of the facts, the only evidence pointed out by the State upon which it relies to demonstrate the "strength" of the prosecution's case came from either Vincent Ashley or Sylvester Davis (RB at 1). The State acknowledges that it was Davis who put the shotgun in the possession of Mr. Mills;

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[2]The State also asserts that the claim is "insufficiently briefed" (RB at 16). The State fails to explain how it is "insufficiently briefed." The argument clearly set forth the nature of the claim, and noted that "[i]n light of the new evidence indicating that Ashley was the shooter, and the arguments set forth in Argument I, supra, the facts of this case should be subject to the adversarial testing of a new trial. Jones v. State, 591 So. 2d 911 (Fla. 1991)) (Answer Brief of Appellee-Cross/Appellant at 73). It certainly was "sufficiently" briefed for the State to allow it to respond. See RB at 15-19. Thus, the State cannot demonstrate any "prejudice." Mr. Mills did not believe it necessary to repeat verbatim the factual basis for the argument, as it had been exhaustively set forth in the preceding argument, as the brief noted. Moreover, Mr. Mills' brief was written and filed in accordance with the accelerated schedule requested by the State; thus, any putative briefing "insufficiencies" are not attributable to Mr. Mills.

and it was Davis and Ashley who identified the shotgun introduced at trial as the one in Mr. Mills' possession prior to the incident in question (Id.). The remainder of the critical evidence against Mr. Mills, as described by the State, came from the mouth of either Ashley or Davis (RB at 1-3).[3] Even the State's reliance on Gloria Robinson's testimony is insufficient; without Davis' testimony that Mr. Mills purportedly told him that he was going to get his sister to pick up the weapon, Robinson's testimony does nothing to demonstrate Mr. Mills' guilt.

The direct examination testimony of prosecution witnesses is not the only information that must be looked to in assessing Mr. Mills' entitlement to a new trial under Jones. Both Davis and Ashley were cross-examined at trial. Mr. Mills' Answer Brief discusses the impeachment of Davis at trial, and this will not be repeated herein. See Answer Brief at 41-42; R. 122-41 (Cross-Examination of Sylvester Davis). Suffice it to say that Davis, who acknowledged that he would testify to anything to stay out of prison and who "exchanged a few laughs" with Ashley when they saw each other in court (R. 135), was not a witness who survived cross-examination with much, if any, credibility. This applies equally to Ashley, whose deal brokered by the State Attorney's Office guaranteed Ashley a free ride on a string of felonies, not to mention the murder of James Wright. That their testimony was important and of concern to the jury is demonstrated by the jury's

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[3]The State also argues that the gunshot residue test "tied" Mr. Mills to the shooting (RB at 3). This false assertion will be discussed infra.

request for a read-back of their testimony (R. 473).

The only other "direct" evidence discussed by the State is the gunshot residue test results (RB at 3). Nothing about the testimony on this point "tied" Mr. Mills "to the shooting of James Wright" (Id.). Again, the State ignores the record. The technician who testified at trial on this issue was unable to testify to a scientific certainty that Mr. Mills fired a weapon based on the results obtained. While the results were slightly higher than normal, they were far below the amount necessary to be conclusive (R. 384-392). Moreover, that Ashley had no residue on his hands (RB at 3), is not dispositive of whether he fired a weapon. The state's own witness admitted that there existed numerous factors which could effect the test results (R. 305-306). A person did not have to shoot or handle a gun for the results to be positive. Most people walking the streets have some traces of antimony, which is the element tested for (R. 388-392). The state's gunshot residue witness also testified that contact with certain metals, e.g., lead, could produce results similar to that obtained from people who had shot a firearm (R. 392-393, 395-396). Also effecting the test results is the fact that antimony particles can be wiped off; moreover, the particles dissipate over a period of time (R. 312-313). In the present case, there was testimony concerning a two-hour delay in taking Ashley's test, during which time Ashley was rubbing his hands on the grips of his bicycle and could have wiped his sweaty hands onto his clothing (R. 312-313). The police did not test Ashley's clothing or the

grips of his bicycle for any antimony residue (R. 309, 313). Thus, the State's reliance at this point on the outcome of the test results in this case is misplaced.

Next, the State repeats its arguments about the "significant credibility issues surrounding Anderson's testimony" (RB at 16 *et. seq.*). The State repeats its personal beliefs that Anderson's testimony was "clearly shown to be false" (RB at 16), or were "outright lies" (RB at 8), and that "the lower court made no credibility determinations" with respect to Anderson (RB at 8). As set forth in Mr. Mills' Answer Brief and as clearly established by Judge Eaton's order, the State's assertions are palpably and demonstrably false. See Answer Brief at 28-29; PCR. 287.[4] The lower court did not "ignore" the credibility arguments being asserted by the State (RB at 16), but rather considered and rejected them in crediting Anderson's testimony and finding him credible. This is a significant difference, one which the State refuses to accept.[5] These credibility determinations apply equally to Mr. Mills' claim for a new trial. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999) ("We recognize and honor the

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[4]The State insists on asserting that Judge Eaton made no credibility determinations as to Anderson, yet in its Initial Brief, chides him for his "repetition of the mantra of 'credibility'" (IB at 23). The State's arguments are inconsistent, to say the least.

[5]And one which, when credibility determinations are made against defense witnesses, the State chides collateral counsel for refusing to accept. The rules are the same, however, for both sides. Changing the rules for the State in this case would require revisitation of every case in which this Court has upheld credibility determinations adverse to defendants.

trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact"). No matter how many times the State expresses its belief that Anderson's testimony is false, this does not change Judge Eaton's order or the deference to which it is entitled. Id. The hysterical tenor of the State's argument simply points to the need to have the facts of this case, as they now stand, subjected to the crucible of an adversarial testing. See Jones v. State, 709 So. 2d 512, 527 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part) (noting troubling nature of case where there is evidence that another person committed the murder "yet none of this evidence was heard by the jury that tried and convicted Jones").

The State next argues that the "theory" that Ashley was the triggerman is "inconsistent" with the theory at trial, that is, that Mr. Mills was not involved, as he testified (RB at 17-18). This argument overlooks the fact that Anderson's credible testimony constitutes newly discovered evidence of impeachment as to Ashley. Jones, 709 So. 2d at 521; Robinson v. State, 770 So. 2d 1167 (Fla. 2000).[6] In light of this newly discovered

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[6]Mr. Mills also submits that the State's reliance on Mr. Mills' testimony is an improper application of the Jones analysis. The analysis of newly-discovered evidence in the Jones context cannot presuppose that the defendant would or would not testify at a retrial, since a decision whether to testify is a strategic one that must be made on the advice of counsel and with full knowledge of the prosecution's case. Just as the discovery of material exculpatory evidence could alter the defense strategy at trial, see United States v. Bagley, 473 U.S. 667, 683 (1985) ("The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficult in reconstructing in a post-trial proceeding the course that the

evidence, the case at retrial would come down to a "battle" so to speak between Ashley's version of events and Mr. Mills' version of events. As conceded by the State in its Initial Brief, "[o]f course, the determination of the credibility of an accomplice's version of the crime is for the jury to make" (IB at 14 n.12). Mr. Mills agrees that the jury should now make this determination. Here, in light of the newly discovered evidence, alone and in conjunction with the weakness of the State's case and Ashley's other version of the events that was subject of the previous appeal, it is clear that the facts should be subjected to the crucible of an adversarial testing before a jury, as there is a reasonable probability of an acquittal.

As Judge Eaton found, Ashley, due to his varying versions of the events over the years, is the "least credible witnesses that has ever appeared" before him. A conviction for first-degree murder should not be based on such a person's testimony, particularly when that person is an accomplice with complete immunity from prosecution. The State's blind willingness to stand by such a conviction no matter how tenuous the evidence speaks volumes for what it believes its role is in criminal prosecutions: winning at all costs no matter what. In this age of repeated

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defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response"), so too could the introduction of newly-discovered evidence into the "mix" of evidence alter strategy decisions. Mr. Mills does not have the burden of establish his innocence at a retrial; rather, the State has the burden of establishing his guilt beyond a reasonable doubt.

exonerations of defendants from death row (with Florida leading the nation), the State's position is more than troubling. A new trial should be ordered.

CONCLUSION

In light of the foregoing arguments, Mr. Mills submits that a new trial is warranted.

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by fax and Federal Express to all counsel of record on May 25, 2001.

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