IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO5-2379

MATTHEW MARSHALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of post-conviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R. __" -- record on instant appeal to this Court;

"PC-R __" –record on post conviction appeal.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Marshall has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Marshall, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Trial

Mr. Marshall was charged by indictment dated February 16, 1989, with first degree murder. Both Mr. Marshall and the victim, Jeffrey Henry, were inmates at the Martin Correctional Institute at the time of the crime for which Appellant was convicted. Appellant pled not guilty and presented evidence of self-defense at trial. Appellant's trial was held in November and December of 1989. A jury returned a verdict of guilty on first degree murder. At the penalty phase, trial counsel presented no mental health witnesses and no live testimony from family members. Appellant waived his right to present any statutory mitigation. The Appellant also waived his right to jury instructions on the statutory mitigators. Appellant would later allege that counsel=s preparation and presentation of mitigation was constitutionally inadequate.

Following conclusion of the penalty phase, the jury recommended a life sentence without possibility of parole for 25 years. On December 12, 1989, the trial court overrode the jury's life recommendation and sentenced Appellant to death. The trial judge found as mitigating only that Appellant behaved well at trial and had entered prison at a young age.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence, concluding that the "record in this case contains insufficient evidence to reasonably support the jury's recommendation of life.@ Marshall v. State, 604 So. 2d 799 (Fla.

1992), cert. denied, 508 U.S. 915 (1993). Chief Justice Barkett, and Justices Kogan and Shaw concurred in the affirmance of guilt but found that "reasonable people could differ as to the appropriateness of the death penalty, and the court's override was therefore improper." Id.

Post-Conviction

On January 29, 1999, Appellant filed his final amended 3.850 motion for post conviction relief which raised twenty-seven claims. These claims included allegations of serious jury misconduct involving racial bias, predisposition of guilt, and juror consideration of non-record evidence such as news reports. These allegations, presented as AClaim IX@ in the 3.850 motion, were grounded on information provided by Florida attorney Ronald Smith based upon a phone call he had received from an unidentified juror from Mr. Marshall=s trial. On March 29, 1999, the State filed its response.

After a Huff[1] hearing on April 14, 1999, the trial court ordered an evidentiary hearing on three of Appellant's claims. Two of the three claims involved allegations of ineffective assistance of counsel at the penalty phase. The other claim involved a Brady[2] violation affecting the guilt phase of the trial. The trial court refused Appellant=s request for an evidentiary hearing regarding jury misconduct because it believed that Athe allegations alleged in the attached affidavits inhered in the verdict." (PC-R 1829) After

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[1]. Huff v. State, 622 So.2d 982 (Fla. 1993)

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

conducting a 3 day evidentiary hearing, the trial court issued an order on April 18, 2000, denying Appellant's Rule 3.850 motion. Thereafter, Mr. Marshall timely appealed the denial of his motion.

This Court in Marshall v. State, 854 So. 2d 1235 (Fla. 2003), affirmed the trial court's order denying post conviction relief, with the exception of the claims of juror misconduct. On this issue the Court remanded the case for an evidentiary hearing. Marshall, 854 So. 2d at 1253.

Evidentiary Hearings Pursuant To Remand

Upon remand, an initial evidentiary hearing was held on March 24, 2004, at which six (6) of the twelve jurors appeared. The trial court construed the remand order in the most literal terms asking each juror only three, extremely narrow questions:

1. AWere you a juror in the case State versus Matthew Marshall that was tried in the courtroom in 1989 and Mr. Marshall was charged with first degree murder@? (R274, 276, 278, 280, 283, 285, 316, 319, 322);

2. AAre you the juror who phoned attorney Ronald B. Smith, who is a lawyer in Stuart, and said basically two things. First, that you were related to one of Mr. Smith=s clients and also that you were a juror in the case and that you observed other jurors doing things that were improper including making racial jokes and also failing to follow the judge=s instructions that the jurors should not come into any contact with news media coverage during the trial? (R274, 276,

278-279, 280-281, 283, 285-286, 316-317, 319-320, 323); and,

3. ADo you know who that person was?@(R274, 277, 279, 281, 283,286, 317, 320, 323).

Not surprisingly, the six jurors testified that they were not the juror who telephoned attorney Ronald Smith and did not know of any juror who had telephoned Mr. Smith. Two of the jurors were deceased at the time of the hearing, one man and one woman. The remaining four jurors could not be served with the Court=s subpoenas because they were either residing out of state or had moved within the state. (R258-260)

After this initial evidentiary hearing, defense counsel continued its efforts to locate and serve the remaining jurors. During this time, a CCRC investigator found juror Coy Lee Thomason=s ex-wife at his last known address.(R327-331) This witness, Debra Thomason, told the investigator that she witnessed Coy Thomason reading newspaper articles and talking about the case to others at his workplace during the time he was serving as a juror.(R327-331) She indicated that her husband assumed from the beginning of the trial that Mr. Marshall was guilty because he was a prisoner. She was also aware of racial jokes made among the jurors.

Defense counsel then timely filed an Emergency Motion to Add a Witness for the follow up evidentiary hearing scheduled for May 19, 2004. An affidavit was attached to the motion in which Mrs. Thomason stated in pertinent part:

I, Debra Thomason, . . . was married to Coy Lee Thomason

from February 1979 until our separation in February 1999 and our divorce in July 2000. I was contacted regarding the whereabouts of my ex husband recently because of his role as a juror in the Matthew Marshall case. He was being sought by Martin County Judge Geiger regarding this case.

At the time that Coy Lee Thomason was a juror in that case we were married. I recall his being called for jury duty and I recall his reaction to being picked to be on the jury. He was very excited to be involved in what was a very high profile case. From day one he talked to me and others in my presence about the case. This included graphic details of the crime, court proceedings, deliberations, testimony etc. He discussed the case with the employees of our printing business during business hours within earshot of any customers there at our shop. He knew that he wasn=t supposed to talk about the case but he did anyway regularly.

He also followed the case in the newspapers, reading everything and cutting the articles out placing them in his briefcase. The first thing in the morning he looked forward to getting the paper and reading the latest coverage of the case. As late as 1999, when we physically separated, I know for a fact that he still had all the clippings from the newspapers in his briefcase which he carried with him everywhere.

> My ex husband Coy Lee Thomason, also made it clear to me and others that the defendant in the case, Matthew Marshall, was guilty from the getgo. He spoke of Mr. Marshall as a man guilty of the charges from the day the trial commenced. Mr. Marshall=s status as an inmate at the time of the crime appeared to prejudice his judgement.
>
> In addition I read an article in our local newspaper a number of months back. It was titled Ajurors could go back to court@ and was printed in the summer of 2003 I believe. The article describes the deliberations in the Marshall case as having suffered from juror misconduct. The racial jokes and the sharing of information from newspaper articles brought my ex husband=s face immediately to mind.
>
> Signed by me the 29th of April, 2004 at Hobe Sound, FL.

(R76-82)

Despite its obvious pertinence to the issues presented on remand, the court refused to allow Mr. Marshall to present the non-juror witness at the May 19th hearing. Inexplicably, the trial court suggested that the information from Debra Thomason was Anewly discovered evidence@ even though it was directly probative to the subject of evidentiary hearing ordered by the Supreme Court. The trial court suggested that Mr. Marshall was required to file a successive post - conviction motion in order for the testimony to be considered. (R76, 331) Counsel for Mr. Marshall argued that the court

should have heard and considered the evidence: A. . . we=re kind of uncovering what happened here. Now, maybe because one of the jurors didn=t want to fess up to that, that she made that call, there=s nothing we can do about that right now. But we have discovered a possible breach, a possible violation here so I=m asking the Court to continue along the path that we=ve been going and that way you can make a clear determination and make a decision for the Supreme Court.@(R335) In response, the judge reiterated his decision to deny the Emergency Motion to Add A Witness and instructed counsel to file Aan additional" post - conviction motion. (R337) During the remainder of the hearing, the court heard from three of the four remaining jurors, all whom testified they were not the juror who telephoned attorney Ronald Smith and did not know who did.

Thereafter, on June 1, 2004, counsel for Mr. Marshall filed a Successive Motion for Post Conviction Relief based on newly discovered evidence (R83-97) and filed a motion to interview juror Coy Lee Thomason. On June 5, 2004, witness Debra Thomason, age 48, unexpectedly died at a Hospice. Mrs. Thomason had given the investigator no indication of illness when she was interviewed and swore out the affidavit referenced above.

On June 30, 2004, an Amended Successive Motion was filed in response to the state=s allegations that the original motion was incomplete. (R108-119, 98-102) On that same day, counsel for Mr. Marshall notified the trial court that witness Debra Thomason had died. (R129) The record shows the death notice as an attachment to the Amended

successive motion. The trial court then held legal argument regarding how juror Coy Lee Thomason would be interviewed, in light of Mr. Marshall=s Successive Motion. (R355-360) Counsel for Mr. Marshall was adamant that counsel should be allowed to interview Coy Lee Thomason outside of the courtroom (with the prosecutor if need be) in order to discover relevant evidence A. . . in a non-threatening environment where there can be dialogue.@(R358) Counsel further objected to the Court conducting the interview as he had done with other jurors because for A. . . Most people and most civilians the courtroom is overwhelming and a scary situation and they don=t necessarily give forthright information.@(R359) Counsel further argued that she Awas in disagreement with filing the successive motion. I thought this evidence should have been part of the original motion . . . now that it=s [a successive motion] that puts it in totally different procedure.@(R357) Mrs. Thomason=s untimely death made it critical that the trial court allow defense counsel sufficient leeway to develop juror Coy Thomason=s testimony through both informal interview and subsequent direct questioning in court.

On July 16, 2004, the state filed it=s Response to Defendant=s Amended Successive Motion. (R130-151) On August 25, 2004, the trial court partially granted Defendant=s motion to interview juror Coy Lee Thomason. The order stated A. . . Pursuant to rule 1.431(h) the interview will be conducted by the Court on September 8, 2004, at 4 p.m. The Court will conduct the initial questioning of the juror and will allow subsequent questioning by counsel for the defense and state as it deems appropriate. . .@(R152-153,

154-155)

Due to an unfortunate series of events, including the judge=s decision to take senior status and the destruction caused by two hurricanes, the hearing scheduled to interview Coy Thomason did not take place until June 10, 2005. (R366, 377, 386, 392) During the June 10, 2005, hearing, the trial court indicated that he would ask the questions of Mr. Thomason, rather than allowing counsel to direct their own inquiry. Later in the hearing, defense counsel objected that the court=s unnecessary restraint would frustrate her ability to uncover what Mr. Thomason knew: A. . . I=m from Broward County, I don=t come up here and read the local newspaper. There was plenty of coverage. I just want to know his state of mind, has he been told anything. . . . I would ask him general questions, have you talked to your kids, has anybody told you what is going on, what=s been in the newspaper. Have you read anything about your wife saying anything to anybody about this case. You know, I=m feeling constrained, but I=m limited, but I don=t have a choice. Asking a person a series of questions in an open fashion, it=s a more conversational type thing and this holds me back, you know. I=m used to asking the questions.@(R413)

As if to illustrate his evident hostility to the entire process, the trial court first advised Mr. Thomason that the questioning would take Aa total of ten minutes.@ (R 392) The trial court then asked Mr. Thomason the same three anemic questions asked of other jurors regarding the phone call to Ronald Smith with the same inevitable result. (R404-405).

After a brief recess, Mr. Thomason was returned to the jury box for questioning regarding the Appellant=s successful petition. The following exchange between the judge and Mr. Thomason occurred:

THE COURT: And I have just two real quick questions on this issue. While you were a juror trying the Matthew Marshall case, did you ever discuss the case with your ex-wife Debra Thomason or any people at your place of work?

MR. THOMASON: No, Sir, I didn=t.

THE COURT: Did you ever read any newspaper articles regarding the Matthew Marshall case while you were a juror on the case?

MR. THOMASON: No, Sir, I didn=t.

The trial court then asked counsel to suggest questions, allowing the defense to pose, through the court, only two additional questions:

THE COURT: ...First, did youBexcuse me, did you at anytime carry a briefcase with you containing articles of the Matthew Marshall case?

MR. THOMASON: No, Sir, I didn=t.

THE COURT: Did anyone tell you or have you read any newspaper articles or heard anything on radio or television about why you were being called here today?

MR. THOMASON: No, Sir. I thought it was going to be questions about the trial.

THE COURT: And when you say you thought it was going to be questions about the trial, did you think it was going to be questions that I have asked you to this point?

MR. THOMASON: No, Sir, I didn=t. (R418-19)

On September 28, 2005, the trial court issued an order denying the juror misconduct claim based on the juror interviews described above. The order makes no mention of Debra Thomason and the trial court appears to have decided the motion without considering either her affidavit or that of attorney Ronald Smith. (R215-218) A timely notice of appeal was filed.

SUMMARY OF ARGUMENTS

Appellant has made allegations of serious jury misconduct impugning the fairness of his trial in which the trial court overturned a jury=s recommendation of life and sentenced him to death. These allegations are backed by credible sources including the affidavit of an independent attorney who spoke with one of the jurors and the ex-wife of a juror who independently confirmed the specific misconduct previously reported by the attorney. Yet, despite these circumstances, the same trial judge who 16 years earlier had determined that the Appellant deserved to die despite a jury=s judgment to the contrary, chose to ask only three meaningless questions of the former jurors in a process destined to conceal rather than arrive at the truth. The trial court erred in construing this Court=s remand in this unnecessarily narrow fashion. The trial court erred in disallowing the introduction of proffered testimony from juror Coy Thomason=s former wife, requiring instead that the Appellant file a successive motion for post conviction relief based on newly discovered evidence. Finally, the trial court erred in disallowing the informal

deposition or interview of Coy Thomason outside of the courtroom, failing to properly and fully question Coy Thomason and unnecessarily refusing counsel the opportunity to direct limited questions of the witness. All of these errors have substantially prejudiced the Appellant and have produced a manifest miscarriage of justice.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY QUESTION FORMER JURORS ABOUT JURY MISCONDUCT REVEALED BY TWO CONSISTENT AND INDEPENDENT SOURCES.

In his post conviction motion, Marshall alleged that racial remarks and jokes and the jury's consideration of non-record materials deprived him of a fair and impartial jury. The factual basis for this claim rested, initially, on the affidavit of Ronald Smith, a Florida lawyer entirely disconnected from the case. According to Mr. Smith's affidavit, he received a telephone call from a woman who claimed that she had served on the jury in Marshall's case. During the phone conversation with Mr. Smith, the woman indicated that (1) some jurors decided Marshall was guilty before the trial was over; (2) some jurors told racial jokes about Marshall; (3) some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates; and (4) some jurors, despite the trial judge's orders forbidding it, read and discussed articles concerning the trial. Mr. Smith, however, was unable to recall the name of the woman who called his office.

The trial judge, who 16 years earlier had rejected the jury’s recommendation of life

and sentenced Marshall to death, summarily denied this claim without conducting an evidentiary hearing. This court in Marshall v. State, 854 So. 2d 1235 (Fla. 2003), reversed and remanded for an evidentiary hearing on the claim of jury misconduct. The Court recognized both the seriousness of the jury misconduct revealed in the phone call reported by Ronald Smith and that such "overt acts" did not "inhere" in the verdict: "*[W]hen appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct.* This is one way that we attempt to draw a bright line. …[t]he issue of racial, ethnic, and religious bias in the courts is not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary… the alleged conduct, if established, …[is] violative of the guarantees of both the federal and state constitutions which ensure all litigants a fair and impartial jury and equal protection of the law." Marshall, 854 So. 2d at 1241-42, *citing* State v. Hamilton, 574 So. 2d 124, 128. S*ee also* Wright v. CTL Distribution, Inc., 650 So. 2d 641, 643 (Fla. 2d DCA 1995) (stating that appellants, at the very least, must have an opportunity to determine the truth or falsity of juror's allegation in affidavit that racial slurs and comments were madeduringdeliberations).

This Court similarly found that Marshall's allegations regarding the use of non-record information and predispositions to find guilt did not inhere in the verdict: "… this Court has stated that any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject to judicial inquiry. *See* Baptist Hospital, 579 So. 2d at

100-01…. *See* Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding that motion supported by sworn affidavit of third party indicating that alternate juror had a predisposition to find defendant guilty for matters unrelated to trial warranted juror interviews)." Marshall, 854 So. 2d at 1241-42. Accordingly, this Court remanded the case with instructions for the trial court to conduct an appropriate hearing to ascertain whether misconduct had occurred.

The Court, however, was also concerned about the sanctity of the jury deliberation process and accordingly stated: AThe scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct. Moreover, the trial court may wish to conduct most or all of the questioning of the jurors, thereby ensuring that unnecessarily intrusive questions will not be asked of the jurors and to prevent questioning on matters that inhere in the verdict. People v. Hedgecock, 51 Cal. 3d 395, 272 Cal. Rptr. 803, 795 P. 2d 1260, 1274 (1990) (discussing steps trial court can take to avoid a chilling effect on jury deliberations when holding evidentiary hearing on juror misconduct claim).@ Marshall, 854 So.2d at 1253.

After remand, the trial court proceeded to conduct a series of brief evidentiary hearings on various dates until all the jurors were interviewed, except for two, who were deceased. The trial court asked the same set of three perfunctory questions, quoted in

full in the statement of the case above -- whether the witness had been a juror in the case (not a fact in dispute), made the phone call to Ronald Smith, or knew the person who did. These questions were inadequate to the task at hand even given this Court=s admonition to avoid subjects that inhered in the verdict.

Not surprisingly, each juror denied knowledge of the call to Ronald Smith. This result was inevitable given the narrow scope of the questions. It was already established before the hearing that only one juror, a woman, made the call to Ronald Smith. For half the jurors this question, like the first question regarding whether they were a juror at the trial, was essentially meaningless. The only other question posed by the court **B** do you know the person who called Ronald Smith**B** was not meant, nor perhaps designed, to realistically elicit meaningful information regarding jury misconduct. The phone call occurred years after the trial, when the jurors had long since dispersed to their separate lives. It was hopelessly unrealistic to believe that the caller, making accusations of serious misconduct against fellow jurors, looked those jurors up to share her accusations. The possibility that other jurors besides the caller had any knowledge of the phone call was so remote that the question itself bordered on the ridiculous. And yet, it is all that the judge asked.

In essence, the trial court chose to not ask even a single question directly relevant to the underlying allegations of jury misconduct. ***Indeed, the jurors could not have revealed any knowledge that they may have had concerning the allegations of***

misconduct because, in fact, they were never asked. Rather, each juror was merely asked if he or she was the person who told Ronald Smith about jury misconduct or knew the person who made that call. No one was asked if she told or heard racial joking. No one was asked if jurors discussed sending Marshall back to prison to kill black inmates. No one was asked if the jurors discussed the case prior to their deliberations. No one was asked if they or other jurors brought to court or otherwise considered newspaper reports. No one was asked if any juror expressed a predisposition toward guilt because the defendant was already a prisoner. And yet, there could be no other purpose for questioning the jurors other than to discover such information. Although this Court specifically instructed the trial court that none of these acts, each clearly reflected in Ronald Smith's affidavit, inhered in the verdict, the trial court erroneously restricted its inquiry to discovering who made the phone call.

The trial court=s hopelessly crimped approach to the interviews seems particularly difficult to understand given his comment after the initial phase of juror interviews: AWell, obviously we didn=t do the second part, which is find out who made the phone call. And ***certainly knowing Ronald Smith - - and I have known him for a long, long time there=s no question in my mind that somebody called***.@(R287) *(emphasis added)*. It is also difficult to understand why the trial court upon learning that a female jury was deceased did not appropriately expand the scope of his inquiry given the distinct possibility that the caller had died. It appears that the trial court both misconstrued this

Court=s remand order and was disinclined to uncover facts that might undo a decision he had made 16 years earlier that Matthew Marshall deserved to die despite the jury=s finding that life was more appropriate.

In an effort to protect against unnecessary intrusion into the jury=s deliberative process, this Court=s remand order very clearly focuses on discovering the identity of the juror who called Ronald Smith: AThe scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct.@ This language could not have been intended, however, to limit the scope of the evidentiary hearing *strictly* to discovering the identity of the caller. Indeed, the only conceivable purpose for discovering the identity of the caller was to discover whether there was a factual basis for her allegations of juror misconduct. The order itself suggests this by directing the court to conduct further inquiry if there was Aa reasonable probability of juror misconduct.@ How could the trial court possibly know whether such a reasonable probability existed if he never asked a single question relevant to the alleged misconduct?

Perhaps the trial court erroneously believed that he was constrained not to ask pertinent questions in order to avoid questions that might reach subjects that Ainhere in the verdict.@ *See* Marshall, 854 So. 2d at 1241-42. This justification would be obviously untenable in light of the remand. Jurors telling racial jokes in a trial involving a black

defendant does not Ainhere@ in the verdict. Suggesting to other jurors that conviction would be socially valuable so that the defendant could return to prison to kill other black inmates does not inhere in the verdict. Presumptions of guilt based on the defendant=s status as an inmate does not inhere in the verdict. Discussion of the evidence outside of the courtroom does not inhere in the verdict. Consideration and sharing of newspaper reports does not inhere in the verdict.

Yet, despite independent evidence in the affidavit of Ronald Smith that such events took place, the trial court made absolutely no effort to discover their truth or falsity choosing instead to ask only three meaningless questions destined to reveal absolutely nothing of significance. Surely a man sentenced to death deserves a more sincere effort to arrive at the truth regarding facts that create serious doubt about the fundamental fairness of his trial.

Moreover, the very process by which the trial court questioned the jurors, including juror Thomason, was conducted in a manner highly unlikely to arrive at the truth regarding the fundamental issue of whether Matthew Marshall received a fair trial by an impartial jury. Indeed, the entire procedure was designed and had the undisputable effect of chilling the jurors and suppressing the truth. The questioning of the jurors took place sixteen (16) years after the trial, in the same courtroom where it was alleged serious jury misconduct took place. Each juror was ushered into this overwhelming setting and questioned from the jury box where he sat alone as the sole witness and, as far as he

knew, perhaps prime suspect. He was surrounded by a judge, two prosecuting attorneys, a defense attorney, a court reporter, and a bailiff. Confronted by the very judge who had admonished him and other jurors 16 years earlier to fulfill their basic civic obligations of fairness, impartiality and objectivity, he was essentially asked if he or others had violated their oath. It was virtually inevitable under these circumstances that jurors, including Coy Thomason, readily agreed that they had no knowledge as to why they were being questioned. The jurors must have been relieved to hear the three meaningless and uninformative questions posed by the trial court because none of these questions required the jurors to respond to the pertinent allegations of racial bias, presumptions of guilt, forbidden discussion of the case prior to deliberation and consideration of non-record evidence such as news reports. The jurors could not have confirmed or denied any of the specific allegations of misconduct, because the trial court erroneously never bothered to ask them.

II. THE TRIAL COURT ERRED IN FORCING APPELLANT TO FILE A SUCCESSIVE MOTION FOR POST CONVICTION RELIEF RATHER THAN TAKING AND CONSIDERING EVIDENCE PROVIDED BY A JUROR=S FORMER WIFE CONFIRMING THE ALLEGATIONS OF JUROR MISCONDUCT, AND EXPANDING THE SCOPE OF ITS INQUIRY OF THE FORMER JURORS.

During the course of trying to locate jurors, an investigator working for Mr. Marshall inadvertently discovered juror Coy Lee Thomason=s ex-wife living at his last known address.(327-331) During a brief conversation as to why the investigator was

looking for Coy Thomason, Debra Thomason told the investigator that she witnessed Coy Thomason reading newspaper articles and talking about the case during the time he was serving as a juror.(327-331) She also referred to racial jokes made by jurors and her husband=s presumption that the defendant was guilty because he was already a prisoner. On May 4, 2004, counsel filed an AEMERGENCY MOTION TO ADD WITNESS@ in order to have Debra Thomason testify during a hearing already scheduled for May 19, 2004 (R62-68). An affidavit was attached to the motion, (R76-82) pertinent parts of which are quoted in the statement of the case, above.

Despite its timeliness and obvious pertinence to the issues on remand, the trial court denied the motion to present Mrs. Thomason=s testimony and ruled that Mr. Marshall must instead file a successive motion for post conviction relief on the basis of Anewly discovered evidence.@ (R76, 331) Counsel for Mr. Marshall objected and argued to the court: A. . . we=re kind of uncovering what happened here. Now, maybe because one of the jurors didn=t want to fess up to that, that she made that call, there=s nothing we can do about that right now. But we have discovered a possible breach, a possible violation here so I=m asking the Court to continue along the path that we=ve been going and that way you can make a clear determination and make a decision for the Supreme Court.@(R335) However, the court reiterated that Mr. Marshall was required to file Aan additional@ post - conviction motion in order for the court to consider Mrs. Thomason=s testimony regarding juror misconduct.(R337) Thereafter, on June 1, 2004, counsel for

Mr. Marshall filed a successive post conviction motion based on newly discovered evidence. (R83-97) Counsel also filed a motion to interview juror Coy Lee Thomason based on the affidavit of Debra Thomason and for discovery on the new post conviction motion.(R76-82)

On June 5, 2004, witness Debra Thomason, age 48, died at Hospice. (R129) In light of her unexpected death, the trial court=s arbitrary refusal to hear her testimony at the May 19 hearing resulted in profound prejudice to Mr. Marshall. (R78) If the allegations of misconduct contained in Debra Thomason=s affidavit were proven credible and true, her testimony to that effect would have required that Appellant be given a new trial untainted by racial bias and the other acts of juror misconduct. The trial court=s arbitrary and legally unfounded demand that Appellant file a successive post conviction motion in order for Debra Thomason=s testimony to be heard resulted in fundamental error and profound prejudice to Mr. Marshall.

The trial court's ruling, which had the effect of excluding highly relevant and credible evidence of the alleged jury misconduct, utterly misconstrues the concept of "newly discovered evidence" and the rules that constrain its use. Indeed, the judge's ruling defies common sense. Rules regarding newly discovered evidence relate to a litigant's efforts to open a factual issue already decided on the basis that new, previously unknown evidence has come to light. These rules obviously have no application whatsoever regarding factual issues yet to be decided. The factual issues concerning jury

misconduct which were the subject of the remand in this case were the very reason for taking evidence in the first place. Although it is apparent that the trial judge in this case may have already decided what he believed to be true, this hardly renders unexpected evidence relevant to the ultimate, still undecided factual issues "newly discovered." Contrary to the judge's apparent belief, "newly discovered evidence" is not synonymous with "unexpected, unfavorable evidence."

The trial court=s error in construing the scope of remand was compounded by this inexplicable decision to disallow Mrs. Thomason's proffered testimony of juror misconduct. The information provided by Debra Thomason directly and independently confirmed the specific misconduct conveyed by the unidentified juror to attorney Ronald Smith. Even though produced in a timely fashion for the trial court in an affidavit submitted prior to the interview of several jurors, the trial court persisted in asking the same three perfunctory questions of these jurors. Surely the combined weight of Ronald Smith=s affidavit and that of Mrs. Thomason produced a sufficient evidentiary basis to justify inquiry regarding the underlying allegations of misconduct. This Court's remand order suggests nothing less. Yet, as if hoping not to discover such evidence, the trial court refused to expand his otherwise useless inquiry and continued to deny counsel the opportunity to ask any questions. Even if this Court were to find no error in the trial court=s restricted approach prior to his awareness of Mrs. Thomason=s proffered testimony, it was a manifest error to continue that fruitless approach thereafter.

III. THE COURT ABUSED IT=S DISCRETION IN NOT ALLOWING COUNSEL TO INFORMALLY INTERVIEW AND SUBSEQUENTLY TAKE TESTIMONY FROM JUROR COY LEE THOMASON, WHEN HIS FORMER WIFE CONFIRMED IN AN AFFIDAVIT THAT HE WAS GUILTY OF SERIOUS AND PREJUDICIAL JUROR MISCONDUCT.

On June 30, 2004, an Amended Successive Motion for Post Conviction Relief was filed in response to the state=s suggestion that the original Successive Motion was technically incomplete.(R108-119, 98-102) On that same day, the trial court held legal argument regarding how juror Coy Lee Thomason would be interviewed. (R355-360) Counsel for Mr. Marshall was adamant that counsel should be allowed to discover evidence from Coy Lee Thomason through interview or deposition outside of the courtroom A. . . in a non-threatening environment where there can be dialogue.@(R358) Counsel further objected to the proposal that Mr. Thomason be interviewed exclusively by the court in the courtroom because for A. . . most people and most civilians the courtroom is overwhelming and a scary situation and they don=t necessarily give forthright information.@(R359) Counsel further argued that she Awas in disagreement with filing the successive motion. I thought this evidence should have been part of the original motion . . . now that it=s [a successive motion] that puts it in totally different procedure.@(R357) Here counsel was understood by all to be referring to the procedures available for conducting discovery on the successive motion, which was the legal issue under discussion at that time. Counsel continued: "And I=ll just say finally that if the Court wants to do it himself in court, I object to that . . .@(R358)

On August 25th, 2004, the trial court issued an order regarding the procedures for interviewing juror Coy Lee Thomason. The order stated A. . . Pursuant to rule 1.431(h) the interview will be conducted by the Court on September 8, 2004, at 4 p.m. The Court will conduct the initial questioning of the juror and will allow subsequent questioning by counsel for the defense and state as it deems appropriate. . .@(R152-153, 154-155)

The trial court=s refusal to allow counsel to interview or depose Coy Thomason outside of the courtroom prior to his testimony was in error. This error was compounded at the hearing itself when, as argued in section II above, the trial court failed to conduct a meaningful inquiry of Mr. Thomason in light of the evidence presented in the affidavit of his ex-wife or allow counsel to conduct her own direct questioning.

In State v. Lewis, 656 So. 2d 1248, 1249-1250 (Fla. 1994), this court was asked to determine whether parties could engage in pre-hearing discovery relating to a Rule 3.850 motion for post conviction relief, including the deposition of the trial judge. This Court answered the question in the affirmative:

> AIn this vein, we find the procedures established in Davis, 624 So. 2d at 284 persuasive and adopt the following paragraph as our own: In most cases any grounds for post-conviction relief will appear on the face of the record. On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party's] burden to show that the discretion has been abused. The trial judge, in deciding whether to allow this limited form of discovery, shall consider the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other

relevant facts. *See* People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 121 Ill. Dec. 937, 941, 526 N.E. 2d 131, 135 (1988).

In Defrancisco v. State, 830 So. 2d 131, 133-134 (2nd DCA 2002), the court distinguished between requests of an attorney to interview a juror versus seeking a formal court inquiry. A party seeking to have the trial court question a juror must present "sworn factual allegations that, if true, would require a trial court to order a new trial." Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 100 (Fla.1991); *see also* Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000) (stating the party must make a prima facie showing of juror misconduct to be entitled to a juror interview). On the other hand, the burden on a party who merely wishes to have his attorney speak to jurors is less demanding. Rule Regulating the Florida Bar 4-3.5(d)(4) states that, after a trial has ended, a lawyer may not communicate with jurors except to determine whether the verdict is subject to a legal challenge. If the lawyer has "reasonable grounds to believe" such a challenge exists, the lawyer "must file in the cause a notice of intention to interview," setting forth the names of the jurors to be interviewed. Id. In Roland v. State, 584 So. 2d 68 (Fla. 1st DCA 1991), the court noted that the criminal rules of procedure, unlike the civil rules, do not specifically require the filing of a motion when an attorney wishes to communicate with a juror after the verdict. *Cf.* Fla. R. Civ. P. 1.431(h). The Roland court suggested that an attorney for a criminal defendant may file a notice of intention to interview jurors with the Court and the opposing party pursuant to rule 4-3.5(d)(4), rather

than a motion. [FN1] Indeed, the Arbelaez court implied this is the correct avenue for a criminal defense attorney to follow if he or she has "reason to believe" the verdict could be legally challenged based on juror misconduct. Arbelaez, 775 So. 2d at 920 n. 10.

In the circumstances presented here, the trial court abused its discretion in not allowing defense counsel to speak to juror Coy Thomason outside of court regarding the Appellant's successive post conviction motion. Once the trial court required the Appellant to file this distinct motion for relief, Appellant was entitled under the authority of the above cases to conduct discovery including an interview of this key witness. More importantly, in light of the apparently inconvenient corroborating evidence offered by Thomason's wife of juror misconduct, the trial court also abused its discretion by severely limiting the questions asked of Coy Thomason and by refusing to allow any direct, meaningful questioning by counsel at the evidentiary hearing. By any measure, the inquiry conducted by the trial court of Coy Thomason was wholly inadequate given the combined weight of the independent affidavits of Ronald Smith and Debra Thomason.

CONCLUSION AND RELIEF SOUGHT

The very process by which the trial court questioned the jurors, including juror Thomason, was conducted in a manner highly unlikely to arrive at the truth regarding the fundamental issue of whether Matthew Marshall received a fair trial by an impartial jury. Indeed, the entire procedure was designed and had the undisputable effect of chilling the jurors and suppressing the truth. Surely a man sentenced to death deserves a more

sincere effort to arrive at the truth regarding facts that create serious doubt about the fundamental fairness of his trial. Based on the foregoing Mr. Marshall requests that he be granted a new trial or a new evidentiary hearing to be conducted by an impartial Judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on September __, 2006 to: Office of the State Attorney, Nineteenth Judicial Circuit, 411 South 2nd Street, Ft. Pierce, Florida 34950 and ?, Attorney General's Office, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401-3428.

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Counsel certifies that this brief is typed in Times New Roman 14-point font.