IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2379

MATTHEW MARSHALL,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA, (Criminal Division)
****

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
1515 North Flagler Drive, 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
Counsel for Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ……………………………………………………….ii

TABLE OF AUTHORITY…………………………………………………...iii

PRELIMINARY STATEMENT……………………………………………. 1

STATEMENT OF THE CASE AND FACTS……………………………… 1

SUMMARY OF THE ARGUMENT ………………………………………..13

ARGUMENT ………………………………………………………………13

I. THE TRIAL COURT DID NOT ERR IN ITS QUESTIONING OF THE FORMER JURORS GIVEN THE FLORIDA SUPREME COURT'S REMAND ORDER. (Restated) ……..................................13

II. THE TRIAL COURT DID NOT ERR IN RESTRICTING THE EVIDENTIARY HEARING TO TESTIMONY BY FORMER JURORS AND TO THE ISSUES LISTED IN THE REMAND ORDER OF THE FLORIDA SUPREME COURT. (restated) …………………………...33

III. THE MANNER THE TRIAL COURT CHOSE TO INTERVIEW COY LEE THOMASON WAS APPROPRIATE AND NOT AN ABUSE OF DISCRETION. (restated) 35

CONCLUSION ……………………………………………………………41

CERTIFICATE OF SERVICE & FONT ……………………………………..42

TABLE OF AUTHORITIES

CASES

Arbelaez v. State,
775 So. 2d 909 (Fla.2000) 38

Armstrong v. State,
579 So. 2d 734 (Fla. 1991) 18

Bernal v. Lipp,
562 So. 2d 848 (Fla. 1990) 16, 38

Brown v. State,
124 So. 2d 481 (Fla. 1960) 20

Canakaris v. Canakaris,
382 So. 2d 1197 (Fla.1980) 23, 39

Castor v. State,
365 So. 2d 701 (Fla. 1978) 19

F.B. v. State,
852 So. 2d 226 (Fla. 2003) 21

Ford v. Ford,
700 So. 2d 191 (Fla. 4th DCA 1997) 23, 39

Freeman v. State,
563 So. 2d 73 (Fla.1990) 7

Hopkins v. State,
632 So. 2d 1372 (Fla. 1994) 20

Huff v. State,
569 So. 2d 1247 (Fla.1990) 23, 39

J.B. v. State,
705 So. 2d 1376 (Fla. 1998) 19, 20

Jones v. Miller,
719 So. 2d 997 (Fla. 5th DCA 1998)... 18

Kelley v. State,
569 So. 2d 754 (Fla. 1990) 38

Lightbourne v. State,
644 So. 2d 54 (Fla. 1994) 29, 33

Lusk v. State,
446 So. 2d 1038 (Fla.1984) 7

Marshall v. Florida,
508 U.S. 915 (1993).. 8

Marshall v. State,
604 So. 2d 799 (Fla. 1992) 6

Marshall v. State,
854 So. 2d 1235 (Fla. 2003) 9, 10, 13, 17, 41

Minnis v. Jackson,
330 So. 2d 847 (Fla. 3d DCA 1976).. 38

National Indem. Co. v. Andrews,
354 So.2d 454 (Fla. 2d DCA 1978), certiorari denied 359 So.2d 1210 ….21, 23, 39

Preast V. Amica MutualINorths Co.,
483 So. 2d 83 (Fla. 2d DCA), review denied, 492 So.2d 1334 (Fla.1986). 23, 38, 39

Robinson v. State,
707 So. 2d 688 (Fla. 1998) 32, 33

Roland v. State,
584 So. 2d 68 (Fla. 1st DCA 1991).. 38

Schofield v. Carnival Cruise Lines, Inc.,
461 So. 2d 152 (Fla. 3d DCA 1984)...23, 39

Shere v. State,
579 So. 2d 86 (Fla. 1991) 38

Smith v. State,
521 So. 2d 106 (Fla. 1988) 20

State v. Johnson,
616 So. 2d 1 (Fla. 1993)... 20

State v. Lewis,
656 So. 2d 1248 (Fla. 1994) 23

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 19

Trease v. State,
768 So. 2d 1050 (Fla. 2000) 23, 39

United States v. Posner,
644 F. Supp. 885 (S.D.Fla.1986), aff'd, 828 F.2d 773 (11th Cir.1987), cert. denied, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988) 38

Weber v. State,
602 So. 2d 1316 (Fla. 5th DCA 1992).. 18

MISCELLANEOUS

Fla. Crim.Stat. sec. 90.804(2) 31, 32

Rule of Civ. Proc. sec. 1.431(h)..16, 23, 37

PRELIMINARY STATEMENT

Appellant, Matthew Marshall, was the defendant at trial and will be referred to as the "Defendant" or "Marshall". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to records and briefs will be as follows:

1. Record on Appeal following remand for evidentiary hearings regarding alleged jury misconduct- "R";
2. Postconviction record - "PC-R";
3. Appellant's brief - "Br."

Supplemental records will be designated by the symbol "S" preceding the record type. Where appropriate, the volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

In December 1989, a Martin County jury convicted the Defendant, Matthew Marshall, of first-degree murder of a fellow inmate, Jeffrey Henry. The jury recommended a sentence of life in prison. The trial court overrode the jury's recommendation and imposed the death penalty. On direct appeal, Marshall raised

22 issues, all of which were rejected or found to be harmless error.[1] The Florida Supreme Court made the following findings in affirming both the jury's verdict and this Court's sentence of death:

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[1] The issues raised on direct appeal were:(1) that the trial court erred by permitting an inmate to testify identified only by number, not by name; (2) that he was prevented from cross-examining this witness, identified as Number 29, regarding bias; (3) that the trial court erred in instructing the jury on manslaughter; (4) that the trial court erred in instructing the jury that self-defense was not available to felony-murder and third-degree murder where the underlying felonies were burglary and aggravated battery, respectively; (5) that the trial court erred in denying Marshall an instruction on aggravated assault in connection with the self-defense instruction; (6) that the trial court erred in not declaring a mistrial after the prosecution conceded that it had failed to link evidence of the alleged motive; (7) that the trial court abused its discretion in admitting a photograph taken of the victim's head during the autopsy; (8) that the trial court erred in admitting evidence of gambling slips found in Marshall's cell six months after the murder and evidence that Marshall's nickname in prison was "Uzi"; (9) that the trial court erred in refusing to poll prospective jurors to determine whether they had read an article about the murder appearing in the Palm Beach Post; (10) that the trial court erred in denying his motion for judgment of acquittal; (11) that the prosecutor improperly vouched for the credibility of state witnesses during his opening statement; (12) that Marshall was prevented from eliciting from a prison official that inmates were allowed to visit each other's cells; (13) that the trial court abused its discretion in denying Marshall's pretrial motion for appointment of private counsel; (14) that the trial court erred in failing to bring in additional jurors for the venire when the only potential black juror was struck for cause; (15) that the trial court erred in striking for cause a juror who was opposed to the death penalty; (16) that the trial court erred in admitting hearsay evidence; (17) that the trial court should have granted Marshall's motion for particulars; (18) that the death penalty statute and the aggravating circumstances are unconstitutional; (19) that the trial court abused its discretion in refusing to admit evidence of prior violent acts of the victim; (20) that the trial court erred in finding HAC; (21) that the override sentence was improper; and (22) that the death sentence was disproportionate.

Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. The judge found in mitigation that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The judge specifically rejected as mitigation that the defendant's older brother

> influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. The judge concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were "so clear and convincing that no reasonable person could differ.

Marshall v. State, 604 So.2d 799, 802 (Fla. 1992). Specifically, regarding the jury override, the Court stated:

> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnaping, sexual battery, and seven armed robberies.
>
> Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does

> not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." See Tedder, 322 So.2d at 910.
>
> Finally, we do not find the death sentence disproportionate in this case. The facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. See, e.g., Freeman v. State, 563 So.2d 73 (Fla.1990); Lusk v. State, 446 So.2d 1038 (Fla.1984).
>
> Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence.

Id. at 802.

Marshall then filed a Petition for Writ of Certiorari in the U.S. Supreme Court, which was denied on May 17, 1993. Marshall v. Florida, 508 U.S. 915 (1993). Marshall filed his initial 3.850 motion in August, 1994. On January 29, 1999, Marshall's final amended 3.850 motion was filed, raising twenty-seven claims.[2] The trial court granted an evidentiary hearing on claims (3), (11), (17),

[2] These claims included: (1) public records were being withheld in violation of chapter 119, Florida Statutes; (2) the trial transcript was unreliable and incomplete; (3) ineffective assistance of counsel during the penalty phase; (4) Marshall was allowed to waive his right to present penalty phase evidence without an adequate record inquiry to determine whether the waiver was voluntary and intelligent; (5) the Florida Bar rules' prohibition against interviewing jurors is unconstitutional; (6) the trial court erred in permitting a state prison inmate to testify before the jury as an anonymous state witness; (7) the prosecutor prejudicially vouched for the credibility of state witnesses; (8) Marshall's death sentence rested upon an unconstitutional automatic aggravating circumstance; (9) Marshall was deprived of his right to a fair and impartial trial by jury; (10) the trial court improperly considered nonstatutory aggravation; (11) the State withheld exculpatory evidence or presented misleading evidence or both; (12) the trial court and Florida Supreme Court improperly failed to evaluate mitigating circumstances; (13) ineffective assistance of counsel during the penalty phase; (14) the jury instructions improperly shifted the burden to Marshall to prove that a life sentence was appropriate; (15) the jury override resulted in an arbitrary, capricious, and unreliable death sentence; (16) trial counsel was rendered ineffective during voir dire by the trial court's action when it refused to permit more people to participate in the venire; (17) trial counsel failed to obtain a competent mental health expert; (18) Marshall is innocent of first-degree murder; (19) Marshall's sentence was based upon unconstitutionally obtained prior convictions; (20) Florida's capital sentencing scheme is unconstitutional; (21) the trial court's failure to grant a change of venue deprived Marshall of a fair trial; (22) Marshall was improperly shackled during his trial and penalty phase; (23) Marshall's trial was fraught with procedural and substantive errors which cannot be harmless; (24) charging

and (23) of Marshall's amended motion, and summarily denied the remaining claims. An evidentiary hearing was held on August 23-26, 1999, after which the trial court denied all relief.

Marshall appealed the denial of his post-conviction motion to the Florida Supreme Court. On June 12, 2003, the Court affirmed on all but one issue. The Court remanded the summary denial of Marshall's jury misconduct claim for a limited evidentiary hearing. Marshall v. State, 854 So.2d 1235, 1253 (Fla. 2003). The alleged juror misconduct was:

> (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." that the jurors made racial remarks/jokes about Marshall and discussed newspaper articles they had read.

Id. p. 1239. The only support Marshall provided for his claim was an affidavit from attorney Ronald Smith, who averred that an unknown person, a woman, telephoned him claiming that she had served on Marshall's jury and was disturbed by the

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Marshall with both premeditated and felony murder violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (25) Marshall is insane to be executed; (26) Marshall is being denied his right to effective postconviction counsel due to a lack of funding; and (27) newly discovered evidence establishes that execution by electrocution is cruel or unusual punishment.

alleged actions described above. The Florida Supreme Court's opinion specifically outlined the scope of the evidentiary hearing on remand ordering the trial court: (1) to attempt to identity the woman juror who spoke to Mr. Smith; (2) to interview that juror; and (3) to conduct further interviews only if it determines that there is a reasonable probability of juror misconduct. Id. p. 1253.

In the course of subpoenaing the jurors, the State and Marshall discovered that two of the twelve original jurors had died, one man and one woman.[3] The trial court determined that all remaining ten jurors should be ordered to court to be questioned regarding Smith's affidavit. Since some of the jurors either were not served or were out of state, the evidentiary hearing had to be broken into different days. The court held the first part on March 24, 2004, at which six (6) of the twelve jurors appeared. Jurors Eleanor Louise Broderick, Nancy Cooke Deacon, Cleveland Wayne Glover, Richard John Larson, Anthony Frank Asterino, and Elwin Weemes Jensen all testified that they were not the juror who telephoned attorney Ronald Smith and did not know of any juror who had telephoned Mr. Smith. (R. 272-287)The remaining four jurors could not be served with the court's subpoenas either because they resided out-of-state or had moved within the state.

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[3] The State notes that the deceased female juror, Judy Cunningham, provided an affidavit at the time of the original 3.850. Ms. Cunningham's

The trial court continued the evidentiary hearing to May 19, 2004 to enable the defense investigator to serve the remaining four (4) jurors.

At the May 19, 2004 evidentiary hearing three of the remaining four jurors appeared. Jurors Sandra Luttman, Pamela Bachmann, and Sandra Hallenback all testified that they were not the juror who telephoned attorney Ronald Smith and did not know of any juror who had telephoned him. (R. 316-327) The remaining juror, Mr. Coy Thomason, was scheduled to appear at a continued evidentiary hearing in September, 2004.

In the meantime, prior to the May 19, 2004 hearing, Marshall filed an emergency motion seeking to add a non-juror as a witness at the hearing. Marshall alleged that the defense investigator, while attempting to locate juror Coy Thomason, found his ex-wife, Debra Thomason, at his last known address. The motion stated that during a "brief" conversation regarding why the investigator was looking for Mr. Thomason, Debra Thomason told the investigator that she witnessed Mr. Thomason reading newspaper articles and talking about the case during the time he was a juror. (R. 62-75)

The affidavit from Debra Thomason, attached to Marshall's motion, stated that she was married to Coy Thomason from February 1979-February 1999. They

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affidavit, made after Mr. Smith's, does not support his claims.

were divorced in July 2000. According to the affidavit, Mr. Thomason spoke to her and others (in her presence) about the trial from “day one.” Debra Thomason claimed that Mr. Thomason discussed the case with employees of their printing business “within earshot of any customers there at [their] shop.” He spoke about “graphic details of the crime, court proceedings, deliberations, testimony, etc.” The affidavit further stated that Mr. Thomason “followed the case in the newspapers, reading everything and cutting the articles out, placing them in his briefcase.” She claimed that Mr. Thomason was still carrying the newspaper clippings in his briefcase when they separated in 1999. Finally, the affidavit stated that Coy Thomason made it clear to Ms. Thomason and others, from the “day the trial commenced” that Marshall was guilty. Ms. Thomason believed that Marshall’s status as an inmate at the time of the crime prejudiced her ex-husband’s judgment. (R. 65-75)

The State argued at the May 19, 2004 hearing that the emergency motion to add Debra Thomason as a witness should be denied for several reasons. First, because the Florida Supreme Court’s opinion expressly limited the scope of the evidentiary hearing on remand to attempting to identity the female juror who spoke to Mr. Smith, to interview that juror and then to conduct further interviews only if the Court determined that there was a reasonable probability of juror misconduct.

Marshall, 854 So.2d at 1253. Since Debra Thomason was not a juror, the State argued, she was not a proper witness at the evidentiary hearing. She could not be the female juror who allegedly contacted attorney Ron Smith. Second, she could not provide the trial court with information pertinent to the May 19, 2004 evidentiary hearing because she was not claiming to know the identity of the female juror who allegedly contacted Ron Smith. The affidavit did not claim that her ex-husband knew who that person was and, even if it did, it would be impermissible hearsay. Finally, the affidavit did not claim that the jurors made racial jokes/comments or discussed the newspaper articles. While it alleged that Coy Thomason read the articles, it did not allege that he discussed them with the other jurors. Again, even if it did, it would be impermissible hearsay.

The State argued that the allegations of misconduct in the affidavit went to alleged independent misconduct by juror Coy Thomason, which was not the subject of the remand and which would have to be raised in a separate proceeding. The trial court agreed, denying the emergency motion to add Debra Thomason as a witness. (R. 327-337) Thereafter, on June 30, 2004 Marshall filed a successive 3.851 alleging "newly discovered evidence" of juror misconduct on the part of juror Coy Lee Thomason and a corresponding Motion to Interview Juror Coy Lee Thomason as a discovery tool for the successive 3.851. At a June 30, 2004

hearing, the trial court granted Marshall's motion to interview juror Coy Lee Thomason, noting that it would conduct the initial interview in accordance with the procedures it had already used with the other jurors. The trial court specifically allowed counsel an opportunity to ask follow-up questions based upon the "new evidence" in Debra Thomason's affidavit. (R. 347-362)

Due to various scheduling difficulties, juror Thomason only appeared in court on June 10, 2005 at which time the court conducted the questioning in two parts. Initially, the court asked him the same three questions it had previously asked the other nine surviving jurors. It then asked the two questions based upon Debra Thomason's affidavit proposed by the State. The court then broke to discuss the additional questions submitted by defense counsel Donoho. It then recalled Thomason and asked him several questions relating to the allegations contained in Debra Thomason's affidavit. Mr. Thomason denied calling Smith or knowing who did, denied reading or carrying news articles about the trial, denied discussing the trial with Debra Thomason or his employees, and denied knowing in advance why he was testifying at that hearing. (R. 389-419)

On September 28, 2005 the trial court entered an order denying relief, finding no evidence of juror misconduct. The court made the following findings based upon the evidence adduced at the evidentiary hearings:

a. No person can be identified as a female juror who served on Mr. Marshall's trial jury and who called Stuart attorney Ronald Smith charging juror misconduct.
b. Because no caller can be identified, no further juror interviews are necessary.
c. No proof exists that juror Coy Lee Thomason violated the instructions by the Court and engaged in juror misconduct.
d. No reasonable probability exists that nay of the acts charged of juror misconduct occurred.

(R. 215-217) This appeal follows.

SUMMARY OF ARGUMENTS

The trial court did not abuse its discretion by questioning the jurors itself regarding the misconduct investigation mandated by the Florida Supreme Cour, nor in the scope of the questions it asked. Furthermore, the court did not abuse its discretion by not allowing testimony of a non-juror who had no direct knowledge about the subjects which were the focus of the remand.

ARGUMENT

CLAIM I

THE TRIAL COURT DID NOT ERR IN ITS QUESTIONING OF THE FORMER JURORS GIVEN THE FLORIDA SUPREME COURT'S REMAND ORDER. (Restated).

Marshall claims that the trial court erred in limiting its questioning of the former jurors from Marshall's second penalty phase trial to three questions. He

asserts that, based upon the affidavits of Ron Smith and Debra Thomason, the trial court had adequate grounds to open up the questioning of the jurors regarding possible misconduct. Describing the trial judge as "hostile" Marshall alleges that he asked overly "narrow", "perfunctory", and "meaningless" questions "not meant, nor perhaps designed, to realistically elicit meaningful information regarding jury misconduct" (R. 16) and which led to the "inevitable" result that none was found. "In essence, the trial court chose to not ask even a single questions directly relevant to the underlying allegations of jury misconduct. These claims are without merit, were waived, and are procedurally barred as well. The trial court's decision should be affirmed.

The court has discretion to decide the manner and method of any juror interviews it permits. Rule of Civil Procedure 1.431(h) governs the interview of a juror after a verdict. That rule states: "After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview." The standard of review for the trial court's decision on how to conduct a hearing and the evidentiary decisions for the questions asked during that hearing is abuse of discretion. See Bernal v. Lipp,562 So.2d 848 (Fla. 1990). The procedure and the questions the trial court used were both proper given the scope

of the remand order, the evidence before the court, and the requests of the parties during the proceedings. The lower court did not abuse its discretion in conducting the juror questioning itself nor in the scope of its questions.

Marshall first argues that the trial court should have expanded the scope of its inquiry once the death of a female juror was discovered. However, the Florida Supreme Court specifically limited the inquiry to ascertaining the identity of the juror and only then determining if there was a reasonable probability of juror misconduct. This Court specifically stated that the trial court may wish to conduct the questioning in order to avoid questions which inhere in the verdict.

> The 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.

Marshall v. State, (citations omitted). That is exactly what the trial court did and, thereby, did not abuse its discretion.

Marshall asserts that the trial court, on its own, construed the remand order in the "most literal" terms almost deliberately setting the stage so the defense could find no meaningful information out. However, defense counsel interviewed the

jurors, without permission, before the first 3.851 motion and uncovered no evidence of jury misconduct related to racial statements or reading of newspaper articles during the trial and/or deliberations. Furthermore, Melissa Donoho, Marshall's counsel, not only did not object to either the court asking the questions or to the questions themselves, but she affirmatively agreed to both. Donoho was present throughout these proceedings and fully participated in the formation of these questions. Marshall did not preserve these issues for appeal by objecting to the procedures or the questions the court used for the juror inquiry. Marshall waived this issue by his agreement with the scope of the court's questions and is now barred from claiming error on appeal.

When a party either concurs with a court's actions or fails to alert the court to problems with its decision or course of action through an objection, that party waives the claim of error on appeal. Armstrong v. State, 579 So.2d 734 (Fla. 1991)(Defense waived future error claim by specifically requesting court to give jury instruction which constituted fundamental error); Jones v. Miller, 719 So. 2d 997, 998-9 (Fla. 5th DCA 1998)(Party waives issue by failing to correct judge's erroneous oversight of prior summary judgement ruling); Weber v. State, 602 So.2d 1316 (Fla. 5th DCA 1992)(same - "defense counsel cannot be allowed to change legal positions in midstream ....[p]rinciples of estoppel, waiver, and invited

error forestall the possible success of such a ruse.") Although the State contends that the scope of the questions the trial court asked the jurors was proper given this Court's remand for a very limited evidentiary hearing and not error, the legal analysis of the defense's actions is comparable to that of invited error. Clearly, Donoho concurred in the court's inclination to limit the scope of the questions; in fact, she specifically wanted to limit the scope even more. Given her statements and stance at the evidentiary hearings, Marshall has waived the issue on appeal even if there was error.

To preserve an issue for appeal, a party must make a specific and contemporaneous objection made in the proceeding at issue, at the time the action occurred. J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998). "Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). This Court has explained that:

> [t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). This requirement gives the trial

judge the opportunity to address and possibly to redress a claimed error and also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage. See J.B., 705 So. 2d at 1378.

The sole exception to the contemporaneous objection rule applies where the error is fundamental. Id. "[I]n order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So. 2d 481, 484 (Fla. 1960) (holding that the alleged error "did not permeate or saturate the trial with such basic invalidity as to lead to a reversal regardless of a timely objection"). Consequently, an error is said to be fundamental "when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." J.B., 705 So. 2d at 1378; see also State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) (stating that "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"). "The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v. State, 521 So. 2d 106, 108 (Fla. 1988); see also Hopkins v.

State, 632 So. 2d 1372, 1374 (Fla. 1994) (noting that "this Court has cautioned that the fundamental error doctrine should be used 'very guardedly'"); F.B. v. State, 852 So.2d 226 (Fla. 2003).

In the November 24, 2003 status conference the court and counsel discussed the scope of the proposed hearing based upon the remand order. The trial court, with the agreement of the State, decided to interview all the jurors, male and female alike, to ensure a complete investigation into the issue and expedite the process. The court also chose to order the subpoenas itself so as to protect counsel from ethics problems regarding the defense contacting the jurors. Clearly the court was not trying to unduly limit the inquiry. Donoho agreed to the procedures set out by the court including having the judge question the jurors. (R 231-251).

Six of the original twelve jurors appeared before the court on March 24, 2004. The State, the trial court, and Donoho discussed both the procedure the court would employ as well as the wording of the individual questions which would be asked the jurors. Donoho agreed that the court should do the questioning. (R. 262-263) During the discussion, the trial court suggested asking questions detailing the essence of the Smith affidavit but Donoho objected saying "I personally wouldn't want you asking something that detailed right away. It think it - it might scare them thinking that they have done something wrong and be afraid to tell the court." She

also cited the remand order by this Court as a reason to ask a less specific question. The trial court disagreed and decided to put the allegations into the question "in order to focus on why we're asking 'Do you know attorney Ron Smith..'", thus presenting the jurors with the factual essence of alleged misconduct. (R. 266-7) The only party who objected to presenting the substance of the alleged misconduct before the jury was the defense. Marshall, through his counsel Donoho, proposed no additional questions for the court to ask these six jurors and offered no areas to follow-up on when the court inquired if the two sides wished to keep the jurors for further questioning. She did ask that the jurors be questioned individually, which to court agreed to do. (R. 286-7)

On May 19, 2004, three additional jurors testified at a hearing where the court asked the same series of questions using the same procedure. The only objection Donoho made was to the court using the phrase "against court order" in its question because it sounded "too harsh." Despite inquiry by the court, Donoho made no other objection and proposed no additional questions to put to the jurors. (R. 311-14) Marshall, through his counsel, specifically condoned both the manner of the juror interviews were conducted and the wording and scope of the questions asked for the first nine of the ten jurors still available. Marshall is now procedurally barred from raising these issues on appeal.

Even if this Court finds no procedural bar and no assent by Marshall to the questioning of the jurors, the manner of holding and questioning the jurors in such a hearing is within the trial court's discretion. Rule of Civ. Proc. sec. 1.431(h). An appellate court will not interfere with that decision absent an abuse of discretion. State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994); Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152, 155 (Fla. 3d DCA 1984), petition for review denied, 472 So.2d 1182 (Fla.1985). Additionally, the court may properly decide to conduct the questioning of the jurors itself. See, Preast V. Amica Mut.Ins. Co., 483 So.2d 83 (Fla. 2d DCA), review denied, 492 So.2d 1334 (Fla.1986). This rule allowing interview of jurors does not authorize broad hunting expeditions or fishing excursions. National Indem. Co. v. Andrews, 354 So.2d 454 (Fla. 2nd DCA 1978), certiorari denied 359 So.2d 1210. Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

Marshall also contends that the trial court's questions prevented the jurors from either knowing what the court was looking for or relating relevant facts or information. "*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." (Br. 17) However, the record clearly shows that there was no such constraint on the jurors' willingness or ability to provide the court with pertinent information. More than one juror took the opportunity afforded by the trial court's questioning to volunteer information or to ask questions of the court. Juror Larsen volunteered that the media had contacted him after the trial and gave details of that contact. (R. 281) Juror Bachmann, far from being intimidated or wanting to hide information as suggested, brought up being approached after the trial (by the defense) and questioned about her deliberations thereby showing that the jurors were aware that the court was investigating possible misconduct and they were willing to volunteer information not specifically asked for in order to assist the court. (R. 320-1)

Furthermore, none of the jurors questioned had any information relevant to the alleged misconduct regarding exposure to or discussion or media coverage or to racial jokes or discussions made during deliberations, which were the specific allegations contained in the Smith affidavit. Each and every one of the ten surviving jurors denied knowing about any such misconduct - and they were asked because of the court's insistence on asking such detailed questions. Juror Luttman specifically said the following in response to the court's questioning: "I did not

listen to anything or talk about the case at all and I don't know of anyone else that did. If they did, it's not to my knowledge." (R. 317) Her testimony, as that of the other jurors, directly confounds Marshall's assertions that 1) misconduct occurred regarding the allegations raised in Smith's affidavit; 2) the jurors could not respond adequately because of the "narrow" questions asked by the court alone, or 3) jurors could not understand the nature of the inquiry. Besides testimony from these jurors there is no other way *jury* misconduct could be shown. Clearly, there is no fundamental error nor an abuse of discretion.

Once Marshall had filed the successive 3.851 motion, the trial court did allow additional discovery and granted the defense the opportunity to interview Mr. Thomason based upon the "newly discovered evidence" contained in his ex-wife's affidavit. (R. 152) The court ruled that it would follow the procedures, previously agreed to by Marshall and used with the other nine jurors. In agreeing to allow a broader interview of Thomason than the other jurors, the court specifically said: "I don't want to restrict a complete examination of Mr. Thomason." (R. 359) At the commencement of the June 10, 2005 hearing, defense counsel Donoho agreed with the trial court asking the same three questions it had of the other jurors (R. 399, 402) and admitted that she had *not bothered* to prepare any questions for Thomason regarding Debra Thomason's allegations. (R. 401) After the initial

questioning by the court, which the defense did not object to, the trial judge then asked Thomason several questions proposed by the State and Donoho; it restricted the questions to topics covered by the affidavit and to subjects which did not inhere in the verdict. (R. 410-417)

None of the ten jurors testified that they contacted Smith, knew of any juror who did, or knew of any misconduct relating to making racial jokes or following media coverage of the trial. Juror Thomason denied any misconduct, reading or listening to media coverage of the case, or discussing the case with anyone outside the jury room. (R. 406)He further denied carrying clippings of articles about the trial with him or of even knowing why he was brought into court. (R. 418-420)

Marshall contends that Thomason's and Smith's affidavits, taken together, provided the court with the "reasonable basis" for a full scale inquiry into alleged juror misconduct. As argued above, the juror were well aware of what the court was asking and in fact had the opportunity to mention any misconduct while they were questioned. None of the evidence elicited during these hearings by these ten jurors gave any indication of juror misconduct. Furthermore, each of these affidavits were unreliable hearsay. Ms. Thomason's affidavit did not directly address the issues in the Supreme Court remand since she averred nothing about the jury deliberations or her husband discussing the case, news articles, or racial

topics with the other jurors. Based upon the information outlined in her statement, none of the other jurors besides Coy Thomason could have provided evidence to support or refute those allegations. Her affidavit raised questions about Mr. Thomason's personal conduct unrelated to the other jurors. Clearly, none of the jurors present at the March 24 or May19 hearings could testify about Mr. Thomason's behavior outside of the jury room.

Contrary to Marshall's assertions, Debra Thomason's affidavit does not concern the actions of the jury as a whole. Quite the opposite, the affidavit's focus is solely on her ex-husband's actions at home, during his time away from the jury. The affidavit stated that Coy Lee Thomason spoke to his ex-wife and others (in her presence) about the trial from "day one." Debra Thomason claimed that Mr. Thomason discussed the case with employees of their printing business "within earshot of any customers there at [their] shop." He spoke about "graphic details of the crime, court proceedings, deliberations, testimony, etc." The affidavit further stated that Mr. Thomason "followed the case in the newspapers, reading everything and cutting the articles out, placing them in his briefcase." She claimed that Mr. Thomason was still carrying the newspaper clippings in his briefcase when they separated in 1999. Finally, the affidavit stated that Coy Thomason made it clear to Ms. Thomason and others, from the "day the trial commenced" that Marshall was

guilty. Ms. Thomason believed that Marshall's status as an inmate at the time of the crime prejudiced her ex-husband's judgment.

Both affidavits are hearsay under section 90.801(c), Florida Statutes, because they are out-of-court statements which are being offered to prove the truth of the matter asserted, i.e. that there was juror misconduct. Debra Thomason was not available to testify at the evidentiary hearing because she died on June 5, 2004 (R. 115, 129).[4] As such, her affidavit was admissible only if it fell under a hearsay exception. Under section 90.804, hearsay evidence can be admitted, if a declarant is unavailable as a witness, only if it qualifies under one of the following four exceptions: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; or (4) statement of family or personal history. Ms. Thomason's affidavit does not qualify as former testimony and with the exception of the portion regarding the dates of her marriage and divorce from Coy Thomason, it is not a statement about family or personal history. Further, it is not a statement made under belief of impending death. Post-conviction counsel makes

[4] The court had concluded its questioning of six of the ten jurors by the time Debra Thomason's affidavit was submitted and nine of the ten by the time she died. Clearly, it could not alter any of those questions *after* the fact. The only juror left to interview was Coy Thomason and the court did allow more latitude in his questioning. Furthermore, Marshall did not attempt to preserve her testimony after the court did not allow her to testify at the May 19, 2004 hearing.

clear that she and her investigator "were completely unaware of [Ms. Thomason's] illness and [were] shocked to learn of her death." (R. 115). There is absolutely no evidence that Ms. Thomason knew her death was imminent on April 29, 2004, when she made the affidavit. Finally, the affidavit is not a statement against Debra Thomason's interest.

In Lightbourne v. State, 644 So.2d 54 (Fla. 1994), a death case, the defendant alleged, in a Brady claim, that the State withheld information that it was acting in concert with and had an agency relationship with Lightbourne's two cellmates, Theodore Chavers and Theophilus Carson, both of whom had testified against Lightbourne at trial regarding incriminating statements allegedly made by him in the county jail. Lightbourne also alleged that Chavers and Carson lied at the trial about what Lightbourne told them and that the State deliberately used this false and misleading testimony.

At an evidentiary hearing, Lightbourne attempted to introduce an affidavit made by Chavers in 1989, almost eight years after the trial, in which he stated that the investigators in the case made it clear to him that several charges against him would be dropped if he acted as an informant. He further stated that the state attorneys pressed him to lie at the trial about what Lightbourne said in the cell. He said that Carson, who was also in the cell, worked for the State as well and that

Carson lied about Lightbourne's statements in exchange for having his charges dropped. Additionally, Lightbourne tried to introduce several letters purportedly written by Chavers to the state attorney's office and two taped telephone conversations between Chavers and an assistant state attorney in 1989 and 1990, all intended to show that Chavers was working for the State and that he lied at trial.

Lightbourne also sought to admit into evidence an affidavit made by inmate Jack R. Hall, in 1989, claiming that he was in the cell with Lightbourne the whole time that Chavers was there and that Lightbourne spoke only to Hall. Hall’s affidavit stated that he heard Chavers and two other inmates discussing how they were going to get out of jail by telling the police that Lightbourne made incriminating statements about the murder. Finally, Lightbourne wanted to introduce a letter written by Carson in 1982 to prove that Carson expected certain benefits for his testimony and a letter written by Ray Taylor, a cellmate of Chavers’ during the evidentiary hearing, stating that Chavers told him he lied at Lightbourne's trial and that Lightbourne did not commit the murder.

The trial court refused to admit the affidavits, letters or other evidence, ruling it was hearsay which did not fall under any exception to the hearsay rule. On appeal, the Florida Supreme Court affirmed the exclusion of the evidence, noting that Chavers, Hall, and Carson were all unavailable witnesses at the time of

the evidentiary hearing.[5] Hall had died, Carson could not be located despite a diligent search and Chavers was initially found incompetent to testify, later professed a lack of memory and refused to answer questions and finally was found in contempt of court and declared unavailable as a witness. Relying upon section 90.804, the court noted that the evidence did not qualify as former testimony, statements under belief of impending death, or statements of family or personal history. The only possible exception, the court noted, was a statement against interest which is defined as:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

§ 90.804(2)(c), Fla.Stat. (1991). The Court found that Hall's affidavit clearly was not contrary to his pecuniary or proprietary interest, nor did the evidence expose

[5] The Court doubted that Taylor was unavailable as a witness. Taylor was transferred from the county jail to a prison facility in another locality before he was called to testify at the evidentiary hearing because defense counsel failed to inform jail personnel of their intent to call him as a witness. In any event, the court found that Taylor's letter did not fall within any of the exceptions for hearsay, regardless

him to criminal liability. Carson's letter also was not a statement against his pecuniary, proprietary, or penal interest because his letter did not contradict anything he said at trial. Finally, the Court noted that "[a]lthough Chavers state[d] in his affidavit and in one of the letters that he lied at trial, it cannot be said that a reasonable person would believe they were subject to a perjury penalty eight years after providing testimony at a trial." Id at 57. The statute of limitations had run so that Chavers could no longer be prosecuted for perjury. Moreover, the Court found that the hearsay evidence relating to Chavers lacked the necessary indicia of reliability. Specifically, the Court noted that the statements were made several years after the trial, that Chavers had feigned a memory loss at the evidentiary hearing and would not answer questions pertaining to his statements, thereby severely undermining their credibility. Further, some of the statements made in the letters were contradictory and indicate that he told the truth at trial. As such, the Supreme Court concluded that the trial court correctly refused to admit the hearsay statements into evidence.

Similarly, in Robinson v. State, 707 So.2d 688 (Fla. 1998), the Florida Supreme Court affirmed a trial court's refusal to allow an affidavit from a recanting co-defendant into evidence at an evidentiary hearing. The Court noted

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of his availability.

that the co-defendant's new version of events had never been subjected to adversarial testing because he refused to expose himself to cross-examination. Thus, the absence of direct testimony by the alleged recanting witness was fatal to the claim. In the end, the Court concluded, the co-defendant's unauthenticated, untested affidavit was nothing more than hearsay, i.e., an out-of-court statement offered to prove the truth of the matter asserted, which was inadmissible because it did not fall within any hearsay exception. Citing Lightbourne, the Court concluded that the affidavit did not fall under any of the exceptions outlined in section 90.804(2)(c). It did not expose the co-defendant to criminal liability (expired statute of limitations) and lacked the requisite indicia of reliability for admission under section 90.804(2)(c).

Similarly, here, neither affidavit falls under any of the hearsay exceptions in 90.804(2)(c). Smith's affidavit is obvious hearsay since it is merely a restatement of an unidentified third party's telephone conversation. As discussed above, Debra Thomason's affidavit meets none of the exceptions and there is no evidence that it was made under belief of impending death. There is absolutely no evidence that Ms. Thomason knew her death was imminent on April 29, 2004, when she made the affidavit. Although sworn, the affidavit does not state that it was made under penalty of perjury. Consequently, as in Lightbourne and Robinson, the affidavits in

this case would be inadmissible at any evidentiary hearing. Moreover, as in those cases, the affidavits do not have the requisite indicia of reliability and cannot form the foundation upon which to launch into a full scale interrogation of the jury's deliberative process as Marshall seems to want. Furthermore, Debra Thomason's affidavit alleged nothing more than her ex-husband's individual misconduct which, although improper, would not warrant a new trial. It does not allege jury misconduct and does not establish the requisite prejudice. Marshall has not presented any independent evidence corroborating either Smith's or Debra Thomason's affidavits. The trial court did not abuse its discretion in its interview of any of the ten surviving jurors. As outlined above, the trial court established a procedure by which to question the ten surviving jurors. It developed this procedure with the input and agreement of both the State and Marshall to comport with the requirements specified in the remand order from the Florida Supreme Court which suggested the court conduct the questioning limited to three areas. Both parties requested and agreed to having the trial court do the actual questioning and each agreed to the scope of the questions.[6] The form of the questions was proper given

[6] Donoho objected only to the factual details the trial court put into its questions, wishing a more general, less specific question. If the trial court had followed her request, the evidence elicited at the hearings may have been far less detailed than it is now.

the remand order by this Court and was not an abuse of discretion.

CLAIM II

THE TRIAL COURT DID NOT ERR IN RESTRICTING THE EVIDENTIARY HEARING TO TESTIMONY BY FORMER JURORS AND TO THE ISSUES LISTED IN THE REMAND ORDER OF THE FLORIDA SUPREME COURT. (restated)

Marshall contends that the trial court should have opened up the evidentiary hearing beyond the remand order of the Florida Supreme Court and allowed Debra Thomason to testify. Essentially, he argues that by requiring him to file a successive 3.851 motion, the trial court denied him the ability to present Debra Thomason's testimony since she died before the hearing on the successive motion could be held, resulting in "profound prejudice." He argues that her testimony was pertinent to the inquiry ordered by the Florida Supreme Court because it touched up similar areas of misconduct regarding the media and racial jokes.

The remand order from the Florida Supreme Court was unequivocal. It focused solely on discovering ***if*** a juror had called Smith, ***who*** that juror was. This Court, unlike Marshall, did not assume the allegations in Smith's affidavit were factually correct or even reliable. Also, Debra Thomason's affidavit did not involve jury misconduct (by the panel) but potentially only misconduct of one juror,

committed away from all the other jurors. As such, it clearly did not relate to the issues before the court in the limited evidentiary hearing required by this Court.

The trial court properly determined that the allegations contained in this second affidavit presented different issues regarding juror misconduct and thus were beyond the scope of the remand order. Nowhere in her affidavit are there any allegations that Coy Thomason spoke with *other jurors* about the media reports, brought the articles into the jury room, or discussed any racial matters regarding the trial with any of the other jurors. Additionally, by the time Donoho asked the court to allow Debra Thomason to testify all nine of the surviving ten jurors had already testified and none had asserted that any misconduct had occurred. (R. 327-337) It is obvious that her charges of misconduct were solely restricted to her ex husband Coy Thomason. The trial court viewed Debra Thomason's statements as "newly discovered evidence" and granted an evidentiary hearing to interview Coy Thomason based upon this new set of allegations. Obviously the court could not predict that Debra Thomason would die before the hearing on the successive motion. The court's actions, like that of a trial counsel's, cannot be judged from the vantage point of hindsight. The trial court's denial of Marshall's motion to have Debra Thomason testify at the hearing ordered by this Court, based upon Smith's affidavit, was proper and not an abuse of discretion.

CLAIM III

THE MANNER THE TRIAL COURT CHOSE TO INTERVIEW COY LEE THOMASON WAS APPROPRIATE AND NOT AN ABUSE OF DISCRETION. (restated)

In his final point, Marshall contends that the trial court erred by questioning juror Thomason itself, as it had done with all the previous nine jurors. Marshall argues that the trial court improperly limited his discovery in the successive 3.851 motion by not allowing his counsel to question Thomason "informally" outside the courtroom. He maintains that the court, and defense counsel, were not bound by the procedure set out in Rule of Civ. Proc. 1.431(h). Marshall asserts that he was not able to uncover evidence of misconduct by Thomason because he was constrained by both the court conducting the interview and by the questions the court chose to ask. This claim is without merit.

Rule of Civil Procedure 1.431(h) governs the interview of a juror after a verdict. That rule states: "After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview." Marshall misinterprets the law regulating the post-trial interviewing of trial jurors. Rule 1.431(h) makes no such distinction between the interview done by the court or

done by the attorneys, since it clearly applies to both. See Bernal v. Lipp, 562 So.2d 848 (Fla. 3rd DCA 1990); Minnis v. Jackson, 330 So.2d 847, 848(Fla. 3d DCA 1976)(saying rule 1.431 allows the court to permit counsel to ask questions); Preast v. Amica Mut. Ins. Co., 483 So.2d 83 (Fla. 2d DCA), review denied, 492 So.2d 1334 (Fla.1986)(saying the rules allows the court to ask the questions); United States v. Posner, 644 F.Supp. 885, 885-88 (S.D.Fla.1986), aff'd, 828 F.2d 773 (11th Cir.1987), cert. denied, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988). The court in Arbelaez v. State, 775 So.2d 909 (Fla.2000) affirmed the trial court's denial of *any* juror interviews as both procedurally barred and lacking the prima facie showing; the opinion merely cited to the Bar rule controlling the ethical conduct of attorneys. Marshall also cites Roland v. State, 584 So.2d 68 (Fla. 1st DCA 1991) for the proposition that the civil rule does not apply to criminal cases. While this Court has not ruled on the issue directly, it has implicitly sanctioned criminal courts following the procedure set out in the civil rule. Kelley v. State, 569 So.2d 754 (Fla. 1990); Shere v. State, 579 So.2d 86 (Fla.1991). More importantly, whether counsel should have filed a motion requesting permission to interview jurors or should have merely noticed the court that she intended to do so is beside the point; Marshall filed a motion such as dictated by rule 1.431(h), thus bringing this case under the regulation of the rule. Consequently, the trial court did indeed have discretion to

determine the manner of the interviews.

The issue is not whether Marshall presented an adequate basis for the court to grant post trial juror interviews, but whether the court abused its discretion in the manner in which that interview was conducted. Once again, the standard of review for how the court conducted the evidentiary hearing and the interview of juror Thomason is abuse of discretion. An appellate court will not interfere with that decision absent an abuse of discretion. Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152, 155 (Fla. 3d DCA 1984), petition for review denied, 472 So.2d 1182 (Fla.1985). Additionally, the court may properly decide to conduct the questioning of the jurors itself. See, Preast V. Amica Mut.Ins. Co., 483 So.2d 83 (Fla. 2d DCA), review denied, 492 So.2d 1334 (Fla.1986). This rule allowing interview of jurors does not authorize broad hunting expeditions or fishing excursions. National Indem. Co. v. Andrews, App. 2 Dist., 354 So.2d 454 (1978), certiorari denied 359 So.2d 1210. Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

As noted above, the trial court was diligent in its handling of juror Thomason. It granted the defense motion to interview this juror, but kept the format the same as it had used with the other jurors - *the procedure Marshall had agreed with before*. Mindful of the dictates of the Florida Supreme Court as well as the contents of the successive 3.851 motion containing Debra Thomason's affidavit, the court restricted the allowable questions to areas which did not inhere in the verdict and which focused specifically on the alleged misconduct. Before the hearing on June 10, 2005, it invited both sides to prepare questions for Thomason. (R. 356-359) Only the State did so, submitting its questions to the court at the beginning of the June 10, 2005 hearing. (R. 389-403)

After the court asked the same three questions it had of the other nine jurors, it then asked the two questions submitted by the state based upon the new allegations. The new questions were: "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?" and "Did you ever read any newspaper articles regarding the Matthew Marshall case while you were a juror on the case?" (R. 406) The court then broke for a short time to allow the defense time to formulate questions based upon Debra Thomason's affidavit. At the end of the break, Donoho submitted five questions for the court to ask. The trial court agreed to ask her first

question inquiring if Thomason had carried news articles in his briefcase during the trial. Based upon the prior decision in Marshall v. State, 854 So.2d 1235, the court did not allow the following questions since they went to the deliberative process of the verdict. "Did you believe Matthew Marshall was guilty from the day trial commenced because he was an inmate at the time?" and "Did you discuss the guilt of Matthew Marshall with other jurors before the closing arguments?". These questions essentially encapsulated issues first raised in the juror affidavits attached to Marshall's first 3.851 motion and which were denied by this Court. The trial court also ruled that they went beyond the issues raised in the pleadings which were based upon Debra Thomason's affidavit.

Marshall's proposed third question dealt with whether Thomason had read articles regarding the present hearings on the jury issues. The court ruled that it had nothing to do with the alleged misconduct during the trial. The court tried to accommodate her by asking a rephrased question.[7] (R. 412-414) The final question concerned whether Thomason had discussed media reports with fellow jurors during the jury deliberations. The State objected to that question as well on the grounds that the affidavit never mentioned Thomason discussing anything with

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[7] "Did anyone tell you or have you read any newspaper articles or heard anything on the radio or television about why you were being called here today?"

fellow jurors; in other words, there were no grounds articulated in the successive 3.851 motion to allow the inquiry to move into this area. (Nor did the previous testimony of the other nine jurors, even if the court could have considered it.) Debra Thomason's affidavit only went to Coy Thomason's actions alone, not any actions done or statements made in conjunction with other jurors.

The June 10, 2005 hearing was an evidentiary hearing based upon Marshall's successive 3.851 motion. As such, it was not limited in the same way the hearing mandated by the remand order had been. Marshall could have presented Debra Thomason if she had been alive to testify, within the bounds of the rules of evidence, about Coy Thomason's actions and/or statements. It is also interesting to note that Donoho made no effort to subpoena or to present additional evidence to support the allegations Debra Thomason had made in her affidavit. None of the former employees or customers from the print shop, who would have been in a position to hear and to see Coy Thomason's statements and actions, came to court on June 10, 2005 to lay a foundation that he had committed juror misconduct during Marshall's trial. While it is unclear if the lack of witnesses was a result of the defense failing to investigate or a failure to achieve results from investigating, the logical inference from this lack of evidence presented by the defense is that no such

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(R. 419).

evidence existed. The court, therefore, had no independent, reliable basis on which to expand the scope of questioning beyond what the court actually did. Consequently, the trial court did not abuse its discretion in conducting the hearing in the way it did or in limiting the scope of the questions asked from the sole witness, juror Thomason.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court should affirm the lower court's denial of relief.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____
LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No. 698271
1515 N. Flagler Drive, 9th Floor
West Palm Beach, Florida 33401
Office: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response" has been furnished by U.S. mail to Melissa Minsk Donoho, Special Assistant CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, and Ryan Butler, Esq., Office of the State Attorney, Nineteenth Judicial Circuit, 411 South 2nd St., Ft. Pierce, Florida 34950, this 26th day of December, 2006.

____
LISA-MARIE LERNER
Assistant Attorney General

CERTIFICATE OF FONT

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