

Seminole County Circuit Court

Seminole County Courthouse
301 North Park Avenue
Sanford, Florida 32771
407/665-4239
Fax : 407/665-4241

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 954-713-1299

To: Todd G. Scher, Litigation Director
Of: CCRC - South
From: Judge O. H. Eaton, Jr.
Re: State v. Gregory Mills
Date: May 1, 2001

DOCUMENTS	NUMBER OF PAGES*
Order Setting Aside Death Sentence, Staying Execution and Ordering Additional Hearings	14

COMMENTS:

* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 407/665-4239.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA

CASE NO. 79-653-CFB

STATE OF FLORIDA,

Plaintiff,

vs.

GREGORY MILLS,

Defendant.

**ORDER SETTING ASIDE DEATH SENTENCE,
STAYING EXECUTION AND
ORDERING ADDITIONAL HEARINGS**

This court is once again called upon to review post conviction relief claims that attack the death penalty and the fairness of the proceedings that have occurred in this troublesome case.

After the trial, back in 1979, the jury recommended that the defendant be sentenced to life in prison. The trial judge overrode the recommendation and sentenced the defendant to death. The trial judge found, in an order that would probably be summarily reversed as insufficient today, that the following aggravating circumstances were proven:

1. The defendant was under a sentence of imprisonment when he committed the murder.
2. The defendant was previously convicted of Aggravated Assault.

3. The defendant created a great risk of death to many persons.
4. The defendant was engaged in commission of a burglary at the time of the murder.
5. The murder was committed to avoid arrest.
6. The murder was committed for pecuniary gain.
7. The murder was especially heinous, atrocious and cruel.

On direct appeal the Supreme Court struck three of the aggravating circumstances; great risk to many persons, pecuniary gain, and heinous, atrocious and cruel, but affirmed the death sentence. The Supreme Court's *Tedder*¹ analysis recognized that a jury's recommendation of life should be given great weight and should be followed unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. Nevertheless, the Supreme Court affirmed the death sentence based upon three valid aggravating circumstances and no mitigating circumstances.

Now, under the second death warrant, the defendant raises two new claims.

CLAIM I

**NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE
CO-DEFENDANT WAS THE TRIGGERMAN, THUS
WARRANTING A NEW TRIAL AND/OR THE IMPOSITION
OF A LIFE SENTENCE**

¹ *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

This claim of newly discovered evidence involves the testimony of John H. Anderson, a convicted felon and long time friend of the defendant who is currently serving a sentence at Polk Correctional Institution. The discovery of this witness requires discussion.

The co-defendant, Vincent Leroy Ashley, was given complete immunity for the murder in this case and for other crimes in exchange for his testimony at trial. He testified that he met Mills at his house on Locust Avenue in Sanford, Florida, and that he and Mills obtained Mills' shotgun and rode their bicycles into nearby neighborhoods looking for a house to burglarize. They selected a house and, according to Ashley's trial testimony, Mills went inside through a window with the shotgun. The victim was asleep in the house and, upon hearing noises, came into the room where he confronted Mills. At that point Mills shot and killed the victim. Both perpetrators then fled on their bicycles.

Another witness, Sylvester Davis, was granted immunity in exchange for his testimony. His girlfriend was also granted immunity for her involvement in this and an unrelated crime, although she did not testify at trial. Davis testified that Mills obtained the shotgun and a bag from above the door in the bedroom where he and his girlfriend were lying on the bed drinking beer. Mills left the house and Davis heard the "ticking" of a ten speed bicycle coasting away from the house. Davis testified that when Mills later returned he stated that he had just killed a "cracker."

Davis and his girlfriend were given the bag containing shotgun shells. They buried them and later took the police to the location so they could be retrieved and placed in evidence.

Vincent Leroy Ashley recently refused to testify about the events surrounding the murder. This court had the opportunity to see and hear him and to observe his demeanor. This witness is possibly the least credible witness that has ever appeared before this court. It is apparent that this witness will not tell the truth and will in fact say anything that benefits him.

However, some weeks before Ashley refused to testify, an investigator spoke to him at the institution in which he is serving a life sentence for a crime unrelated to the murder in this case. The investigator asked Ashley to name some friends that he and Mills had and that is where the name of John H. Anderson was first disclosed.

The investigator went to see Anderson. He told Anderson that he was an investigator for C.C.R.C. and that Mills was under a death warrant. Anderson wanted time to think about things so the investigator returned on a later date for another interview. It was then that Anderson revealed that he had a conversation with Ashley in the exercise yard at the Seminole County Jail after the murder trial and Ashley told him he, and not Mills, was the triggerman. This, of course, was completely opposite to the testimony Ashley gave at trial. When the investigator returned for

a third visit, Anderson also revealed that a year or so later he and Ashley were playing pool in Sanford when the subject came up again. Anderson testified about the conversation stating, "I asked him about it again, you know, 'cause you know, we ... all us grewed up together. And then he just said, 'hey, man, you know, I just had to do what I had to do, it's me or him. And I was, you know, I rather it be him than me.'"

The court did not have the opportunity to observe or hear Sylvester Davis testify. Therefore, it is difficult to judge his credibility. The court did observe Anderson testify. His testimony is naturally suspect because he has a motive to protect Mills. But the circumstances surrounding the discovery of his testimony lend credibility to it. His demeanor on the witness stand was much better than Ashley's. His statements were clear and simple and stated in the language of the streets. While the state pointed out that Anderson and Ashley were in jail together only briefly on two occasions after the trial it is possible that the conversation occurred.

The problem in the case is the credibility of the witnesses or the lack thereof.

The court is being called upon to determine whether or not the testimony of John H. Anderson would (or should) sway the decision from the imposition of the death penalty in this case to the imposition of a life sentence like the jury recommended. This is

not an easy task. One of the problems, of course, is the passage of time and the evolution of death penalty practice in the State of Florida. It is highly unlikely that this court would have overridden the jury's recommendation had the verdict been returned today. It is highly unlikely that the trial judge's sentencing order would have been accepted as sufficient today. For instance, the trial court was simply wrong by not finding any mitigating circumstances. The jury had to weigh the credibility of these incredible witnesses and come to a conclusion about them. While they may have been satisfied beyond a reasonable doubt that Mills was at least a principal in the murder, they may not have believed Ashley's testimony. This court certainly would not have believed him. Additionally, the disparate treatment given to Ashley for his testimony and the incentives given to Davis for his, could have been the reason for the jury's recommendation. These arguments were not presented to the trial judge as matters of mitigation.

In order for newly discovered evidence to be considered for the purpose of setting aside a death sentence, it must pass the two prong test addressed in *Jones v. State*, 709 So.2d 512 (Fla. 1998). The test requires the evidence "must have been unknown by the trial court, the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence. Additionally, the newly discovered evidence must be of such nature that it would probably produce a different

sentence." To reach this conclusion, the court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."

Id. at 521.

It is clear that Anderson's testimony is newly discovered evidence. It was unknown at the time of trial and, since Ashley did not make the statements until after the trial, neither Mills nor his counsel could have discovered it with due diligence. The statement would be admissible at trial, if only for impeachment.

As stated in *State v. Robinson*, 711 So.2d 619 (Fla. 2d DCA 1998),

Historically, newly discovered evidence in the form of impeachment evidence was considered insufficient as a matter of law to warrant a new trial. (Citations omitted.)

Recently, however, this rule of impeachment evidence has been expanded. Florida courts now are willing to consider newly discovered "impeachment" evidence as sufficient to grant a new trial in certain limited circumstances. In *Jones*, the supreme court stated: "[A]n evaluation of the weight to be accorded the [newly discovered] evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. (Citations omitted.)

Id. at 623.

Here, the credibility of the witnesses has become a major issue in the case. Was Mills inside the house with the shotgun at the time of the murder or was he outside? The jury resolved the issue to establish he was at one place or the other. In balancing

the testimony of John H. Anderson with the rest of the evidence in the case, the court concludes that the death penalty should not be imposed under the circumstances.

CLAIM II

**NEWLY DISCOVERED INFORMATION ESTABLISHES THAT
AN IMPERMISSIBLE EX PARTE COMMUNICATION
OCCURRED BETWEEN THE STATE AND THE SENTENCING JUDGE
DURING MR. MILLS' INITIAL POST CONVICTION PROCEEDINGS**

This claim also comes under the heading of "newly discovered evidence" in that the documents that brought the claim to light were discovered when the State Attorney sent records to the repository on April 6, 2001.

On November 14, 1989, Mills filed his first Motion for Post Conviction Relief. It was summarily denied by the trial judge under circumstances that call the propriety of the entry of the order into question.

At the hearing on April 30, 2001, the trial judge (who is now retired) was called as a witness by the Assistant Attorney General. He testified in part as follows:

Q. Do you recall issuing an order summarily denying Mr. Mills' Rule 3.850 motion?

A. Yes, I do.

Q. Do you recall the circumstances of how that order came to be typed up, if you will?

A. The way I recall, I received the motion, and I believe at that time I called the state attorney in Seminole County and told

him I received a motion, I was going to deny the motion, and would they prepare the order denying it. That is the best of my recollection.

The testimony further reveals that the trial judge's office was located in Melbourne and the case was a Seminole County case. The trial judge believed it was necessary to expedite the entry of the order because a death warrant was pending at the time.

In *Rose v. State*, 601 So.2d 1181 (Fla. 1992), a Motion for Post Conviction Relief was filed by an assistant public defender who was later allowed to withdraw. The state filed a response to the motion and agreed that an evidentiary hearing was required. Subsequently, the state submitted a proposed order which was adopted in its entirety by the trial court denying all relief. Rose's new counsel was neither served with a copy of the proposed order nor provided an opportunity to file objections. The court assumed that the order was submitted after an ex parte communication was made between the court and the state.

In determining to reverse the order Justice Barkett reviewed the common practice in many circuits in the 1970's (which, by the way, included the Eighteenth Circuit) in which the court would contact the prevailing party and request an order for consideration. The court stated:

The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitation of time. Normally, any such request is made in the presence of both parties or by a

written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. (Citations omitted.)

Canon 3A(4) of Florida's Code of Judicial Conduct states clearly that

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, *neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.*"

Fla. Bar Code of Jud. Conduct, Canon 3A(4). (emphasis added.) Nothing is more dangerous and destructive of the impartiality of the judiciary, that a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

The court went on to state, and this is crucial to the situation presented by the trial judge's testimony in this case,

We are not concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

This court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge....The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

.... The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is

called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

Justice Harding, in a concurring opinion in *Rose*, stated, "Judges should be ever vigilant that every litigant gets that to which he or she is entitled: 'the cold neutrality of an impartial judge.'" 601 So.2d at 1184.

Unfortunately, this situation has arisen time and time again. In *Huff v. State*, 622 So.2d 982 (Fla. 1993), the defendant filed a Motion for Post Conviction Relief and the state submitted a proposed order denying all relief. It is unclear when the proposed order was submitted or what prompted the submission. Defense counsel received a copy of the order on Friday and it was signed by the trial judge on the following Monday. The Supreme Court reversed the order stating:

In view of the wide scope of issues raised below and the fact that the death penalty was involved as well as the other circumstances in this case, we agree with Huff that his due process rights were violated. Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it.

Id. at 983.

The court noted that "When a procedural error reaches the level of a due process violation, it becomes a matter of substance." *Id.*

A similar due process violation was found in *Smith v. State*, 708 So.2d 253 (Fla. 1998) even though Smith had "ample opportunity to object to the substance of the proposed order." And trial judges have fallen into error by instructing the state attorney to prepare a sentencing order in cases in which the death penalty has been imposed. *Spencer v. State*, 515 So.2d 688 (Fla. 1993); *Card v. State*, 652 So.2d 344 (Fla. 1995).

The testimony on this claim is uncontroverted. An improper ex parte communication occurred between the state attorney and the trial judge. This communication was for the purpose of requesting the state to prepare an order denying the defendant's Motion for Post Conviction Relief filed November 14, 1989. Even though the denial of the motion was reversed by the Supreme Court, such a due process violation becomes a matter of substance and actual prejudice is not required to be shown. However, as counsel for the defendant pointed out, knowledge of the ex parte communication would have resulted in the ultimate recusal of the trial judge if for no other reason than because he would have become a witness in the hearing to determine the propriety of the ex parte communication. Thus, the defendant reasons, he would have received that to which he is entitled, the cold neutrality of an impartial trial judge.

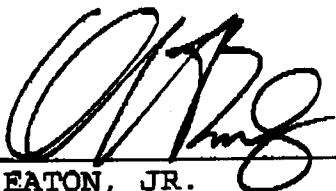
IT IS ADJUDGED:

1. The judgment and order dated April 18, 2001, sentencing the defendant to death is set aside. The court will set a resentencing hearing by separate order.

2. The order dated January 3, 1991, denying the defendant's Consolidated Proffer In Support Of Request For Evidentiary Hearing, Application For Stay Of Execution And Motion For Fla. R. Crim. P. 3.850 Relief is set aside. A hearing required by the case of Huff v. State, 622 So.2d 982 (Fla. 1993) will be scheduled by separate order unless the provisions of paragraph 1 herein become final, making this portion of the order moot.

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

ORDERED at Sanford, Seminole County, Florida, this 1 day of May 2001.



O. H. EATON, JR.
Circuit Judge

Copies furnished to:

**Thomas Hastings, Assistant State Attorney
State Attorney's Office
100 East First Street
Sanford, FL. 32771**

**Kenneth Nunnolley, Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL. 32118**

**Todd G. Scher, Litigation Director
CCRC - South
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL. 33301**

**Tanya Carroll, Deputy Clerk Capital Cases
Supreme Court of Florida
500 South Duval St.
Tallahassee, FL. 32399-1927**

**Warden James Crosby
Florida State Prison
P. O. Box 747
Starke, FL. 32091**