

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-appellee,

v.

CASE NO. SC01-879

GREGORY MILLS,

Appellee/Cross-appellant.

_____ /

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

REPLY/CROSS-ANSWER BRIEF OF
APPELLEE/CROSS-APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0998818

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #438847

444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax # (904) 226-0457
COUNSEL FOR
APPELLEE/CROSS-APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

To the extent that the statement of the case and facts contained in Mills' brief contains various criticisms and editorial comments directed toward the prior opinions of this Court, such assertions, which concern long-concluded proceedings, are inappropriate and mere surplusage. For purposes of this brief, it is sufficient to state that the *Tedder*, *Keen*, and *Apprendi* issues are no longer viable.

To the extent that discussion of the facts from the guilt phase of Mills' capital trial is necessary, the evidence can be summarized as follows:

The .410-gauge shotgun used to murder James Wright in his Sanford, Florida home was in the possession, custody, and control of the defendant, Gregory Mills. Sylvester Davis described how Mills removed the shotgun, and shells for it, from their place of storage in the house that he shared with Mills. (R100). Davis identified the shotgun that Mills took out of their house as the one that was shown to be the murder weapon. (R103). Likewise, Vincent Ashley identified the shotgun that was shown to be the murder weapon as the one that was used in the burglary of the victim's home. (R258).

Firearm and toolmark examination established that the shotgun wadding recovered at the victim's residence was fired

from the shotgun identified by Davis and Ashley as the shotgun they saw in Mills' possession. (R232).¹ Moreover, the spent shell found at the murder scene was fired from the same weapon. (R238).

Vincent Ashley described how he held the shotgun while Mills climbed into the victim's home and then handed the weapon in to Mills. (R247). Ashley also described how he then entered the house; how he left quickly when he saw the victim getting out of bed; and how he heard a gunshot while he was outside of the house. (R248-49).

Sylvester Davis described how Mills told him that he had "shot some cracker," thrown the gun in some bushes and needed to go back and wipe the fingerprints off of it, and how Mills and Ashley had entered the house with Mills in possession of the shotgun. (R105-106). Mills also told Davis that he (Mills) should have shot Ashley, but that the victim came through the door with something dark in his hands, so he shot the victim. (R107).² Mills told Davis he was going to call his sister to go pick up the gun from where he had thrown it. (R109). Davis did

¹This matching was possible because the front sight screw on the shotgun protrudes slightly into the barrel of the weapon, causing a distinctive mark to be scored into the wadding when the weapon is fired. (R233).

²Mr. Wright's widow testified that the victim had arthritis and wore dark-colored knit gloves all the time. (R8).

not see Ashley after the murder until two or three weeks prior to trial, when he saw him in the courthouse where they both had criminal court appearances. (R116). He did not discuss the shooting with Ashley. (R117).

In addition to this direct testimony, Mills is tied to the shooting of James Wright by the gunshot residue found on his hands. (R384). The level of antimony present is consistent with Mills having discharged a firearm.³ No antimony was found on Ashley's hands. (R304). Further, Mills and Ashley were the only people found riding bicycles in the area of the murder at the time of its commission -- Ashley was in the area (R29-30), and Mills and his bicycle were found at the hospital (R44-45; 167-68). The Wright residence is two-tenths of a mile from the hospital where Mills was found. (R168-169). Sanford Police Department Patrolman Hasson rode Mills' bicycle from the Wright residence to Mills' residence. (R322). Detective Reynolds timed this ride to take approximately 4 to 6 minutes. (R328-329). Patrolman Hasson also rode the bicycle from Mills' house to the hospital. (R324). Detective Reynolds timed this ride to take approximately 6 minutes. (R329-330).

Gloria Robinson is the City of Sanford employee who found

³The gunshot residue swabbings were taken 2 hours after the murder. (R385).

the murder weapon on May 25, 1979. (R75-77). While she was at the place where she found the weapon (Eighth and Mellonville), Ms. Robinson saw a vehicle with the initials "VM" on the side pass by. (R82). "VM" is Vivian Mills, who is Mills' sister; on May 25, 1979, she rode past Gloria Robinson's location in a vehicle having the initials "VM" on its side. (R176-177). Melvin Staley is Vivian Mills' boyfriend and was with her at that time. (R183). He also saw Gloria Robinson, and verified that the car, which belonged to him, had "VM" on the side. (R183). The location was around Eighth and Mellonville. (R184). This testimony is consistent with Mills' statement to Davis that he was going to get his sister to pick up the weapon from where he had disposed of it. (R109).

Ashley and Davis were cross-examined at length about the dismissal of various criminal charges that followed after they came forward with information about this offense. (R122; 266-79).

ARGUMENT

CLAIM I

IN REPLY TO MILLS' ARGUMENT THAT THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RELIEF ON THE "ANDERSON" CLAIM.

On pages 20-45 of his answer brief, Mills argues that the trial court has "absolute discretion" with respect to

determinations concerning the credibility of witnesses. However, throughout that discussion, Mills never acknowledges that two of the three versions of events related by Anderson were proven to be false by unrefuted, and unrefutable, evidence. Moreover, as the state discussed in its *Initial Brief*, the lower court merely stated that the remaining Ashley/Anderson "statement" "might have taken place." (R287). A "possibility" that the conversation occurred, when juxtaposed against two outright lies, establishes an abuse of discretion when that "possibility" is used to grant relief in the face of evidence, which the lower court ignored, that is consistent with, and independently corroborative of, Ashley's trial testimony.

Moreover, in his brief, Mills states that in order to find an abuse of discretion with respect to the granting of sentence stage relief, this Court would have to find that the lower court exercised its "judicial responsibility" in an "unreasonable, unconscionable, and arbitrary action taken without proper consideration of facts and law pertaining to the matters submitted." When Mills' own definition of abuse of discretion is applied to the facts of this case, it is readily apparent that that is exactly what the lower court did. It was an abuse of discretion to grant relief based upon the "possibility" that a conversation "might" have occurred, especially when the same

witness had also related two other conversations that could not have taken place. The lower court should be reversed.

The lower court ignored, in its "newly discovered evidence analysis," that Mills was present at the scene of the murder (under the Anderson version), and was aware of the "facts" related by Anderson. The record in this case clearly indicates that Mills was well aware of Ashley (after all, Mills told Davis he should have shot Ashley), and it makes no sense whatsoever to assert that any testimony about Ashley's involvement is "newly discovered evidence." *Occhicone v. State*, 768 So. 2d 1037, 1041 (Fla. 2000).⁴ Moreover, in addition to ignoring the fact that Ashley was known to Mills because, under the most recent version of events, both of them were present at the scene of the murder, the lower court wholly ignored the fact, as does Mills, that the present theory and the Anderson "version" are wholly inconsistent with Mills' guilt phase testimony, which was that he had nothing to do whatsoever with the murder. That total inconsistency in positions further undercuts the viability of this claim, and suggests that, as has been noted in the past, it

⁴In *Occhicone*, this Court stated "therefore, no one better than Occhicone himself could have known about these witnesses." *Occhicone v. State*, 768 So. 2d at 1041. In this case, no one better than Mills would have known about Ashley. It is absurd to reach a contrary conclusion.

is not unusual for witnesses to emerge once a defendant has been convicted. *High v. Kemp*, 819 F.2d 988, 994 (11th Cir. 1987), *cert. granted*, 108 S.Ct. 2896 (1988), *order vacated and cert. denied*, 109 S.Ct. 3264 (1989).⁵ Mills never explains the striking inconsistencies between his trial testimony and Anderson's 2001 version of events. The state respectfully submits that no such explanation is offered because no explanation exists. It was an abuse of discretion for the lower court to ignore those fatal inconsistencies. The grant of sentence stage relief should be reversed.

The wholly disingenuous nature of this claim is well demonstrated by the closing argument delivered by penalty phase counsel. Counsel made only one elliptical reference to someone other than Mills having been the person who fired the fatal shot. The penalty phase closing argument, in pertinent part, reads as follows:

What I do want to do is point out to you, though, that not three, but two critical state's witnesses were given immunity in exchange for their testimony. The most critical of those witnesses, obviously, is Vincent Ashley. Vincent Ashley was in the classic sense a co-Defendant of Gregory Mills. Vincent Ashley was there. Vincent Ashley admitted his participation,

⁵To the extent that page 24 of Mills' brief implies or otherwise asserts a claim of ineffective assistance of counsel, such a claim was not raised in the circuit court, and cannot be raised, for the first time, on appeal.

having participation in all of the events which surround the killing of Mr. Wright.

. . .

Vincent Ashley told you a version of events. Mr. Ashley was there. Mr. Ashley does know that happened. But, the State cut a deal with Mr. Ashley, even knowing his participation, in two serious felony cases of which the State had knowledge, the case for which Mr. Mills is tried, burglary and a killing, a homicide.

Mr. Ashley obtained complete and total immunity from prosecution on either of those crimes. But, that's not all he obtained. He obtained complete and total immunity on three other felony offenses in exchange for this testimony against Gregory Mills.

Vincent Ashley was the only person of the State's witnesses who was in a position to know how the offense took place. Vincent Ashley had every opportunity to fabricate. You, as triers of fact, have to determine how much weight you will give his testimony and how credible a person he is in light of that fact. In addition to what you know about how the events took place, we don't really know who pulled the trigger. There was evidence one way or another. We do know, though, that even if Mr. Ashley had just been there, that he was subject to prosecution both for burglary and for second degree murder.

(Sup.R at 97-98).

It takes no analysis to recognize that because Mills was present, if he wanted to defend his case on the theory that Ashley was the real killer, he could obviously have done so because he knew what the truth was. However, it makes utterly no sense to argue, as Mills has done, that he has only now "discovered" that Ashley was the "real killer." Mills could

just as easily have testified (in 1979) that Ashley was the "shooter" during the guilt phase of his capital trial. He did not do that, but, nonetheless, the lower court granted relief based on an argument that Mills has always had available to him, but chose not to use. That result is absurd.

On page 29 of his brief, Mills argues that the lower court "credited Anderson's testimony." However, as set out in the State's initial brief, the lower court made no credibility determinations -- it merely found that it was "possible" that the conversation related by Anderson took place. That finding by the circuit court ignored the fact that two other similar conversations, which were also "related" by Anderson, were proven to be outright lies. The circuit court's conclusion that it was "possible" for the conversation to have occurred is due no deference from this Court. In fact, as the United States Supreme Court has stated, "[t]here is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California*, 110 S.Ct. 1190, 1198 (1990)[footnote omitted]. In this case, the lower court did precisely what the United States Supreme Court, and common sense, establish should not be done --

grant a retrial based upon speculation.

Moreover, in relying on speculation to grant relief, the lower court did exactly what this Court has repeatedly declined to do -- make credibility determinations based upon a cold record. *See, e.g., State v. Spaziano*, 692 So. 2d 174, 178 (Fla. 1997). Specifically, the lower court seems to have made findings with respect to the credibility of trial witnesses Ashley and Davis based solely upon a reading of the record. Such a credibility determination, when made upon a cold record, cannot stand, especially when, as is the case here, there is convergent validity and independent corroboration of the trial testimony itself. The court abused its discretion by ignoring the presumptively valid nature of Mills' conviction and sentence.⁶

In footnote 6 on page 32 of his brief, Mills attempts to defend the lower court's error in addressing Davis' credibility without ever observing him testify by stating that the State "declined to call him as a witness." Mills' intentionally

⁶On page 32, Mills indulges himself in deliberate obfuscation of the State's argument in its initial brief concerning Ashley's trial credibility. In the prior proceeding before this Court, the lower court's credibility determination with respect to Ashley was made with respect to the events that occurred in front of Judge Eaton, not with respect to the events that occurred at trial. Despite Mills' histrionic attempt to change the State's argument, the State has, at no time, contradicted the prior arguments made in this case.

imprecise wording creates an inaccurate impression of what did (and did not) occur.⁷ It is true that Davis was transported to Seminole County, but it is also true that his trial testimony was never challenged in this proceeding on any basis that was not known at the time of Mills' 1979 trial. Neither was his credibility challenged at the evidentiary hearing on any basis other than through argument of counsel based on matters known and presented at trial. Because that is so, and because Mills' conviction and sentence are presumptively valid and it is Mills' burden to prove otherwise, there was no need to present Davis' testimony. Mills has not suggested that Davis' testimony would differ from his trial testimony, and, because no new matters are raised with respect to Davis, any testimony by him in this proceeding would have been, at best, of arguable relevance.⁸ The lower court improperly assessed Davis' testimony, and Mills' efforts to save that erroneous result only serve to place the error in sharper focus.

As set out in the State's *Initial Brief*, the adequacy of the

⁷The use of the word "decline" creates the false impression that someone asked the State to call Davis, but the State refused. See, Merriam-Webster's Collegiate Dictionary, 10th Ed.

⁸In other words, the State is not required to call every trial witness (or even some of them) and have them reaffirm their trial testimony. The trial is the main event, and the State is entitled to rely on its result.

original sentencing order entered in this cause is not an issue that was before Judge Eaton, nor is it one that he should have passed on.⁹ As the Eleventh Circuit Court of Appeals has noted in the context of a jury override, "it is not our function to decide whether we agree with the advisory jury or with the trial judge and the Supreme Court of Florida. Our review, rather, is limited to ascertaining whether the **result** of the override scheme is arbitrary or discriminatory." *Lusk v. Dugger*, 890 F.2d 332, 342 (11th Cir. 1989) [emphasis in original]. Just as it is not the function of the Eleventh Circuit to determine whether or not it agrees with the sentencing judge, it is not Judge Eaton's place to determine whether or not **he** agrees with the judge who heard all the evidence and rejected the jury's advisory sentence and sentenced Mills to death. A finding by the sentencing court that no mitigation was established is entitled to a presumption of correctness in Federal Court. *Daugherty v. Dugger*, 839 F.2d 1426, 1430 (11th Cir. 1988) ("Nevertheless, the sentencing court found *Daugherty* established no mitigating factors. As we are required to do, we accord this finding a presumption of correctness under 28 U.S.C. §

⁹The Circuit Court raised this "issue" on its own. No claim with respect to the adequacy of the sentencing order was pleaded in the Rule 3.850 motion. The lower court's reason for raising this procedurally barred claim is unknown.

2254(d)."). That finding should not be rejected out of hand by the Rule 3.850 Court and, whether or not the lower court agrees with the sentencing court is of no moment. However, the State respectfully suggests that the Court's willingness to state its evident disagreement with the sentence imposed in this case is further evidence that it abused its discretion in granting relief herein. Likewise, to the extent that footnote 10 on page 42 of Mills' brief attempts to challenge the validity of the gunshot residue analysis, that claim is procedurally barred. Mills cannot resurrect it, in a footnote, at this late date.

The lower court abused its discretion when it granted relief on the basis of Anderson's "testimony." That grant of relief ignores the fact that the testimony of not only Ashley, but also Davis, was internally consistent with respect to the relevant details, as well as being consistent with the other evidence which is not, and never has been, challenged. In ignoring the other, independent evidence, the circuit court, in Mills' words, granted relief based upon an "unreasonable, unconscionable, and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted." This Court should correct that error.

CLAIM II

**IN REPLY TO MILLS' ARGUMENT THAT THE LOWER COURT DID NOT
ABUSE ITS DISCRETION WITH RESPECT TO THE PREPARATION
OF THE ORIGINAL ORDER DENYING RULE 3.850 RELIEF.**

With respect to claim II of Mills' brief, the State primarily relies upon the arguments and authorities submitted in its initial brief. However, certain claims contained in Mills' brief deserve comment.

On page 50 of his brief, Mills suggests that the only way he could have "reviewed [these records] in time" would have been to "camp out" at the records repository and review records on a daily basis. That argument is absurd. Mills could, and should, have reviewed the documents transmitted to the repository in advance of the date that he finally accomplished such review, and, as was demonstrated in the prior proceedings, he had an "agent" available in Tallahassee to accomplish such a records review had he truly desired to undertake one. The timing of the "discovery" of the "draft order" is suspect, is unsupported by any evidence, and demonstrates an abuse of process by Mills. The lower court ignored the procedural bar defenses pleaded by the State, and committed error, as a matter of law, in so doing.

To the extent that Mills seeks to raise the "order" issue

as a *Brady v. Maryland* claim, he cannot plead such a claim for the first time on appeal from the Rule 3.850 proceeding in the trial court. This claim was not raised as a *Brady* claim in the circuit court, and, in any event, is not a *Brady* claim. That argument is spurious.¹⁰

Mills was on notice that the State's response had not been served upon him, and, contrary to his argument on page 62 of his brief, Mills now seems to take the position that the "impropriety" could in fact have been asserted in the Rule 3.850 proceeding itself.¹¹ In any event, Mills' brief appears to assume some impropriety on the part of the Rule 3.850 trial judge which directly contradicts the testimony of Billy Nolas, which was that he had no basis to assume, allege, or suspect any impropriety of any sort. (R21). Mills cannot have it both ways. The "order" issue could have been discovered in a timely fashion through due diligence, and there is, therefore, no basis for relief. *Steinhorst v. State*, 695 So. 2d 1245 (Fla. 1997).

Finally, Mills ignores the fact that he received an

¹⁰On page 64 of his brief, Mills alleges that the draft order was "improperly suppressed" by the State. That claim is likewise raised for the first time on appeal and is procedurally barred. In any event, there is no *Brady* obligation to disclose the documents at issue.

¹¹This is contrary to the testimony of Billy Nolas, who represented Mills in the first Rule 3.850 proceeding.

evidentiary hearing on his Rule 3.850 motion, which is the process that he was due. Mills is not automatically entitled to relief even if the order was entered contrary to the later-established requirements of *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and *Rose v. State*, 601 So. 2d 1181 (Fla. 1992). Those cases are not retroactively available to Mills, and to do as the circuit court did, and apply a "presumptive prejudice standard" is contrary to the law in this area.¹²

CROSS-APPEAL

MILLS IS NOT ENTITLED TO A NEW TRIAL.

In a three-quarter page presentation, Mills argues that the lower court erred in not granting a new guilt phase proceeding. (AB 73). This claim is procedurally barred because Mills did not request such relief from the Circuit Court.¹³ It is a well-

¹²Of course, it also makes no sense to place the post-conviction trial court in error based upon case law that did not exist at the time of the complained-of actions. Mills has demonstrated no reasonable probability of a different result, nor has he suggested how the result of the proceedings would have been different had he had a different judge presiding over his Rule 3.850 evidentiary hearing. Mills has not demonstrated a denial of due process, nor has he demonstrated prejudice. The grant of relief should be reversed in all respects.

¹³In his Rule 3.850 motion, Mills asserted that he should receive a new trial in the heading to Claim I. He made one similar reference in his closing argument, but, at the end of that argument, specifically requested an evidentiary hearing on the 1991 Rule 3.850 motion and a new **sentencing proceeding**. (R168).

settled principle that the lower court cannot be placed in error based upon matters which were not before it. *See, Robinson v. State*, 707 So. 2d 688, 700 (Fla. 1998). In this case, Mills abandoned his request for a new guilt phase proceeding by explicitly seeking only sentence stage relief in his final argument. Because he abandoned the guilt phase issue, and because it was reasonable for the Circuit Court to conclude that Mills had done so, it is disingenuous to assert grounds for relief that are predicated upon a matter that was abandoned below. Moreover, this claim is insufficiently briefed -- that shortcoming calls the sincerity of the claim into issue, and, in any event, constitutes a procedural bar.

Alternatively and secondarily, Mills' cross-appeal is not a basis for relief for the following reasons.

As set out in the State's *Initial Brief*, there are a number of significant credibility issues surrounding Anderson's testimony -- the "helpful version" is chronologically in between two different versions of events that were clearly shown to be false. The lower court wholly ignored these credibility issues, and, in so doing, committed reversible error by substituting its judgment for that of the jury with respect to witnesses who

never testified in this proceeding.¹⁴ The lack of credibility that permeates Anderson's testimony (and the lower court did not find him credible -- it only found that the conversation "might" have taken place) does not provide a basis for setting aside a presumptively valid conviction. In other words, neither a conviction, nor a sentence, should be set aside based upon speculation about what "might" (or might not) have happened.

Assuming for the sake of argument that the guilt phase claim is properly before this Court, the lower court fortunately did not compound the error it committed as to the sentence by disturbing the conviction based upon no more than speculation about what might have been. Mills' conviction is based upon sufficient evidence, as this Court held in 1985. *Mills v. State*, 476 So. 2d 192 (Fla. 1985). That conviction is presumptively

¹⁴In granting sentence relief based upon Anderson's testimony, the lower court either *sub silentio* rejected the testimony of Ashley and Davis without benefit of seeing and hearing them testify, or found that the hearsay to which Anderson testified was somehow more compelling than all of the testimony and evidence from the trial. The result is wrong regardless of how the lower court arrived at it. The state recognizes that Ashley and Davis have felony records. However, the lower court did not observe the trial testimony of either witness, and it was error of the worst sort for that court to substitute its judgment for that of the jury and judge who **did** have the benefit of those observations. The jury obviously found them credible enough (along with the other evidence of guilt) to convict Mills of first-degree murder, a conviction this Court upheld years ago.

correct. *Murray v. Giarratano*, 109 S.Ct. 2765, 2772 (1989) (O'Connor, J., concurring); *Hitchcock v. State*, 413 So. 2d 741 (Fla. 1982); *Spinkellink v. State*, 313 So. 2d 666 (Fla. 1975). It is unreasonable to suggest that the Anderson "testimony" (about a conversation that "might" have taken place) overcomes that presumption when it is not even consistent with the theory of defense at trial -- that Mills had nothing to do with the burglary or the murder. It makes no legal sense to suggest that this qualifies as "new evidence,"¹⁵ which, **by definition**, is evidence which cannot have existed at the time of trial. Obviously, Mills well knew whether he was present at the scene of the murder at the time of the trial in 1979 -- he should not be allowed to engage in and benefit from a strategy, in the face of execution, which admits that he lied when he testified that he was not present and had nothing to do with the murder of James Wright.

Moreover, the shortcoming of the Anderson testimony is that, while the **statement** to Anderson was purportedly made after trial, **the information contained in that statement would have been known to Mills at all times because, under that version of**

¹⁵It does, however, suggest that Mills is willing to try out a new theory in an effort to avoid execution. Unfortunately, the lower court fell for that strategy, at least as to the sentence.

events, he was there. Mills could have testified that Ashley was the "real killer." He did not do so, and it is ludicrous to suggest that Mills is now "entitled" to change his theory of defense. By definition, such cannot be newly discovered evidence, and cannot provide a basis for relief of any sort. *Porter v. State*, 653 So. 2d 374, 379 (Fla. 1995) (" . . . newly discovered evidence, by its very nature, is evidence which existed but was unknown at the time of [trial or] sentencing."); *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324 (Fla. 1994) (" . . . the defendant was aware of this alibi evidence . . ."). This evidence does no more than relate Mills' version of how the offense occurred, which has, at various points in the proceeding, been that he was not involved, or that Ashley is the "real shooter." As this Court held in *Scott v. Wainwright*, 433 So. 2d 974, 976 (Fla. 1983), "[t]he 'new evidence' that [the defendant] wants to present at a new sentencing hearing relates to his version of how the murder was committed. This is not 'newly discovered evidence.'" The same legal principle applies here -- if Mills was present at the crime scene, and that is his current story, then he obviously knows what happened because he was there. And, he has presented nothing that would preclude a conviction for first-degree murder under a felony-murder theory -- the Anderson testimony does not affect the conviction

because, even if that story is believed, Mills is still guilty of first-degree felony-murder.¹⁶ Mills' conviction should not be disturbed based upon the testimony of Anderson, which is inconsistent with Mills' defense at trial, as well as all of the other evidence. Mills is not entitled to relief on his cross appeal.

CONCLUSION

In discussing the role of collateral litigation, the United States Supreme Court has stated:

It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence and death penalty cases are no exception. When the process of direct review -- which, if a Federal question is involved includes the right to petition this Court for writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of Federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is Federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

Barefoot v. Estelle, 453 U.S. 880, 887 (1983). Those observations with respect to the proper place and emphasis of collateral litigation are equally appropriate and applicable in the context of state postconviction proceedings. A Rule 3.850

¹⁶Of course, there is more evidence of Mills' guilt than the testimony of Ashley and Davis. That evidence came from unchallenged sources. See pages 1-4, above. All of that evidence is internally consistent and mutually corroborative.

motion is not a forum to relitigate the guilt or penalty phases -- it is not the "main event" in death penalty litigation. And, most particularly, the Rule 3.850 court is not entitled to substitute its judgment for that of the sentencing court, which heard the witnesses, saw the evidence, and was in the best (and only) position to evaluate the credibility of the witnesses and evidence that was presented at the defendant's capital trial. As the Eleventh Circuit Court of Appeals has pointed out:

The question is not whether we agree with the sentencing court that appellant should receive the death penalty. . . . nor is it within our province to judge the merits of the particular aggravating factors chosen by the [state] legislature and interpreted by the [state] courts as justifying the imposition of death.

Proffitt v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1982), modified, 706 F.2d 311 (1983), cert. denied, 464 U.S. 1002, 1003 (1983). Just as it is not the function of the appellate courts to retry the circumstances that led to Mills' sentence of death, the question before the lower court was not whether it agreed with that sentence. See, *Antone v. Strickland*, 706 F.2d 1534, 1538 (11th Cir. 1983). The lower court was charged with the responsibility of evaluating the purportedly "newly discovered evidence" against the evidence elicited at Mills' capital trial. That court did not do that, and that shortcoming is an abuse of discretion that compels reversal of the lower court. Likewise,

the lower court abused its discretion with respect to the issue concerning the Rule 3.850 proceeding order, granting relief in the absence of any prejudice based upon a perceived error that was not error at all.

As the Fifth Circuit Court of Appeals stated, "[w]e cannot and should not retry the case in our imaginations." *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985). That appears to be precisely what the collateral proceeding trial court did in this case. The end result of the lower court's errors was that it set aside a presumptively valid conviction and sentence based upon a mere possibility. Mills' sentence of death was imposed in 1979, and, in the succeeding years, has withstood repeated direct and collateral attack. The trial court erred when it set that sentence aside, and that error should be corrected by this Court.

Based upon the foregoing, the State respectfully submits that the order granting sentence stage relief should be set aside, and Mills' death sentence reinstated. The cross appeal should be denied.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing which has been typed in Font Courier New, Size 12, has been furnished by Federal Express and Fascimile to Todd G. Scher, Litigation Director, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this _____ day of May, 2001.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457