

IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,

Appellant,

v.

CASE NO. SC18-42

LOWER COURT CASE:2010-CF-0479

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.

_____ /

APPELLEE'S SUPPLEMENT TO MAY 23, 2019, STATUS REPORT/NOTICE
OF FILING EMERGENCY MOTION TO ENFORCE RULE 3.190(I) IN THE LOWER
COURT

COMES NOW, the State of Florida, by and through the undersigned Assistant Attorney General, pursuant to this Court's April 25, 2019, order granting Appellee's Emergency Motion to Supplement the Record by Relinquishing Jurisdiction to the Circuit Court for an Evidentiary Hearing, and hereby files this supplement to its status report previously filed on May 23, 2019, and attaches the following:

1. Emergency Motion to Enforce Rule 3.190(i), which was filed in the lower court May 31, 2019.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

/s/ Christina Z. Pacheco
CHRISTINA Z. PACHECO
Assistant Attorney General
Florida Bar No.: 71300

RECEIVED, 05/31/2019 02:10:32 PM, Clerk, Supreme Court

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COUNSEL FOR THE STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May 2019, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Eric C. Pinkard, CCRC, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us** and **support@ccmr.state.fl.us**.

/s/ Christina Z. Pacheco
COUNSEL FOR THE STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 2010-CF-00479

DEATH PENALTY CASE

DELMER SMITH,

Defendant.

_____ /

EMERGENCY MOTION TO ENFORCE RULE 3.190(I)

COMES NOW, the State of Florida, by and through the undersigned counsel, and hereby files the instant motion to enforce Florida Rule of Criminal Procedure 3.190(i), and in support thereof states the following:

On May 20, 2019, Defendant's postconviction counsel, Mr. Eric Pinkard, deposed Lieutenant Dumer, former Detective Diamond, and Detective Ortiz. After the depositions were taken, Mr. Pinkard contacted undersigned counsel and asked whether she objected to using Detective Ortiz's deposition in lieu of live testimony during the evidentiary hearing scheduled for June 5, 2019.

Next, on May 30, 2019, Mr. Pinkard deposed former Sarasota County Crime Scene Technician Jessica Jarecki in North Carolina. Mr. Pinkard was present in North Carolina for the very limited

deposition, while undersigned counsel and her co-counsel appeared by telephone.

During the deposition, Mr. Pinkard asked questions that exceeded the narrow scope of the deposition. Undersigned counsel objected numerous times. While the deposition was being recorded by the court reporter, undersigned counsel asked Mr. Pinkard the purpose of the deposition and whether he would later seek to use the deposition in lieu of live testimony, like he did for Detective Ortiz's deposition. Mr. Pinkard responded that he had not yet decided at that point and that he would not know until later. **Undersigned counsel objected and told Mr. Pinkard that advance notice was required if he intended to be using the deposition as testimony during the evidentiary hearing. Mr. Pinkard asked undersigned counsel whether she would stipulate to using the deposition as testimony, and undersigned counsel made it very clear that she would not.** She advised Mr. Pinkard that she would agree to have the witness appear by Skype or by telephone, but she would absolutely not stipulate to using the deposition as testimony.

Undersigned counsel also notified Mr. Pinkard that it would be unfair and improper for Mr. Pinkard to have the witness answer the questions that counsel objected to and then subsequently seek to admit the deposition as evidence during the

evidentiary hearing. **Mr. Pinkard eventually agreed that the deposition would only be used for discovery purposes.**

On May 31, 2019, at 10:20 a.m., Mr. Pinkard sent undersigned counsel an email stating that Ms. Jarecki "would prefer not to testify on her day off next wed., June 5th." He therefore asked whether we can "stipulate to the entry of her deposition[.]"

Depositions to perpetuate testimony are controlled by Florida Rule of Criminal Procedure 3.190(i). Pursuant to the rule, a motion must be filed along with affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend the hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. Fla. R. Crim. P. 3.190(i). "The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any nonprivileged designated books, papers, documents, or tangible objects be produced at the same time and place." Fla. R. Crim. P. 3.190(i)(1). Further, "[i]f the application is made within 10 days before the trial date, the court may deny the application." Fla. R. Crim. P. 3.190(i)(1). Mr. Pinkard's actions are problematic and violative of this rule in many respects.

Mr. Pinkard failed to file any motion to perpetuate the testimony of Detective Ortiz or Jessica Jarecki. Discovery depositions are treated very differently than depositions to perpetuate testimony. As the Florida Supreme Court has acknowledged, "a discovery deposition is not intended as an opportunity to perpetuate testimony for use at trial, is not admissible as substantive evidence at trial, and is only admissible for purposes of impeachment." *Blanton v. State*, 978 So. 2d 149, 155 (Fla. 2008).

Mr. Pinkard knew, or should have known, the availability of *his* witnesses for the evidentiary hearing when he was securing their deposition testimony. **It was wrong for Mr. Pinkard to conduct discovery depositions and then subsequently seek to use those depositions as evidentiary-hearing testimony without any prior notice to counsel and without obtaining an order from this Court.**

While Detective Ortiz is apparently not available to testify on June 5 due to pre-planned travel arrangements, Mr. Pinkard should have known that prior to taking his deposition. Mr. Pinkard filed a motion for discovery depositions and coordinated Detective Ortiz's deposition. If Mr. Pinkard had done his due diligence, the parties could have made arrangements for the deposition to be treated as a deposition to perpetuate

his testimony. There is no justification for why he failed to follow the proper procedure.

With regard to Ms. Jarecki, it is shocking that Mr. Pinkard is asking for a "stipulation" to use her discovery-deposition testimony as evidentiary-hearing testimony after he affirmed during the deposition that he would not be doing so. Additionally, pursuant to Florida Rule of Criminal Procedure 3.190(i)(6), "No deposition shall be used or read into evidence when the attendance of the witness can be procured." Here, Mr. Pinkard has not appeared to have made any effort to procure the witness. Her "preference" not to testify "on her day off" is clearly not a valid reason for Mr. Pinkard's blatant disregard for rule 3.190(i). Additionally, as previously mentioned, undersigned counsel has already informed Mr. Pinkard that she would not object if he requested to have her testimony taken over the phone or by Skype.

Based on the foregoing, the State of Florida respectfully requests that this Court enforce Rule 3.190(i), of the Florida Rules of Criminal Procedure, and that this Court provide whatever other instructions or remedies this Court finds suitable under these very troubling circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2019, I electronically filed the foregoing with the Clerk of the Court

by using the e-portal filing system which will send a notice of electronic filing to the following: Eric C. Pinkard, CCRC-M, Rachel P. Roebuck and Ali A. Shakoor, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us**, **roebuck@ccmr.state.fl.us**, **shakoor@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**; The Honorable Diana L. Moreland, Circuit Court Judge, Manatee County Judicial Center, 1051 Manatee Avenue West, Bradenton, Florida 34206, **gelliott@jud12.flcourts.org**; Suzanne O'Donnell, Assistant State Attorney, Manatee County State Attorney's Office, 2071 Ringling Boulevard, 4th Floor, Sarasota, Florida 34237-7036, **sodonnell@sao12.org**, **bmoss@sao12.org**, and **saorounds@sc12.org**.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

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