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

Case No.: 05-2007-CF-049458-AXXX

STATE OF FLORIDA,

Plaintiff,

vs.

CHRISTOPHER J. WOOD,

Defendant.

REQUEST FOR JUDICIAL NOTICE

COMES NOW, the Defendant, CHRISTOPHER J. WOOD, in proper person, pursuant to Fla. Stat. §§ 90.201 and 90.203, and requests this Court to take judicial notice of Florida Law requiring the original trial judge to evaluate the weight of both the newly discovered evidence raised in the 3.850 motion and the evidence which was introduced at trial. In support of this request, the following is presented:

1. Filed simultaneously with this request is a postconviction motion raising several grounds of newly discovered evidence.

2. In order to determine whether this newly discovered evidence requires a new trial, the trial court is required to evaluate this evidence and weigh both the newly discovered evidence as well as the evidence which was introduced at trial.

3. Since this case is currently assigned to a successor judge, not the original trial judge, I respectfully request this Court to judicially notice Florida Law which provides that only the

original trial judge can evaluate and weigh the testimony and evidence which was presented before him.

ARGUMENT

It is mandatory that a court take judicial notice of a law of the State in which the Court is sitting because, *Averbis legis non est recedendum*.. See Florida Statute § 90.201 and *Casa de Alabonza v. Bus Service Inc.*, 669 So.2d 339 (Fla. 3d DCA 1996). This is especially so when a party complies with the procedures set forth in § 90.202 by: requesting that judicial notice be taken of the fact; serving the necessary notice to the adverse party; and, supplying the Court with the necessary information. *City of Lakeland v. Select Tenures*, 129 Fla. 338, 176 So. 274, 277 (1937).

The fact of law which I am requesting to be judicially notice is that which specifically states only the original trial judge can evaluate and weigh the newly discovered testimony and evidence to the testimony and evidence which was presented before him at trial. Since I have raised newly discovered evidence in the form of witness' testimony and other facts, Florida Law mandates that the trial judge hearing this case "consider all newly discovered evidence which would be admissible and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial. This determination includes consideration of evidence that goes to the merits of the case as well as impeachment evidence." *Hurst v. State*, 18 So.3d 975, 992 (Fla. 2009). In making this determination, it is well settled that, "it is virtually impossible for any judge other than the actual trial judge to properly entertain" a motion based on evaluating the weight of the evidence. *Sanford v. State*, 687 So.2d 315, 317 (Fla. 3d DCA 1997). Especially when "the credibility of the witnesses played such an important role... [A] careful consideration of the credibility of the witnesses cannot be adequately accomplished by a

mere reading of the cold trial transcript. [ ] The demeanor, physical appearance, gestures, voice intonations, etc. of the witness while testifying are … critical factors which bear on the credibility of the witness. And such factors clearly cannot be captured or articulated on a trial transcript. Only the judge who actually presided over [the] trial and observed the witnesses will know what significance, if any, such factors played in the outcome of the trial." *Id.* at 317. Therefore, a successor judge does not have the authority to entertain this evaluation on the "weight of the evidence because a successor judge would be forced to rely on a 'cold' record." *State v. May*, 703 So.2d 1097 (Fla. 2d DCA 1997). See also *Turner v. State*, 993 So.2d 996, 997 (Fla. 2d DCA 2007) (Holding that in a postconviction proceeding a successor judge may not rule on matters based on the credibility of witnesses that he has not heard.)

The instant case stood or fell on the credibility of me and my wife. Where I stated that we planned to make a pornographic movie and she said we did not. It all came down to who was more credible; her or me. This Court fully recognizes this as it stated in the ruling on my first 3.850 motion, *Id.* at 2. Now, with the introduction of the new evidence, this Court must evaluate the weight of the evidence produced at trial and determine: (1) whether the jury misconduct raised to a level that would prejudice me considering the weight of the evidence presented against me at trial; ~~(2)~~ [redacted] (3) whether the partial recantation of a witness who testified at trial, and the correction of that testimony, is enough that would produce an acquittal when considering the weight of the evidence presented against me at trial; (4) whether the newly discovered witness who stated that, two days prior to the filming of the pornographic video (the alleged rape), my wife told him we were making this movie and that we

[redacted] (5) whether the cumulative effect of all of the errors in this case raised to a level which prejudiced me considering the weight of the evidence presented against me at trial.

Therefore, since this "motion rests on the determination of credibility [and] resolution of conflicts," only the original trial judge can hear this motion. *May*, 703 So.2d at 1100. This is so, "even if that requires the temporary assignment of retired judge [Holcomb] to sit as an associate judge in this case ..." *Kelly v. State*, 637 So.2d 972 (Fla. 1st DCA 1994).

However, Judge Holcomb must be able to "effectively provide the required evaluation of the weight of the evidence." And since (5) years has passed since trial, this "passage of time now makes this task much more difficult for him or any other trial judge" to review and evaluate the evidence that is required by law. *Id.* at 977. (See *Kelly*, supra, (holding the passage of 5 years since the original trial judge heard the testimony presented a problem with evaluating and weighing the testimony); see also *Turner*, supra, (holding that even if the original trial judge were available to evaluate and weigh the evidence and testimony, the proceedings should be held *de novo* "because so much time [2½ years] ha[d] passed." *Id.* at 998.

Additionally, the *Kelly* Court, *Sanford* Court, *Turner* Court and a plethora of others have made it abundantly clear that when the evidence of guilt in a case is tenuous and the trial court cannot effectively provide the required evaluation of the weight of the evidence due to the passage of time or the death or resignation of a trial judge, a new trial must be granted so not to deprive the defendant of his rights to due process and a fair review because, *actus curiae neminem gravabit*. Or as section 38.12, Fla. Stat., states: a party "making any motion before such [successor judge] *shall suffer no detriment* by reason of his [predecessor's] resignation,

death or impeachment." (Emphasis Added). "This section, ... does not authorize successor judge to weigh and compare testimony of witness whom he has not seen or heard." *Bradford v. Marine Construction Co.*, 182 So.2d 447, 448 (Fla. 2d DCA 1966). (see also *Robinson v. State*, 462 So.2d 471 (Fla. 1st DCA 1985) granting a new trial "in the interest of justice" because the original trial judge was unable to evaluate the weight of the evidence.)

Wherefore, it is requested that this Court judicially notice the above stated Florida Law mandating that Judge Holcomb be temporarily assigned to this case to provide the required evaluation of the weight of the evidence presented as newly discovered evidence as well as that which was presented at trial, or, in the alternative, if Judge Holcomb is unable to effectively provide this evaluation because of the passage of time or any other reason, I request this Court to grant me a new trial.

Respectfully submitted on this 11th day of July 2012.

CHRISTOPHER J. WOOD, pro se
Defendant
DC # 990846
Franklin Correctional Institution
1760 Hwy. 67 North
Carrabelle, FL 32322-2157

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed an original and true and correct copies of this document in the hands of _____ Mailroom Personnel, at Franklin Correctional Institution on this 11th day of July 2012 for mailing via prepaid first class United States mail to: **(1)** The Clerk of Court, 400 South St., 2nd Floor, P. O. Box 999, Titusville, Florida 32781; **(2)** The Office of the State's Attorney, 400 South St., Titusville, Florida 32780; **(3)** The Honorable Charles M. Holcomb, the Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, Florida 32940; and **(4)** The Honorable Charles M. Holcomb, P.O. Box 236564, Cocoa, Florida 32923.

CHRISTOPHER J. WOOD, pro se