

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01573-COA

LEANDER SMITH
a/k/a Lee Andrew Smith
a/k/a Tiger

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [REDACTED]
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<i>Tomarcus Monte Fulks v. State</i> , No. 2007-KA-01572-SCT (July 23, 2009)	1

STATUTES

none

OTHER AUTHORITIES

none

REPLY ARGUMENT

The state's arguments are drastically diluted by the recently decided *Tomarcus Monte Fulks v. State*, No. 2007-KA-01572-SCT (July 23, 2009), where the court addressed the same issue as addressed in the case at bar. The *Fulks* court reversed the conviction there for the similar UCCCR 9.04 violation as here.

In *Fulks*, a key witness who initially gave a statement beneficial to the defendant changed his version of events making Fulks a key participant in a multi-defendant home invasion. In normal course, the defendant received the witness' initial statement in discovery. (*Fulks* ¶2). However, the prosecution did not inform defense counsel of the new statement until the day before trial "for the first time that [the witness] instead would testify that he had seen Fulks kick in the back door of the home, lead the robbery party inside." (*Fulks* ¶3). Fulks' motion for continuance based on the new discovery, was denied. *Id.*

In reversing Fulks' conviction for an abuse of discretion in denying the motion for continuance, the Court stated that "the State's eleventh-hour disclosure of the unexpected content of this witness's testimony" resulted in the same irreparable prejudice suffered by the defendant in *Box v. State*, 437 So. 2d 19 (Miss. 1983), forcing "a trial by ambush in which critically important evidence was sprung on a defendant with such abruptness that defense counsel had time neither to investigate its veracity nor to make meaningful preparation to meet it." (*Fulks* ¶8) See also, *Byrom v. State*, 863 So. 2d 836, 870 (Miss.

2003).

Fulks had more notice than Smith who did not learn that the video was going to be used until well into the trial, making the error here more egregious. The record is clear that Smith's counsel did not invite the error as suggested by the state.

CONCLUSION

It follows, therefore, that *Fulks, supra*, controls the outcome of Leander Smith's case and requires reversal and a new trial.

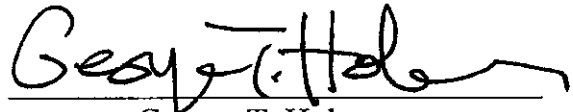
Respectfully submitted,

LEANDER SMITH

BY: 
GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 4th day of August 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Kenneth L. Thomas, Circuit Judge, P. O. Box 548 Cleveland, MS 38732, and to Hon. Leslie Flint, Asst. Dist. Atty. , P. O. Box 848, Cleveland MS 38732, and to Hon. Jeffrey A. Klingfuss, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.


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