IN THE SUPREME COURT OF FLORIDA

CASE NO. **74,902**

GREGORY SCOTT ENGLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT COURT, IN AND FOR DWAL
COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT/INTRODUCTION

Mr. Engle filed an initial brief that discussed the substantial and compelling challenges to his capital conviction and death sentence involved in this action. Mr. Engle was (and is) entitled to an evidentiary hearing on the factual claims presented, and is entitled to disclosure under Fla. Stat. sec. 119. See State V. Kokal, 562 So. **2d 324** (Fla. **1990**); Provenzano v. State, 561 So. **2d 541** (Fla. **1990**). The trial court's summary denial of his Rule 3.850 motion was clearly erroneous. At no time did Mr. Engle "confess the absence of supporting facts" which would entitle him to an evidentiary hearing (State's Answer Brief, p. 6)(emphasis added). In light of this patently inaccurate assertion by the State in its answer brief, Mr. Engle notes at the outset that the State's brief is filled with such misstatements of fact and law.[1] In this reply brief, Mr. Engle reasserts his entitlement to a full and fair evidentiary hearing.

In this brief the Record Appendix previously filed with this Honorable Court shall be cited as **"R.** App. ___." The original trial record on appeal shall be cited as "T. ___," and the resentencing record on appeal shall be cited as **"R.** ___." The Rule 3.850 record on appeal shall be cited as "H. ___." All other citations shall be self-explanatory or otherwise explained.

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[1]Given the page limitations of this brief, Mr. Engle cannot address all of the misstatements contained in the State's brief. Mr. Engle respectfully urges this Honorable Court to rely on the record itself, which plainly refutes the State's assertions.

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BLE OF AUTHORITIES

(I)

MR. ENGLE IS ENTITLED TO *AN* EVIDENTIARY HEARING

The standard for denial of an evidentiary hearing under Fla. R. Crim. P. 3.850 is well known and oft quoted by this Court. Interestingly, while the State contends that the trial court's summary denial was correct, the State never cites the standard for denying an evidentiary hearing: "that the motion and files and records in the case conclusively show that the prisoner is entitled to no relief." **See** Rule 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). Instead of applying the appropriate standard to the facts of Mr. Engle's case, the State resorts to conclusory and misleading statements about the record such as the following:

> Mr. Engle's Rule 3.850 petition raised nothing more than a gaggle of unprepared, unresearched and unsubstantiated claims of a **"boilerplate"** variety which **"usually"** get evidentiary hearings.
>
> When given oral argument on the need for an evidentiary hearing, Engle confessed the absence of supporting facts and rested on his written pleadings.
>
> . . .
>
> In a desperate appeal, Engle seeks reversal with a host of ad hominem arguments and references to **"facts"** that are totally de hors the record.

(State's Answer Brief, p. 6)(emphasis added).[2]

According to the State, Mr. Engle is not entitled to an evidentiary hearing in this case because he "confessed the absence of supporting facts and rested on his written pleadings" before the trial court (Id.). A review of the transcript of the

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[2]**Significantly,** the State contests the facts proffered by Mr. Engle, although never recognizing that that very factual contest makes the need for an evidentiary hearing plain.

trial court proceedings and records below establishes that Mr. Engle vigorously asserted his entitlement to an evidentiary hearing throughout the lower court proceedings. He specifically prepared and submitted to the trial court a detailed written factual proffer in support of the claims requiring an evidentiary hearing (H. **389-436),** along with an extensive factual appendix (H. **437-677)** further demonstrating that an evidentiary hearing was (and is) necessary to resolve the claims.

The trial court (Olliff, J.) at the outset of the in-court proceedings indicated that it had reviewed the records, including Mr. Engle's written proffer (H. **2-4).** Based upon the trial court's review of the records, undersigned counsel indicated that he would be "relatively brief," and would **"rely** upon the written **submissions,"** while arguing that an evidentiary hearing was necessary to resolve the facts (H. **7).** The State now asks this Court to view counsel's actions as a **"confession"** to the absence of any supporting facts. Such a request is absurd and directly contrary to the record before this Court.

Mr. Engle's written proffer provided more than a sufficient factual basis for his entitlement to an evidentiary hearing. That written proffer was properly before the trial court and was in fact accepted by the trial judge, who stated that he had reviewed it (H. **17-18).** Throughout the course of the proceedings before Judge Olliff, undersigned counsel referred to and relied upon that written proffer (E.g., H. 14, **15, 29, 31, 35, 44, 50, 51, 54,** and **56).** Judge Olliff himself indicated that he was considering the matters set forth in the written proffer and was going to refer to them again "before I finally decide" (H. 32-

33). The State's only objection to Mr. Engle's written proffer was to "any new claims which might be contained in the supplemental pleadings which are not contained specifically and precise in that 3.850 motion" (H. 46). Mr. Engle pled no "new claims" in his written proffer, but he did set forth more than a sufficient factual basis for his entitlement to an evidentiary hearing, as did the Rule 3.850 motion itself and its appendix.[3]

Mr. Engle's Rule 3.850 motion, written proffer, and supporting appendices were properly before the trial court and are now before this Court. The need for an evidentiary hearing was and is plain, the State's strange argument to the contrary notwithstanding. The State's assertion that this appeal makes reference to "facts" that are totally "de hors" the record is wrong.[4] The substantial and compelling factual bases for Mr. Engle's claims were properly before the trial court and were more than sufficient to require evidentiary resolution (See H. 389-

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[3]The State's complaint seems to be that counsel did not argue orally for hours; Rule 3.850 does not require an extensive oral dissertation and neither did the lower court judge. The State's argument is particularly inappropriate in a case in which the petitioner's counsel prepared detailed, lengthy written submissions (which the trial judge stated he reviewed, at the commencement of the hearing) in support of the request for an evidentiary hearing.

[4]If the State means the facts were not in the original record, the need for a hearing is clear: that the facts pled by a 3.850 petitioner are non-record is precisely why an evidentiary hearing is necessary to resolve them. If the State means they are "do hors" this record, the State is just wrong -- the facts proffered below are part of the record before this Court. See Case No. 74,902 (this case) Record on [3.850] Appeal; see also Record Appendix (filed with initial brief and including pertinent portions of the record on appeal in this case).

677). Nothing "conclusively" rebutted them, and nothing was attached to the order which showed that they were "conclusively" rebutted. Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court should reverse the trial court's summary denial and remand this case for a full and fair evidentiary hearing.

(II)

IMPROPER OVERRIDE

This claim plainly warrants relief -- a proper resentencing before a Circuit Court Judge other than Judge Santora -- at this juncture. The facts are clear, and clearly reflect that the death penalty was not properly imposed by the judge. Alternatively, there can be no serious dispute that an evidentiary hearing is what is minimally required by this claim. Judge Santora's candid admissions concerning the reasons behind and the manner by which he sentenced (and then resentenced) Mr. Engle to death in this case demonstrate that this death sentence simply does not comport with Tedder v. State, 322 So. 2d 908 (Fla. 1975), Fla. Stat. sec. 921.141, or the eighth amendment. Here, Mr. Engle addresses the State's contentions on this claim.

Although the question of the propriety of the override was presented to this Court on appeal, the claim is now properly before this Court because newly discovered facts which were plainly unavailable to Mr. Engle earlier establish the impropriety of the trial judge's override in this case. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Judge Santora has now stated the reasons he employed in his decision to impose death (reasons that cannot be squared with Tedder): those reasons were not

stated earlier. The State argues that Mr. Engle has waived this claim because he failed to appeal Judge Santora's denial of his recusal motion at the resentencing. This argument would have merit if Mr. Engle had no new facts in support of his claim. But, Mr. Engle does have such facts, based on what Judge Santora disclosed before he recused himself from this 3.850 action.

The State's argument conveniently ignores the newly disclosed facts from Judge Santora -- facts which Mr. Engle was unaware of at the time of his sentencing, resentencing, or on appeal. Here, as in Harvard v. State, 486 So. 2d 537 (Fla. 1986), and Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(in banc), the original judge's statements during the post-conviction process concerning the reasons behind his imposition of the death penalty shed new light on the constitutional error, and require that the claim be re-assessed post-conviction. This claim is not procedurally barred. The State's argument in support of a bar highlights the State's inability to address the compelling merits of the claim. The newly disclosed facts must be evaluated in the context of Judge Santora's override of the jury's verdict that Mr. Engle be sentenced to life.

The State's comments on the newly disclosed facts show that, at the very least, an evidentiary hearing is required to resolve this claim:

> Judge Santora engaged in some non-record banter which CCR subsequently converted into non-contextual affidavits for use on appeal. The State objects to any references to non-record material.

(State's Answer Brief, p. 3). The State later argues that the claim amounts to nothing more than Judge Santora being "ambushed

with his off-the-record asides" (Id. at 13). Without the benefit of evidentiary development, the State has the audacity to ask this Court to cast aside the newly disclosed facts as "non-record banter," "non-contextual affidavits for use on appeal" and "off-the-record asides" (Id.). Of course, this Court can not do that. Much of what Judge Santora said was on the record. After he told the court reporter to "shut that thing off," Judge Santora said a great deal more demonstrating the impropriety of the reasons behind why he imposed death. To the extent the State is disputing that Judge Santora said what he said (in the presence of the State's representatives and CCR's counsel), an evidentiary hearing is needed to resolve the factual dispute.

This Honorable Court cannot simply ignore Judge Santora's recent statements, as the State seems to suggest. The State's "objection" notwithstanding, Judge Santora's "on the record" and "off the record" statements were proffered to Judge Olliff, are part of this record on appeal, and are properly before this Court. The State's reference to them as "non-record material" is misleading and just plain wrong.

The State's only honest attempt to address the merits of the issue was to submit that

> Judge Santora's 'bias' in 1989 would arguably not even be relevant to his opinion at the time of Engle's sentencing.

This argument of course ignores the very content of Judge Santora's statements as to why he was recusing himself in 1989, and that his "bias" was not something that he had recently developed but had been with him since the trial in 1979 (before

he even sentenced Mr. Engle originally).

The recent statements made by Judge Santora establish that the manner by which death was imposed and reimposed in this case was clearly erroneous and did not comport with Tedder and its progeny. Judge Santora's original override and later imposition of death were based precisely on the evidence which this Court instructed him not to consider. Ironically, as the State points out:

> Judges do not exist in a vacuum and are not expected to rule without being affected by their experiences or the evidence.

(State's Answer Brief, p. 12 n.4). That is exactly what happened to Judge Santora in this case. (And that is why he should have recused himself.) He was affected by the evidence, albeit improper evidence (which this Court instructed that he not consider) in the form of codefendant Stevens' statements, and he has been unable to factor them out of his consideration of Mr. Engle's case, since the original trial, and through the sentencing and resentencing.

Mr. Engle is in no way casting aspersions on Judge Santora. Mr. Engle agrees with the State that we cannot expect judges, especially in a situation such as Judge Santora found himself in this case, to not be affected -- but the evidence (Stevens' statements) was an improper consideration, and Judge Santora's resulting bias was an improper reason for the imposition of death. Mr. Engle has noted throughout the litigation of this action that Judge Santora was "forthright," "candid," and "commendable" for disclosing his true feelings. In fact, Judge Santora's statements, both "on the record" and "off," indicate

that he was being "forthright" and "candid" about his "bias" and are anything but "non-record banter" or "off-the-record asides." In context, his statements represent his feelings about Mr. Engle. His disclosures nevertheless establish that he considered Mr. Stevens' statements throughout, and relied on them throughout, and that he never applied the Tedder standard. Judge Santora has told us that he made up his mind to impose death at the original trial, and that decision is what dictated the result of his later actions. Judge Santora is an honest man, as was the judge in Harvard, supra. But as in Harvard, what the sentencing judge has disclosed about the reasons behind his imposition of death during the 3.850 proceedings demonstrates that the death penalty was not properly imposed.

Judge Santora's prejudgment that Mr. Engle deserved to die prevented him from making a proper sentencing determination in Mr. Engle's case and from applying properly the Tedder standard. As Judge Santora has acknowledged, he formed the prejudgment before sentencing, while hearing evidence at the original trial. This prejudgment prevented him from giving the jury's recommendation the "great weight" to which it is entitled under the Tedder standard. At resentencing, it prevented him from properly recusing himself. This unwaivering prejudice was based upon the very evidence this Court instructed the judge to ignore on remand. Moreover, it prevented him from acting "with procedural rectitude in applying section 921.141 and [this Court's] case law." Brown V. Wainwright, 392 So. 2d 1327, 1331

(Fla. 1981).[5]

Mr. Engle was denied his right to a fair sentencing decision from a circuit court judge who was not set on sentencing him to death. He was denied the right to a sentencing judge who considered and applied the Tedder standard. It is the trial judge's duty (not this reviewing court's) to initially apply that standard fairly and impartially, and then to sentence, after assessing the mitigation fully and the aggravation properly, after conducting a trial court "weighing," and after considering the jury's verdict. Judge Santora never did that in Mr. Engle's case. His own statements establish this fact. This Court's affirmance of Judge Santora's override thus means very little in light of these recently disclosed facts. In Florida, the trial judge sentences, not this Court on appeal. Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). The capital sentencing scheme in Florida requires that the trial judge independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed. Van Royal v. State, 497 So. 2d 265 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Of course, this is no less important (and is in fact more important) in a case involving a recommendation of life imprisonment from the jury. See Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Zeigler v. Duaaer, 524 So.

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[5]This Court affirmed the override -- i.e., Judge Santora's actions -- assuming he acted with "procedural rectitude." He did not. Resentencing before another Judge is appropriate. Indeed, Judge Santora has now recused himself from this case.

2d 419 (Fla. 1988); Jackson v. Dugger, 529 So. 2d 1081 (Fla. 1988). There was no independent weighing in this case by the trial judge. Mr. Engle is entitled to a proper sentencing hearing before a judge who is not biased. At a minimum, an evidentiary hearing is required, Lemon v. State, 498 So. 2d 923 (Fla. 1986), for the files and records not only fail to rebut the claim, the files and records now before this Court establish it.

(III)

PRESENTATION OF "FALSE EVIDENCE"

The trial and sentencing jury and court in Mr. Engle's case were presented with and relied upon "false evidence." The term "false evidence" includes the "introduction of specific misleading evidence important to the prosecution's case." Donnelly v. DeCristoforo, 416 U.S. 637, 647 (1974), quoted in Troedel v. Wainwright, 667 F. Supp. 1456, 1458 (S.D. Fla. 1986). In Mr. Engle's case, the State presented such misleading evidence to the jury and judge.

In ruling on this claim, the trial court made the following observation:

> And although there is a difference as to the amount of blood that the doctor found at the time of the autopsy, it's -- there is a difference. but not a great amount of blood in any event.

(H. 41)(emphasis added). This should be compared to the State's opening comments concerning this claim:

> Dr. Floro's written autopsy report indicated recovery of 4 cc's of blood from the body of the victim, Ms. Tolin. This amount was substantially less than the five tablespoons of blood reported at (R. 370) trial.

(State's Answer Brief, p. 13)(emphasis added). The State's own

brief establishes that the trial court below never understood the significance of the discrepancy. Neither the court nor the State ever addressed Dr. Floro's "third" version of the facts.

Taken in context, the vast differences between what Dr. Floro testified to in this case, as compared to what he testified to in the Stevens case, are far from "mere" inconsistencies of a lay witness, but as the State admits involve "substantial" discrepancies in the testimony of the State's key expert witness, the medical examiner. In addressing this issue the State fails to rely upon the proper standard and in doing so determines that Mr. Engle is entitled to no relief, nor an evidentiary hearing, because he failed to obtain any "confession" or "direct proof of conspiracy" from Dr. Floro or Mr. Coxe. This is directly contrary to Rule 3.850: in accord with the rule, Mr. Engle stated the claim, based upon Giglio v. United States, 405 U.S. 150 (1972), and presented the facts to support it.

More significantly, the State misleads this Court by stating:

> Judge Olliff asked Engle's lawyer for proof of a prosecutorial plot to suborn perjury. Mr. Nolas openly confessed he had no proof at all. In addition, Nolas stated that these wild accusations "would be withdrawn" if CCR's investigation turned up no evidence.

(State's Answer Brief, p. 14, citing (H. 34-35)). Nothing could be further from the truth. The record clearly establishes that undersigned counsel was discussing Claim II of Mr. Engle's 3.850 motion, the Brady claim (involving the State's failure to disclose files under section 119, see State v. Kokal, 562 So. 2d 324 (Fla. 1990)), at pages 34-35 of the record and not Claim 111, this claim, the Giglio claim (See H. 33-35). Counsel made no

such statements, confessions, nor concessions as to Mr. Engle's Giglio or "false evidence" claim. Instead, counsel relied upon the motion and written proffer and strenuously argued that an evidentiary hearing was required.

Without an evidentiary hearing, and apparently without even a rudimentary understanding of the claim, the circuit court made findings of fact:

> I don't find that the doctor perjured himself, I don't find from the testimony that the State is spurn [sic] to perjury, doctor lying it's inconsistent -- inconsistent but only in the amount.

(H. 41-42). The discrepancies pled are in the State's words "substantial" and are clearly unexplainable from the record. They relate to a key material aspect of Mr. Engle's conviction and death sentence. (Dr. Floro's account was key to the conviction, and central to the aggravating factors argued by the State.) The allegations must be taken as pled at this juncture, Blackledae v. Allison, 431 U.S. 63 (1977); Lightbourne, supra, for Mr. Engle has pled more than sufficient facts to warrant evidentiary resolution. Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987); Troedel, supra, 667 F. Supp. 1456, affirmed, 828 F.2d 670 (11th Cir. 1987). Absolutely nothing in the "files and records" shows "conclusively" that Mr. Engle is entitled to "no relief," Lemon v. State, 498 So. 2d 923 (Fla. 1986), and no such files were attached to the lower court's order. An evidentiary hearing was and is warranted.

(IV)

BRADY AND REFUSAL TO DISCLOSE FILES AND RECORDS

There should be no question that Mr. Engle's case must be remanded for compliance with the Public Records Act. Fla. Stat. sec. 119. (This is particularly important in this case in light of what the Gislio claim discussed above involves.) Mr. Engle has never been afforded any records from law enforcement or state attorney files. He specifically requested them from the State; the State refused the request (H. 159-208). He specifically requested that the lower court order disclosure (id.); the lower court denied the request (H. 693). This case is controlled by Provenzano v. State, 561 So. 2d 541 (Fla. 1990), and State v. Kokal, 562 So. 2d 324 (Fla. 1990). Under Kokal and Provenzano there is no question that disclosure is required, and that (as in those cases) Mr. Engle's case should be remanded to the trial court with directions that the trial court order disclosure, with leave to amend the claim under Bradv v. Maryland, 373 U.S. 83 (1963).[6]

(V)

INEFFECTIVE ASSISTANCE OF COUNSEL

An evidentiary hearing is necessary on this and other claims involved in this appeal. Once again the State asserts that no evidentiary hearing is required. The State, however, like the circuit court, once again neglects to point to or attach any files and records which show that Mr. Engle is entitled to no

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[6] As to this general Bradv claim, undersigned counsel did "confess" to the absence of any supporting facts -- because of the State's noncompliance with the Public Records Act.

relief. The State cannot do so, for no such records exist. The files and records do not refute Mr. Engle's claims. An evidentiary hearing is mandated by Rule 3.850. The State repeatedly guesses at the supposed **"strategy"** of defense counsel. Mr. Engle, however, has alleged that there was no such strategy, and indeed could not be, because defense counsel failed to adequately investigate and/or was denied critical mitigation evidence through failures of the State and the mental health experts.

Mr. Engle urges that this Honorable Court allow the evidentiary hearing which this case requires.

(VI)

THE REMAINING CLAIMS

As to the remaining claims raised in this appeal, Mr. Engle will rely on the argument presented in his initial brief.

CONCLUSION

There is no question that this case requires an evidentiary hearing. There should also be no question that this case requires a proper resentencing before an unbiased Judge. Because the lower court's orders were erroneous as a matter of fact and law, the decisions below should be reversed, and this case should be remanded for proper evidentiary resolution. Because it is appropriate in this case, this Honorable Court should vacate Mr. Engle's unconstitutional convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Mark Menser, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, **111-29** North Magnolia Drive, Tallahassee, Florida **32301**, this 9 day of October, **1990**.

Billy H. Nolas / Thomas H. Dunn
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