IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,518

GROVER REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Reed's motion for post-conviction relief. The circuit court denied Mr. Reed's claims without an evidentiary hearing. In this brief, the record of courtroom transcript on direct appeal to this Court is cited as (T. ____); the record of documents and pleadings on direct appeal to this Court is cited as (R. ____); the record on 3.850 appeal to this Court is cited as (PC-R. ____); the transcript of courtroom proceedings on the 3.850 motion is cited as (PC-T. ___); and the supplementary record on 3.850 appeal containing transcripts of court proceedings is cited as (PC-RS. ____). Other references used in this brief are self-explanatory or otherwise explained.

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REPLY TO THE APPELLEE'S STATEMENT OF THE CASE AND FACTS

In its answer brief, the State asserts, "Contrary to the intimation in Mr. Reed's brief, Mr. Nichols was not selected by the state, nor is there any record support for the claim that Mr. Nichols was selected as the 'worst possible attorney'" (Answer Brief at 1). There is no citation for this quote in violation of Appellate Rules; it is simply made up. Further, there is record support for State involvement in the selection of Mr. Nichols as the defense attorney. First, the State made the motion to remove Mr. Chipperfield as defense counsel (R. 89-90). Second, the State arranged to have Mr. Nichols present when its motion to discharge Mr. Chipperfield was heard on August 6, 1986 (T. 19-20). Further, Judge Southwood disclosed at that time that the State had previously (apparently off-the-record) advised him that it wished to accord Mr. Nichols "two weeks to allow him time" (T. 20).[1]

The State next asserts, "Mr. Nichols took depositions and obtained funds for his own investigator and for expert witnesses (R. 210-216)" (Answer Brief at 1). However, the record citation is to three Motions for Authority to Incur Expenses which were granted. The first is to obtain authorization for retention of an investigator. Despite this motion, there is no record

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[1]Further circumstantial evidence exists from the State's conduct in post-conviction proceedings that it would engage in ex parte contact with Judge Southwood in order to manipulate the process to its benefit. This improper ex parte communication is discussed in more detail later in this brief.

indication that an investigator was obtained. Mr. Reed has asserted in his Motion to Vacate that investigation did not occur; no evidence was presented at either the guilt or penalty phase proceedings by Mr. Nichols. The second motion was to obtain a copy of one single deposition which had been taken by Mr. Nichols. The third motion was to obtain copies of depositions taken by the Public Defender's Office. Even though no explanation was given as to why a copy was not available from the Public Defender's Office, this motion was granted. This motion did also request authorization for future depositions. However, there is no record indication that any other depositions were in fact taken.[2]

The State next asserts that "A full mental health history was obtained and an evaluation of Reed was submitted to the trial court (R. 315-378)" (Answer Brief at 1). Once again the State misrepresents the record. Mr. Nichols requested a mental health evaluation based upon a previously asserted "suggestion of insanity" (R. 218). Accordingly, Judge Southwood invoked Rule 3.210, 3.211, and 3.216, Fla. R. Cr. Pro. and ordered a psychiatric examination by Dr. Miller (R. 221-23). This evaluation was not confidential. The report was submitted to Judge Southwood and addressed only competency and sanity (R. 249-52). No discussion of mitigating factors was contained in the evaluation. The materials appearing in the record (R. 315-78) to

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[2]Mr. Nichols did make a request for funds to travel to St. Louis to depose two witnesses (R. 208).

which the State refers were medical records concerning Mr. Reed gathered by his prior counsel Mr. Chipperfield. These materials were not presented by Mr. Nichols to the jury which under Florida law is a co-sentencer. No expert testimony concerning the significance of these records as evidence of mitigation was presented either to the jury or Judge Southwood. Mr. Nichols merely asked Judge Southwood to consider the materials as showing "Mr. Reed's past emotional and drug problems" (T. 922).

The State concedes that the defense at trial was to "attack [] the circumstantial nature of the state's case" (Answer Brief at 1). Mr. Reed's claim of ineffective assistance of counsel at the guilt phase is premised upon trial counsel's failure to investigate and present evidence which was consistent with and furthered that defense.

The State asserts, "Six aggravating factors and no mitigating factors were established by the evidence" (Answer Brief at 1). This statement is in error. On direct appeal, this Court held that as a matter of state law the prior-felonies-of-violence aggravator did not apply and had been improperly considered by the sentencers. Reed v. State, 560 So. 2d 203, 207 (Fla. 1990). This Court also determined that the "requisite evidence of heightened premeditation was not proven beyond a reasonable doubt." Reed, 560 So. 2d at 207. Thus, four aggravating factors were found applicable. Further, Judge Southwood stated, "no evidence has been presented to show the existence of any other factors which should be considered in

mitigation" (T. 940). Apparently, Judge Southwood forgot that sixty-three (63) pages of evidence had been presented in the judge sentencing proceeding in order to show "Mr. Reed's past emotional and drug problems." (T. 922).

Next, the State concedes that Mr. Nichols continued as counsel for Mr. Reed on direct appeal to this Court. The State further concedes that this Court struck Mr. Nichols' brief as deficient. However, the State conveniently overlooks what this Court stated:

> The Court has received an initial brief in this appeal of a death sentence which raises only a single point and which does not address the appropriateness of the death sentence. On its face this brief does not appear to be a good faith effort to address all the issues available on appeal.

Order (Sept. 9, 1987), Reed v. State, No. 70,069. The State also overlooks Mr. Nichols' response:

> The undersigned attorney moves for leave to withdraw as attorney of record for GROVER REED, Defendant in this cause, and for grounds would show:
>
> The undersigned's present work schedule makes it impossible to go forward with Defendant's appeal.

Motion to Withdraw (Sept. 21, 1987), filed in circuit court.

Next the State turns to the Rule 3.850 proceedings. Here, the State makes patently false representations. The State contends that it filed a motion seeking production of affidavits, that the motion was granted, and that Mr. Reed willfully refused to comply with such an order. These facts are false. The State filed a Motion to Compel Production of Documents wherein it

"move[d] the Court for an Order compelling delivery of Mr. Reed's appendix within ten (10) days to the State of Florida" (PC-R. 218).[3] The State obtained ex parte the judge's signature on a draft order before service occurred. The order obtained ex parte provided "within ten (10) days of this Order a Capital Collateral Representative shall deliver the appendix to Grover Reed's 3.850 motion to the State" (PC-R. 220). Undersigned counsel who was not originally assigned to Mr. Reed's case checked with Mr. Tom Dunn, the original attorney assigned to the case, who had resigned from CCR subsequent to the filing of Mr. Reed's motion to vacate. Mr. Dunn indicated that "an appendix" had not been prepared. Undersigned counsel filed a response to the order containing this information (PC-R. 221). Mr. Reed then filed a motion to disqualify the presiding judge because of the ex parte contact which occurred and resulted in said order. Mr. Reed relied upon the discussion in Rose v. State, 601 So. 2d 1181 (Fla. 1992), where this Court invalidated an order obtained in an ex parte fashion. The presiding judge recused himself, and a new judge was assigned (PC-R. 292). Meanwhile, the State filed its "Motion to Produce" (PC-R. 223). Mr. Reed responded to this motion on June 22, 1992 (PC-R. 293). This Motion to Produce sought "a copy of contents of the files for the Defendant's trial attorney, appellate attorney and clemency attorney. The State's demand is for a copy of the entire files of these attorneys who

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[3]No request was made for "affidavits", and no authority was cited for the proposition that discovery is available to the State in post-conviction proceedings.

represented the defendant" (PC-R. 223). The State filed its "Response to Motion for Post Conviction Relief" on June 29, 1992 (PC-R. 295). The case was set "for oral arguments on all pending motions on Thursday, July 23, 1992 at 1:30 pm."[4]

At the argument of these motions, the State argued its Motion to Produce. During the argument the State admitted having "spoken to Mr. Nichols on a number of occasions" regarding Mr. Reed's 3.850 motion (PC-T. 89). According to the State, Mr. Nichols claimed to not have retained the original trial file. Collateral counsel for Mr. Reed explained that CCR had a copy of the trial file, and that Mr. Nichols had retained the original (PC-T. 88).

At the end of the July 23, 1992, proceedings, the circuit court directed the parties "to submit proposed orders" (PC-T. 95). The State submitted only one draft order which denied the motion to vacate.[5] The judge signed the State's draft order without any changes. No order was proposed by the State on its "Motion to Produce." Further, no order was ever entered directing Mr. Reed or his counsel to produce discovery. The only order entered on the matter was obtained ex parte with no notice to Mr. Reed or an opportunity to be heard. This Order was

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[4]This order was not contained in the record. However, Mr. Reed's motion to supplement the record with the order has been granted.

[5]Mr. Reed submitted draft orders ruling upon each motion then pending. These draft orders were not part of the record. Mr. Reed's motion to supplement the record with these draft orders has been granted.

clearly in violation of Rose v. State and Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). Furthermore, it only ordered the delivery of "the appendix to Grover Reed's 3.850 motion to the State" (PC-R. 220). However, no appendix had been prepared. Affidavits had been prepared and were quoted in the motion to vacate.[6]

The Order on Motion for Post-Conviction Relief had no attachments. The order denied the Chapter 119 claim, saying, "At the hearing the petitioner failed to establish any nondisclosure and the State asserted full compliance" (PC-R. 309). However,

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[6]At the July 23rd oral argument, Mr. Reed's counsel explained to the circuit court the difference between an appendix and affidavits:

> MR. MCCLAIN: He obtained an order granting that motion before I ever received the motion let alone had a chance to respond. I never got to say what are you talking about. There is no appendix. Do you know what the word appendix means? It's an attachment. We didn't do an attachment to the 3.850 in this case.
>
> The order directed me to provide an appendix. There was not an appendix. Now there are statements and there is a doctor's report, and they are quoted in the 3.850. Mr. Menser indicates he doesn't know who my doctor is. The report quotes in there Dr. Larson. The affidavits are quoted in there. They are in there.
>
> I have another case pending in Jacksonville, Leo Jones, and in that case John Jolly [the Assistant State Attorney] has stipulated that there is no discovery in 3.850 proceedings. I am not entitled to the state's statements. They are not entitled to mine, and for some reason in this case now the statements that are quoted in the 3.850 are supposed to be turned over.

the "hearing" was set as an "oral argument." No evidentiary hearing was permitted upon Mr. Reed's Chapter 119 claim.[7]

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[7]At the July 23rd oral argument, Mr. Reed asserted that the State Attorney's Office had not complied with Chapter 119:

> Finally, the last claim I want to address was claim number one which is the chapter 119 claim, Your Honor. With regard to that, in response the state indicates that -- at least my reading of it indicates that there are other items that the state has decided are exempt and not subject to disclosure under chapter 119.
>
> In responding to the motion to vacate the state says the handwritten notes alluded to in paragraphs 8 and 9 however fall under Kokal. Your Honor, the case law from the Florida Supreme Court, Provinsano [sic], Kokal, Jennings, most recently Mendyk indicate if there is a question about an exemption it should go to Your Honor for an in camera inspection.
>
> I am entitled to that. I am entitled to have you say, yes, this exception applies, and that is what is done in other cases throughout the state. That was -- is what is done in Mr. Engle's case.
>
> Interestingly enough Mr. Bateh in that case indicated that an one in file was all of the state attorney's files, but when his office was recused and a different State Attorney Office came in they discovered three banker boxes and they disclosed one of the three and gave the other two to Judge Olliff for in camera inspection.
>
> That's the proper procedure is an in camera inspection if there is a question about an exemption. The state wants to exempt something they need to have you agree that it's properly excepted.

(PC-T. 66-67).

As to Mr. Reed's claims of ineffective assistance, the order denying stated:

> Given Mr. Reed's decision to withhold evidence from the Court and to invoke the attorney-client privilege, no evidentiary hearing can be conducted. The loss of this crucial evidence would render any subsequent hearing pointless.

(PC-R. 313).

> During oral argument, counsel for Mr. Reed opposed disclosure on the grounds that Rule 3.850 proceedings are "criminal prosecutions", specifically arguing that Rule 3.850 appears in the Rules of Criminal Procedure. This assertion stands in direct conflict with Mr. Reed's prior invocation of Ch. 119, Florida Statutes, which was dependent upon the civil nature of Rule 3.850. This abrupt change in Mr. Reed's position could be attributed to a willful avoidance of discovery.

(PC-R. 313).

> Although the Court does not find any sanctionable misconduct (see Rule 4-3.4 Code of Professional Responsibility) this Court considers Mr. Reed's three misstatements of law and his refusal to disclose his files as record evidence of the unreliable nature of his legal and factual assertions. Thus, Reed has deprived himself of any prima facie presumption of correctness which might otherwise apply to his petition.

(PC-R. 314).

> Since Mr. Reed invoked his privilege there are no files or records before this Court which support his conclusory accusations. On the face of the record, therefore, the claim is denied.

(PC-R. 316).

Clearly, the State's assertion that "[a]bsolutely no 'sanctions' were imposed for any failure to comply with

discovery" (Answer Brief at 4) is patently false. The motion was not accepted as true because of this so called "refusal to disclose his files." An evidentiary hearing was not conducted because of "Mr. Reed's decision to withhold evidence from the Court."

ARGUMENT I

The State, on page 6 of its brief, states, "The Petition was not dismissed as a sanction." At page 17, the State nonetheless asserts Mr. Reed was sanctioned because "The Court could not trust or rely upon Mr. Reed's representations of fact when he refused to back up his conclusory allegations with the very documents he cited." On page 9, the State says, "Although Mr. Reed's petition was not dismissed as a sanction for his willful and bad faith refusal to provide discovery, the law of this state clearly provides for such a result in proper cases." Thereupon, the State cites Mercer v. Raine, 443 So. 2d 944 (Fla. 1983). Mercer stated, "Florida Rules of Civil Procedure 1.380 clearly authorizes the sanctions imposed by the trial court for the defendant's failure to comply with the court's order." 443 So. 2d at 946 (emphasis added). Here, there was no order, simply a motion by the State.

The State conveniently ignores its ex parte communication with Judge Southwood in order to obtain an order directing Mr. Reed to provide the State with an appendix. As a result of the highly improper ex parte actions by the State, Judge Southwood

recused himself. The State then filed its Motion to Produce which stated:

> Comes now the State of Florida, by and through the undersigned Assistant State Attorney, to demand that the Defendant in this case, provide to the State a copy of the entire files for the attorneys that represented the Defendant.
>
> The State specifically request [sic] a copy of the files for the Defendant's trial attorney, appellate attorney and clemency attorney.
>
> The State's demand is for a copy of the entire files of these attorneys who represented the Defendant.
>
> This demand is intended to include, but not limited to, all documents, notes and reports that these attorneys received, gathered or generated in their capacity as attorney for the Defendant.
>
> The State asserts that in view of the allegations in the Defendant's 3.850 Motion, fairness dictate [sic] that this demand be granted and requests this court to order the Defendant to comply with this demand in a timely fashion.

(PC-R. 223). This motion was never ruled upon.

The State also asserts in its brief:

> The "bottom line", as far as Mr. Reed was concerned, was that Reed did not want a "full", "fair" or "honest" hearing. Mr. Reed wanted to file a claim of "ineffective assistance of counsel" and force the state into an evidentiary hearing in which the evidence would be manipulated by Mr. Reed's attorneys contrary to Johnson v. State, 608 So.2d 4 (Fla. 1992).

This assertion is patently false. Mr. Reed's collateral counsel argued to the circuit court as follows:

MR. MCCLAIN: Mr. Nichols has his original [file] is my understanding and I have a copy of his original. That's what I said.

MR. BATEH: Well, he has -- I would just state that's just not the case. He has Mr. Nichols' file. I have asked for a copy of it. They refused to turn it over.

THE COURT: Let's go back to it, Mr. McClain. You state you have a copy of Mr. Nichols' file?

MR. MCCLAIN: Yes, and, Your Honor, if I may follow up on something Mr. Menser said. Mr. Menser in his argument was indicating they didn't have access to Mr. Nichols. Now we find that they do. Mr. Bateh has been talking to Mr. Nichols.

Clearly there has been communication. Clearly the waiver of the attorney client relationship is not a problem that's precluding them from getting information clearly if Mr. Nichols wants -- if he doesn't have it he hasn't come to me. My understanding is he has got it.

THE COURT: Okay. Let's go back. What is your position on furnishing Mr. Nichols' copy of the file that you have?

MR. MCCLAIN: I don't have a problem with it. My understanding is he has it and that's my understanding from him. Now Mr. Bateh --

THE COURT: What is your position on giving it to them?

MR. MCCLAIN: My position is they need to talk to Mr. Nichols. It's up to him to decide what he needs to disclose to defend himself and what he does not need to disclose. The cannons of ethics indicate that he may disclose only to the extent necessary that requires him to decide, not me.

So at this point in time, yes, there was a hearing today, called upon all the pending

> motions and, yes, if the state wanted to they could have called Mr. Nichols to indicate that he doesn't have the file. The State chose not to do that.
>
> At this point in time the only motion pending before this Court is the motion to -- for C.C.R. to provide a copy of the file which Kite specifically said is not the proper vehicle for accomplishing what they want to accomplish, and in reference to Kite the language in Kite is to hold otherwise would subject the records of a defendant who is unable to retain --
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> THE COURT: I am familiar with that.
>
> MR. MCCLAIN: Okay.
>
> THE COURT: You have read that and I had some connection with that case.
>
> MR. MCCLAIN: Okay, Your Honor. I won't belabor the point. Mr. Menser indicated that they didn't know what the defense lawyer knew because we have the file. That's not true. They apparently have had contact with Mr. Nichols.

(PC-T. 89-91)(emphasis added).

Thus, contrary to the State's current misrepresentations, it had access to Mr. Nichols. Moreover, Mr. Nichols had access to his trial file, either because as collateral counsel asserted Mr. Nichols retained the original or because collateral counsel would make the copy CCR possessed available to Mr. Nichols upon a request from Mr. Nichols.

Mr. Nichols was not present at the proceedings below. Thus, there is no indication of what his position was with regard to attorney-client privilege. However, the State asserted numerous conversations with Mr. Nichols had occurred, and did not claim

that Mr. Nichols refused to answer questions because of attorney-client privilege.

Nevertheless, Mr. Reed's Motion to Vacate was denied as a sanction. The circuit court determined[8] that Mr. Reed's failure to disclose the trial, appellate, and clemency attorneys' files without being ordered to do so and his arguments in opposition to the State's motion to produce deprived him of the right to have his allegations taken as true ("Reed has deprived himself of any prima facie presumption of correctness which might otherwise apply to his petition" (PC-R. 314)). Further, the circuit court concluded, "Given Mr. Reed's decision to withhold evidence from the Court and to invoke the attorney-client privilege, no evidentiary hearing can be conducted" (PC-R. 313).

This ruling denied Mr. Reed his due process rights. Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). He was punished for simply opposing the State's motion. A reversal is required.

ARGUMENT II

The State argues that Mr. Reed was not entitled to an evidentiary hearing. The crux of its argument comes down to the last sentence in this section of the State's brief: "While a presumption of correctness does apply to allegations made in a Rule 3.850 petition, that presumption came to be forfeited in

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[8]Actually, all the circuit court did was sign the draft order submitted by the State.

this case" (Answer Brief at 20). The State cites no authority for this novel argument.

This Court has explained that the issue in a Rule 3.850 proceeding is whether, "[a]ccepting the allegations [contained in the 3.850 motion] at face value, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." Harich v. State, 484 So. 2d 1239, 1241 (Fla. 1986). Nowhere in those opinions, however, is there any mention of a movant's forfeiture of his right to have his allegations taken as true.

The State argues that this forfeiture arose when "[t]he State, in the interests of a full, fair and honest disposition of the case, sought access to the non-privileged files cited by Mr. Reed and a copy of the mysterious affidavits allegedly possessed by CCR" (Answer Brief at 20). However, the State chooses to present false facts to this Court.

First, there was nothing honest and fair about the State's conduct. It prepared a motion which concluded:

> WHEREFORE, the State moves the Court for an Order compelling delivery of Mr. Reed's appendix within ten (10) days to the State of Florida and a copy to be filed with the Court.

(PC-R. 218). This motion contained a wordprocessor identification "8630821.SDI" at the bottom. The typists initials also appeared as "kb." On the same date that the motion was

filed an order granting the motion was also filed. This order provided:

> This cause, coming on to be heard on the motion of the Assistant State Attorney, and the Court being otherwise fully advised in the premises, it is
>
> ORDERED AND ADJUDGED that within ten (10) days of this Order a Capital Collateral Representative shall deliver the appendix to Grover Reed's 3.850 motion to the State with a copy also filed with the Court. Additionally, the State shall have 15 days from the receipt of this appendix for the filing of a response.
>
> DONE AND ORDERED at Jacksonville, Duval County, Florida, this 11th day of May, 1992.

(PC-R. 220). This order contained a wordprocessor identification "8630821.SD2" at the bottom. The typists initials also appeared as "kb." Mr. Reed's counsel was given no notice of the ex parte contact and no opportunity to respond to the motion or be heard in any fashion before Judge Southwood signed the State's draft order.

Second, the order, clearly drafted by the State, said nothing about affidavits. Mr. Reed was ordered to turn over a non-existent appendix. Mr. Reed was never given the chance to explain that there was no prepared appendix.[9] Mr. Reed did file a motion to disqualify Judge Southwood on the basis of the ex parte contact pursuant to Rose v. State, 601 So. 2d 1181 (Fla. 1992). This motion was granted. Further under Rose, the order

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[9]Perhaps, the confusion can be explained benignly if the State truly does not know the difference between an "appendix" and an "affidavit."

obtained in an ex parte fashion is void. However, Mr. Reed did respond to the order explaining that there was no appendix (PC-R. 221). Thereafter, the matter was not further pursued by the State.

As to the State's request for "access to the non-privileged files" (Answer Brief at 20), the State filed a motion requesting:

> The State specifically request [sic] a copy of the files for the Defendant's trial attorney, appellate attorney and clemency attorney.
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> The State's demand is for a copy of the entire files of these attorneys who represented the Defendant.
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> This demand is intended to include, but not limited to, all documents, notes and reports that these attorneys received, gathered or generated in their capacity as attorney for the Defendant.
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> The State asserts that in view of the allegations in the Defendant's 3.850 Motion, fairness dictate [sic] that this demand be granted and requests this court to order the Defendant to comply with this demand in a timely fashion.

(PC-R. 223)(emphasis added). It is clear on its face that this motion was not for "access to the non-privileged files" (Answer Brief at 20).

Moreover, Mr. Reed's position at the oral argument on this motion was as follows:

> MR. MCCLAIN: Mr. Nichols has his original [file] is my understanding and I have a copy of his original. That's what I said.
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> MR. BATEH: Well, he has -- I would just state that's just not the case. He has Mr.

Nichols' file. I have asked for a copy of it. They refused to turn it over.

THE COURT: Let's go back to it, Mr. McClain. You state you have a copy of Mr. Nichols' file?

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> MR. MCCLAIN: Okay, Your Honor. I won't belabor the point. Mr. Menser indicated that they didn't know what the defense lawyer knew because we have the file. That's not true. They apparently have had contact with Mr. Nichols.

(PC-T. 89-91).

In its brief the State asserts, "it must be noted that Mr. Reed's appellate desire for a 'full and fair' evidentiary hearing is inconsistent with the position he assumed below. In addition, it was Mr. Reed -- not the state -- who compelled the court to rule on the basis of the record" (Answer Brief at 19). This statement is false. The State is trying to hoodwink this Court.

An evidentiary hearing must be ordered under this Court's well established law.

ARGUMENT III

The State argues that contrary to Mr. Reed's allegations experts were retained. The State cites to "R. 208, 210, 212, 218" as supporting its contention (Answer Brief at 18). These citations are to motions made by Mr. Nichols for authorization to incur expenses. Mr. Nichols sought to travel to St. Louis,

Missouri, for depositions of two witnesses (R. 208), he sought authority to retain an investigator (R. 210), he sought authority to obtain a transcript of the deposition of an FDLE Analyst (R. 212), and he sought authority to obtain copies of depositions conducted by the Public Defender's Office (R. 214). The record does not reflect that Mr. Nichols followed through on these simple requests. There is no record of an investigator ever being retained. Moreover, investigation did not occur. Just as importantly, the citations submitted by the State do not support the State's contention ("Counsel consulted, deposed and obtained funds for experts" (Answer Brief at 18)). Mr. Reed has alleged, and the record does not refute, that Mr. Nichols failed to obtain the necessary assistance of experts.

Mr. Nichols put on no evidence on behalf of Mr. Reed. The State cites to Mr. Nichols' explanation on the record of why he presented no evidence. Mr. Nichols indicated he had no witnesses of substance to present (R. 719). However, Mr. Nichols had not investigated. The failure to adequately investigate renders strategic decisions uninformed and unreasonable. Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). Again, Mr. Reed's allegations are not refuted by the record.

Ultimately, the State's argument, here, once again turns to its contention that Mr. Reed lost the benefit of this Court's holding that allegations in a motion to vacate must be accepted as true ("The disingenuous representations of 'fact' however, did detract from, any presumption of correctness that might

ordinarily attach to a 3.850 petition." (Answer Brief at 29)). The State's position is without merit. Mr. Reed's factual allegations must be accepted as true unless conclusively rebutted by the record. Under that standard, Mr. Reed was and is entitled to an evidentiary hearing.

ARGUMENT IV

Mr. Reed's Rule 3.850 motion specifically alleged that Mr. Nichols did not investigate or prepare for the penalty phase. The Rule 3.850 motion also specifically alleged the mitigating evidence which could have been discovered had counsel investigated. For example, the motion quoted from affidavits of Mr. Reed's family members, friends and former teachers who described Mr. Reed's life history. The motion also quoted from prior mental health records regarding Mr. Reed. Further the motion quoted the report of Dr. Larson, a clinical psychologist who determined that psychological testing and Mr. Reed's history established statutory and nonstatutory mitigating factors. The factual allegations contained in the Rule 3.850 motion are not conclusively refuted by the record, and thus an evidentiary hearing is required.

Without addressing Mr. Reed's factual allegations, which must be taken as true in these proceedings,[10] the State simply

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[10]The State appears to contend that Mr. Reed's allegations are not "believable under the circumstances at bar" (Answer Brief at 30). Thus, again, with no citation of authority, the State argues that the "presumption of correctness" cannot be applied to Mr. Reed's allegations, assumably because Mr. Reed did not turn over files which he was never ordered to turn over.

asserts that Mr. Nichols made a strategic decision not to present mitigating evidence and that Mr. Reed cannot establish prejudice because the mitigating evidence "would not compel a life sentence" (Answer Brief at 30). Regarding Mr. Nichols' supposed strategic decision, first, such a determination cannot be made without an evidentiary hearing.[11] Second, a strategic decision cannot be made without proper investigation, see Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), and Mr. Reed's motion specifically pled that Mr. Nichols did not conduct the necessary investigation.

Regarding Strickland's prejudice prong, the State's argument relies on an erroneous proposition of law. Prejudice is established when there is reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Id. Mr. Reed's factual allegations more than undermine confidence in the outcome, and thus require an evidentiary hearing.

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[11]Indeed, the cases cited by the State to support its argument regarding a supposed strategic decision (see Answer Brief at 30, citing Rose v. State, 617 So. 2d 291 (Fla. 1993); Jones v. State, 528 So. 2d 1171 (Fla. 1988)), are cases in which an evidentiary hearing was held and trial counsel testified about their penalty phase decisions.

ARGUMENT V

Contrary to the State's contention that this argument was not presented in the Rule 3.850 motion (Answer Brief at 30), this argument was Claim VI of the Rule 3.850 motion.

ARGUMENT VII

The State argues that Mr. Reed's Chapter 119 claim "was not argued or proven by Mr. Reed during oral argument" (Answer Brief at 31). The State does not explain how one can "prove" a claim at an "oral argument" and ignores the fact that Mr. Reed's counsel did argue that the trial court was required to conduct an in camera inspection of withheld documents. Mr. Reed's counsel was noticed to appear "for oral arguments on all pending motions" (emphasis added).[12] At that "oral argument," Mr. Reed's counsel argued that the State Attorney's Office had not complied with Chapter 119 and that the trial court should conduct an in camera inspection of records withheld by the State (PC-T. 66-67). The trial court erroneously failed to conduct the required in camera inspection. Reversal is required.

CONCLUSION

For all the reasons explained herein and in Mr. Reed's initial brief, Mr. Reed respectfully requests that this Court reverse the lower court, grant relief, remand for an evidentiary hearing and proper Chapter 119 compliance, and grant any other relief which the Court deems just and equitable.

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[12]The record is in the process of being supplemented with this order.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 21, 1993.

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