IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,927

RAYMOND MICHAEL THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
Florida Bar No. 0754773

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
FOR THE SOUTHERN REGION
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

Rule 9.210 of the Florida Rules of Appellate Procedure provides that: "The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." The Statement of the Case and Facts in the Answer Brief is twenty pages long. Nowhere does it clearly specify areas of disagreement with the Statement of the Case contained in the Initial Brief or with the Supplemental Statement of the Case and the Facts contained in the Corrected Supplemental Brief.[1]

The Answer Brief contains pro forma information not relevant to the issues. It discusses the 119 proceedings before Judge Lebow ignoring the fact that new 119 records were turned over to Mr. Thompson's counsel who was not given the standard sixty day period to review those documents and amend his 3.850 motion. It also seeks to blame the assigned Assistant State Attorney for "mistakenly" agreeing to allow Mr. Thompson's counsel to obtain 119 materials that state agencies had not previously turned over (AB at 8). This allegation reveals opposing counsel's belief that footdragging is the more appropriate response to a 119 request by

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[1]In a footnote, the Answer Brief does correct a mistake made in a footnote in Argument I of the Initial Brief. In footnote 2 of the Initial Brief, Appellant mistakenly said the that Judge Kaplan denied the Motion to Vacate three days after it was filed. The State correctly points out that the order denying the Motion to Vacate was entered thirty two days after the Motion to Vacate was filed. In any event, the order denying was entered before the State had a chance to respond to the Motion to Vacate.

a death sentenced individual. It is the prevalence of that attitude that has caused protracted 119 proceedings. If the Assistant Attorney General had advised the various state agencies involved to turn over public records as soon as possible, perhaps the process in this case and others would have moved faster. However, the Assistant Attorney General's criticism of the Assistant State Attorney's cooperative attitude exposes the real problem. Mr. Thompson's collateral counsel received 119 materials five and one half years after his initial requests. His counsel was given twenty days to review those voluminous documents and amend (PC-R2. 420).

ARGUMENT IN REPLY

INTRODUCTION

The State's Brief fails to address contra authority. Mr. Thompson's Initial Brief was filed in October of 1993. Since that time, numerous cases have been decided by this Court and the Eleventh Circuit which are directly contrary to the rulings below and the State's position in its Answer Brief and which are not addressed in the State's Answer Brief. These uncited cases, contrary to the State's position, include Rivera v. State, 23 Fla. L. Weekly S___ (Fla. June 11, 1998),[2] Mordenti v. State, 23 Fla.

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[2]While the Rivera opinion is cited at page 72 of the Answer Brief, the State ignores that portion of the opinion finding error with the circuit court's application of a procedural bar to an ineffective assistance of trial counsel claim. Rivera at n.9. The State does not address the impact of that decision on Judge Kaplan's application of a procedural bar to Mr. Thompson's claim that he received "ineffective assistance of trial counsel pertaining to the sufficiency of a mental health evaluation for sentencing purposes." See Order Denying Defendant's Motion for

L. Weekly S287 (Fla. May 28, 1998); Valle v. State, 705 So. 2d 331 (Fla. 1997);[3] Ventura v. State, 673 So. 2d 479 (Fla. 1996); Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995);[4] Huff v. State, 622 So. 2d 982 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993);[5] and Hoffman v. State, 571 So. 2d 449 (Fla. 1990).[6]

SUPPLEMENTAL ARGUMENTS I AND II

The first issues addressed in the Answer Brief concern Mr. Thompson's claim of judicial bias. In responding to Mr. Thompson's arguments, the State seems determined to misunderstand. The

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Rehearing, incorporating state's response, and page two of that Response, asserting the ineffectiveness claim was procedurally barred.

[3]The Valle opinion is cited at page 51 of the Answer Brief. However, the State ignores that portion of the Valle opinion indicating that nothing in Rule 3.850 requires the attachment of affidavits. And as explained in Justice Wells' opinion concurring in part and dissenting in part, not only were no affidavits attached, but the identity of the witnesses who would support the allegations was not revealed. Yet, this Court, joined by Justice Wells, reversed and remanded for an evidentiary hearing on an issue where the identity of witnesses was not disclosed in the motion to vacate.

[4]The Porter opinion was relied upon in the Corrected Supplemental Initial Brief filed May 29, 1998. Yet, the State in its Answer Brief does not address the Porter opinion. See Table of Citations in the Answer Brief.

[5]The Walton opinion was cited in the Initial Brief filed on October 11, 1993, yet it is ignored in the State's Answer Brief. See Table of Citations in the Answer Brief.

[6]The Hoffman opinion was cited in the Initial Brief as establishing that the order entered by Judge Kaplan was inadequate and failed to conduct a proper analysis of the 3.850 motion. The Answer Brief at 13 includes a reference to the Hoffman opinion as it relates to jurisdiction over out-of-county agencies (actually the State cites the wrong Hoffman opinion). But there is no effort to discuss the adequacy of Judge Kaplan's order under Hoffman.

deposition of Judge Kaplan in State v. Lewis is clearly the basis of Mr. Thompson's claim that he did not have an impartial judge at his sentencing proceeding. Accordingly, Mr. Thompson did not have the factual basis for the claim prior to the deposition. The State's constant reference to the fact that Mr. Thompson did not raise the claim prior to the deposition is a blatant attempt to raise a red herring.[7]

A. Bias at the time of trial and sentencing.

The State says in its Answer Brief: "Nothing in Judge Kaplan's deposition even remotely implies that he was predisposed to sentence Thompson to death. Likewise, nothing in the deposition implies that he would automatically reject mitigation or accept aggravation" (AB at 31). The State's argument on this claim comes down to whether those two quoted sentences are correct and incorporate the proper test for determining judicial bias.

First, the State is in error in its analysis of the factual allegations in this case. Judge Kaplan has stated under oath his judicial philosophy as to "convicted violent people, yes, that's my role, to make sure I keep them off the streets so that they don't bother you and me." (PC-R2. 779). Judge Kaplan stated: "And, yeah,

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[7]The State never explicitly argues that the failure to raise the issue prior to the deposition was a waiver of the issue. But clearly the constant reference to an irrelevant fact would seem to be an effort to get this Court to ponder whether Mr. Thompson's failure to assert the matter previously was some kind of a waiver. However, the claim was raised timely following Judge Kaplan's deposition in State. v. Lewis on August 25, 1996. As the State concedes, the Motion to Vacate which included the judicial bias claim was filed on March 7, 1997 (seven months later).

I want to get them off the streets if they're convicted of violent crimes, right." (PC-R2 779). Judge Kaplan explained that this meant that "sometimes [he] would give them a little stiffer sentence so they'll spend some more real time in jail" (PC-R2. 783). Judge Kaplan further elaborated: "But, yes, I do - - did give them higher sentences so that they could spend more time in jail than what I might normally because of the system" (PC-R2 786). Judge Kaplan justified this philosophy saying: "I say you got to fight fire with fire. And that's what I mean" (PC-R2. 786).

These statements by Judge Kaplan establish that when an individual was convicted in his courtroom of a violent offense, he did not follow the law when it came to the sentencing decision. He fought fire with fire by imposing a stiffer sentence than was otherwise provided for to accomplish his own objective.[8] Ray Thompson was convicted in Judge Kaplan's courtroom of a violent offense. Judge Kaplan overrode a jury's life recommendation and imposed a sentence of death. Mr. Thompson has alleged that Judge Kaplan followed his personal philosophy, and not those embodied in Tedder v. State, 322 So.2d 1 (Fla. 1975), in imposing the sentence of death.

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[8]Clearly, Judge Kaplan did not and does not follow the law in these circumstances. He felt the law was and is too lenient for those convicted of violent crimes. He would thus determine what sentence he personally felt should be served and then pronounce a sentence that would accomplish his personal goal. There really can be no question but that a juror who expressed this point of view during voir dire would be excusable for cause, and this is because such a juror would not be following the law as determined by the legislature. See Morgan v. Illinois, 504 U.S. 719 (1992).

Second, the State is in error as to the what constitutes judicial bias which violates due process. The State's position seems to be that since Judge Kaplan's statements were directed at all defendants convicted of a violent offense and not just at Ray Thompson, judicial bias was not present in Mr. Thompson's case. The State's position is absurd.[9] The statements of Judge Kaplan show that once someone was convicted of a violent crime in his courtroom he would impose a higher sentence than would otherwise be imposed to accomplish his own personal agenda. That is the definition of bias. See Black's Law Dictionary, Fifth Edition, at 147 (Bias.... Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of the mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case").

Due process requires "a fair and impartial tribunal." Porter v. Singletary, 49 F.3d 1483, 1488 (11th Cir. 1995).[10] "The Due Process Clause entitles a person to an impartial and disinterested

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[9]The fact that Judge Kaplan did not single Mr. Thompson out for special bias, but instead treated all defendants convicted of violent crimes the same, does not ameliorate the due process violation. Judge Kaplan testified that he would impose higher or stiffer sentences than would otherwise be imposed because he disagreed with how the process of law was working. He believed that if he followed the law, violent offenders would get out sooner than he, Judge Kaplan, desired.

[10]The State never once addresses Porter v. Singletary in its Answer Brief. The obvious explanation for this failure is that the State cannot distinguish Porter which found an evidentiary hearing to be warranted for a judicial bias claim.

tribunal in both civil and criminal cases." Marshall v. Jerrico, 446 U.S. 238, 242 (1980). Judge Kaplan by his own testimony did not apply the law with cold neutrality when sentencing a defendant convicted of a violent offense. He acknowledged an interest, an agenda, to "fight fire with fire", to impose a sentence which would be stiffer than would otherwise occur under the law in order to put the defendant away longer than the operation of law would provide for. This is analogous to the constitutional defect discussed in Stringer v. Black, 112 S. Ct. 1130 (1992). There, the consideration of an improper aggravating circumstance in a capital sentencing proceeding was compared to placing an extra (and improper) thumb on the death side of the scales used to weigh aggravation and mitigation. Certainly, Judge Kaplan's sworn testimony establishes that he routinely resorted to placing an extra thumb on the scales of justice in order to impose a stiffer or higher sentence than otherwise called for. Under the law, this is judicial bias which violates due process.[11]

B. Bias at the time of the 3.850 proceedings.

The State certainly missed the point of Mr. Thompson's argument regarding judicial bias in the 3.850 proceedings. First, when the 3.850 was filed in 1991 and presided over by Judge Kaplan,

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[11]This judicial bias must be placed in context. Judge Kaplan overrode a jury's life recommendation. When this Court conducted the direct appeal, this Court did not know that Judge Kaplan would impose higher or stiffer sentences than the law called for in order to accomplish his own personal goal of insuring that a defendant convicted of a violent crime served the sentence he believed appropriate and not the more lenient one the law may call for.

Mr. Thompson was a defendant who had been convicted of a violent crime in Judge Kaplan's courtroom. As such, Mr. Thompson was before a judge who admitted that he believed in "fighting fire with fire". Judge Kaplan admitted that he viewed such defendants and their lawyers with a jaundiced eye. After someone was convicted of a violent crime, Judge Kaplan said "I look at them with skepticism." Yet, Judge Kaplan proceeded to preside over Mr. Thompson's 3.850, and on October 24, 1991, he filed with the clerk his order denying Mr. Thompson's 3.850. The order was entered thirty-two days after the 3.850 was filed. The State was not ordered to respond, and the order accused Mr. Thompson of filing the motion as "merely a delaying tactic" (PC-R. 38).[12]

When Mr. Thompson filed his 3.850 in September of 1991, Rule 3.850 allowed him two years from the date that his conviction and sentence of death became final to file a motion to vacate. Mr. Thompson's 3.850 was filed "almost sixteen months" after his conviction and sentence became final (AB at 3). As the State concedes, the 3.850 was filed over eight months before the expiration of the two year time limit. Yet, Judge Kaplan called the early filing a delaying tactic.

Judge Kaplan was also critical of Mr. Thompson for waiting until five years after his criminal trial in 1986 to make public records requests: "Thus, the defendant has had over five years

[12]In <u>Ventura v. State</u>, 673 So 2d 479, 481 (Fla. 1996), this Court addressed nearly identical circumstances and found that "the trial judge erred in prematurely considering and dismissing Ventura's original rule 3.850 motion".

within which to investigate and state his claims for relief, and to provide this Court with sufficient factual documentation to support same" (PC-R. 37). Whatever Judge Kaplan's view, Mr. Thompson's actions were legitimate and authorized by law. See Ventura v. State, 673 So. 2d 479 (Fla. 1996)(As here, a convicted capital defendant represented by CCR filed an incomplete motion to vacate well in advance of the then applicable two year date and sought the circuit court's assistance in obtaining public records. This Court found "the trial judge erred in prematurely considering and dismissing Ventura's original rule 3.850 motion and that Ventura must be allowed to amend his original rule 3.850 motion once all public records issues have been resolved").[13] Judge Kaplan's actions here were consistent with his testimony in State v. Lewis. He disagreed with how the law operated and what it provided for, and so he ignored it and did what he thought would keep Mr. Thompson off the streets for as long as possible.

After receiving Judge Kaplan's order denying the 3.850, Mr. Thompson filed a timely motion for rehearing.[14] The State filed

[13]Again, the State's Answer Brief never cites to, let alone tries to distinguish, the Ventura opinion. This Court should assume that the State's silence reflects its inability to explain why Ventura does not control.

[14]The State indicates in its Answer Brief that "Thompson miraculously filed a 154-page 'Motion for Rehearing.'" Presumably, the word "miraculously" is intended to reflect upon the ability to generate such a lengthy pleading in so short of time. However, it was not uncommon for CCR to generate lengthy pleadings under warrant in 1991. When Judge Kaplan's shockingly erroneous order arrived, CCR treated Mr. Thompson's case as under warrant in order to put the Motion for Rehearing together as fast as possible.

Despite using the word "miraculous" to describe the Motion

a Response to the Motion for Rehearing approximately fifty (50) days later. On May 10, 1993, almost eighteen months later,[15] Judge Kaplan entered an Order Denying Defendant's Motion for Rehearing which disposed of Mr. Thompson's claims in the following fashion: "A hearing in this cause is not necessary. The defendant's motion is hereby DENIED based upon the reasons set forth in the state's response which is attached hereto with the relevant portions of the record" (PC-R2. 285). This order, entered by Judge Kaplan, is apparently the operative order disposing of all of the issues in the case except those discussed in the Corrected Supplemental Initial Brief.[16] Judge Lebow refused to go behind this order. To the extent that Judge Kaplan was a biased judge as his Lewis deposition indicates, Mr. Thompson was deprived of due process in the 3.850 proceedings. Huff v. State, 622 So. 2d 982 (Fla. 1993).

As to Judge Kaplan's presiding over the 3.850 proceedings, the State spends most of its time discussing Judge Kaplan's order disqualifying himself in October of 1995, in which he indicates

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for Rehearing, the State elsewhere throughout its Answer Brief disparages the quality of the Motion for Rehearing. Certainly, consistency is not a hallmark of the Answer Brief.

[15]There is certainly some irony in Judge Kaplan's criticism of Mr. Thompson's delay in filing his motion to vacate nearly sixteen months after his conviction became final (when the law allowed two years) and Judge Kaplan's waiting eighteen months to rule on the motion for rehearing.

[16]Judge Kaplan's order denying rehearing does not comply with Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). Judge Kaplan conducted no analysis of the issues and made no effort to explain how the attachments in any way conclusively refuted the allegations. Even though Hoffman was cited in the Initial Brief, the State makes no effort in its Answer Brief to explain how Judge Kaplan's order was adequate.

that the basis for disqualification is the personal friendship he has developed with Mr. Thompson's trial counsel, Roy Black. The order indicated that this friendship had developed within the past "year or so" (AB at 7). The State focuses upon the portion of that phrase it likes: the past year. It ignores the vague phrase: "or so." In May of 1993, Judge Kaplan denied Mr. Thompson's Motion for Rehearing, and in doing so found his good friend, Roy Black, not to have been ineffective. This was two years and five months before the order disqualifying Judge Kaplan. It is certainly not outside the range of what could have been meant by the phrase the past year or so.[17]

The State also argues that, while the case was on a limited remand as to 119 issues, Mr. Thompson was obligated to raise an issue outside the remand and argue that Judge Kaplan's newly disclosed relationship with trial counsel should have caused the judge to disqualify himself before denying the motion for rehearing.[18] The State's position is once again inconsistent with

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[17]Moreover, Judge Kaplan's order recusing himself acknowledges that "[s]ince the conclusion of the trial in this matter this Judge has developed a personal relationship with trial counsel for the Defendant, Roy Black" (PC-R2. 125). Thus, the judge conceded his "personal relationship" with Mr. Black since the conclusion of Mr. Thompson's trial in 1986, years before the judge found Mr. Black not to have rendered ineffective assistance of counsel.

[18]Of course the State ignores the knotty issue of how such a matter was to have been raised during the limited remand. This Court retained jurisdiction over the remainder of the case not remanded. Judge Lebow was not free to act as an appellate court and review Judge Kaplan's orders for error. She had jurisdiction over the hearing on the claimed exemption and over other 119 issues which the State Attorney's Office agreed she was to hear.
Mr. Thompson did file an amended 3.850 which included a

its assertions elsewhere within its Brief. The State complained in this Court that Judge Lebow opened up the proceedings to 119 matters outside the scope of the narrow remand. The State still complains about that saying it happened because an Assistant State Attorney "mistakenly" agreed to broadening the scope of the remand.[19] The State should not now be heard to say that Mr. Thompson was free to raise matters during the limited remand other than 119 issues.

As to whether Judge Kaplan properly presided over the 3.850 proceedings, the most important matter is ignored by the State. The Answer Brief does not address Judge Kaplan's deposition testimony that, once a defendant was convicted of a violent crime, he viewed what the defendant or his counsel said with skepticism. Under the circumstances here, Mr. Thompson was denied due process when Judge Kaplan denied his 3.850 and his motion for rehearing. Judge Kaplan had his own personal agenda which he has admitted he placed above the law. Judge Kaplan fought fire with fire, and he want to put away a defendant convicted of a violent offense for as long as possible.

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challenge to his death sentence based upon Judge Kaplan's judicial bias. However, his friendship with Roy Black was a different matter which went to whether he should have presided over 3.850 proceedings, not to the validity of the judgment or sentence itself.

[19]Of course, the Ventura opinion is on point and indicates that this Court would have been forced to reverse and remand for the very 119 proceedings that the Assistant State Attorney agreed to. The actions of the Assistant State Attorney were only a mistake if the goal is to extend the process to longest length of time possible.

SUPPLEMENTAL ARGUMENT III

As to the Chapter 119 issues, the State ignores the bottom line. Over five and a half years after the initial 119 requests, state agencies finally disclosed the public records to which Mr. Thompson was entitled. The Assistant Attorney General did nothing to facilitate this process, and her criticism of the Assistant State Attorney[20] who agreed that a hearing needed to be held in order to insure that Mr. Thompson received all the 119 materials to which he was entitled, is quite telling as to the source of the footdragging.

Moreover, the facts here are virtually identical to the 119 problems discussed in Ventura v. State, 673 So 2d 479 (Fla. 1996), a case not cited by the State, where this Court stated: "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act." Id. at 481. The State's delay in disclosing the 119 materials should not be used to justify denying Mr. Thompson time to review the disclosed material and amend his 3.850 motion. At a minimum, Mr. Thompson should have been afforded sixty days to review the documents and amend. Id. at 482.

ORIGINAL ARGUMENT I

A. The lost state attorney file.

There is no dispute that the State Attorney's Office withheld

[20]Between the proceedings on the original 3.850 and those conduct on the limited remand, a different Assistant State Attorney was assigned the case.

materials claimed to be exempt. Those documents were not turned over for an in camera inspection. Instead, the State lost or misplaced those documents. The State's position is now that withheld documents that are lost, are lost with impunity. If this position becomes the law, there will in the future be a rash of misplaced files. When faced with documents that constitute Brady material or establish evidence of a Card violation, prosecutors can opt for losing the documents knowing that there will be no sanction. Where as here there is an admitted violation of the law, there must be a sanction.

B. FDLE

The State ignores the law in addressing the 119 issues that relate to FDLE. The State never asserts that FDLE has complied with the 119 requests. The State acknowledges that Mr. Thompson challenged FDLE's noncompliance with 119 in his Initial Brief filed in October of 1993. The State asserts that the remand for in camera inspection was limited and did not include other 119 issues until the Assistant State Attorney "mistakenly" agreed that the proceedings on remand should include all 119 matters (AB at 38). The State concedes that Judge Lebow ruled in April of 1996 that she did not have jurisdiction over FDLE.[21] The State seems to concede that the adoption of Rule 3.852 on October 31, 1996, gave Judge Lebow jurisdiction over FDLE, and it acknowledges that on December 10, 1996, Mr. Thompson pointed out that Rule 3.852 specifically

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[21]The State fails to point out that this was pursuant to the State's argument.

gave Judge Lebow jurisdiction over FDLE. Finally, the State observes that Mr. Thompson renewed his efforts to obtain 119 records from FDLE by including in his amended 3.850 a claim that FDLE had failed to fully comply with its obligation to turn over public records (AB at 52-53).

Having conceded all of those facts, the State fails to address or distinguish Ventura, where this Court said "This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure." 673 So. 2d at 481. Despite his entitlement to all public records from FDLE, and despite his entitlement to raise these matters in 3.850 proceedings, Mr. Thompson at the State's urging did not receive the requested public records and was not permitted to be heard on these matters in his 3.850. The case must be reversed and remanded for 119 compliance.

ORIGINAL ARGUMENT II

The State's Brief fails to address Mr. Thompson's argument that Judge Kaplan's order denying 3.850 relief had included no attachments as required by law. The Answer Brief also fails to address Mr. Thompson's complaint that the order denying rehearing "contains no discussion of [the proper] standard and does not explain how the attachments to the court's order refute Mr. Thompson's claims or even mention to which claims the various random attachments are relevant." See Initial Brief at 12. The State's silence must be construed as indicating that the State has no counterargument. In fact, case law indicates the impropriety of

denying a 3.850 without explanation other than to attach a State's response and a State's designation of records. Smothers v. State, 555 So. 2d 452 (Fla. 5th DCA 1990); Oehling v. State, 659 So. 2d 1226 (Fla. 5th DCA 1995).

ORIGINAL ARGUMENT III

In addressing Mr. Thompson's Brady/Giglio claim the State completely ignores Kyles v. Whitley, 115 S. Ct. 1555 (1995), State v. Gunsby, 670 So. 2d 920 (Fla. 1994); and Swafford v. State, 679 So. 2d 736 (Fla. 1996). These cases require cumulative consideration of Brady claims and ineffective assistance claims. Rather than conduct a cumulative analysis, the State engages in its brief in the very compartmental analysis condemned in those cases.[22]

In this case, there was no physical evidence. The conviction was obtained solely upon the credibility of the State's witnesses, and in particular upon the credibility of Bobby Davis who claimed to have been an eyewitness.[23] The allegation that Bobby Davis presented false testimony must be taken as true at this juncture. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The State in

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[22]The State's whole approach is to focus on individual trees in the hopes that the forest will not be noticed. Bobby Davis was the State's case. Despite the presentation of some impeachment, he was believed. However, a wealth of addition impeachment of him existed and for whatever reason did not reach the jury. Whether due to a Giglio violation, or a Brady violation, or a ineffective assistance of counsel, the jury did not hear the whole story about why Bobby Davis should not be believed.

[23]On direct appeal, this Court characterized Bobby Davis as "the state's star witness". Thompson v. State, 553 So. 2d 153 (Fla. 1989).

its Answer Brief refuses to accept the factual allegation as true even though Mr. Thompson has alleged that contrary to Davis' testimony charges in California were in fact pending against him and were dismissed as part of the deal for his testimony against Mr. Thompson. The State's responds to this saying "Thompson has failed to show that dismissal of the California charges were 'a part of his plea bargain.'" (AB at 60). Of course, Mr. Thompson alleged that fact; as for proving it, that is done at the evidentiary hearing which Judge Kaplan at the State's urging refused to conduct. The State's arguments in this claim are simply contrary to the controlling standard for determining when an evidentiary hearing is required.

The State also asserts that trial counsel should have known of some of the available and unused impeachment evidence, so therefore Brady was not violated. Of course, this ignores this Court's ruling in State v. Gunsby, indicating that such circumstances converts the claim to an ineffective assistance of counsel claim.

The State also completely misstates the materiality standard established in United States v. Bagley, 473 U.S. 667 (1985). The proper standard is whether confidence is undermined in the outcome. It is not Mr. Thompson's burden to prove the result would have been different. As is explained in Strickland v. Washington, 466 U.S. 668 (1984), the test adopted in Bagley requires less proof than more likely than not.

The State concedes that the alleged Brady material would have been cumulative to that which Mr. Thompson did present at trial (AB

at 64). In another words, the undisclosed and unused impeachment would have corroborated the impeachment that was presented but which without the corroboration failed to convince the jury that Bobby Davis was not to be believed.

However, the biggest problem with the State's Brief is that it never addresses Judge Kaplan's order denying the 3.850 and order denying the motion for rehearing. Judge Kaplan never explains why the allegations are refuted by the record. In the order denying rehearing, Judge Kaplan simply states: "The defendant's motion is hereby DENIED based upon the reasons set forth in the state's response which is attached hereto with the relevant portions of the record" (PC-R2 285). Judge Kaplan never wrote a single word about the Brady claim. He never explains what the record attachments refuted. The record attachments were attached to the State response to the motion for rehearing but were not referred to in the response. Judge Kaplan's orders do not comply with Hoffman. See Smothers v. State.

ORIGINAL ARGUMENT IV

The State asserts that Judge Kaplan properly denied the ineffective assistance of counsel claim at the guilt phase of the trial on procedural bar grounds. First, Judge Kaplan did not write any thing to indicate what his rationale was other than to say "based upon the reasons set forth in the state's response".

Second, in arguing that an ineffective assistance of counsel claim is procedurally barred the State ignores this Court's recent opinion in Rivera v. State, 23 Fla. L. Weekly at S___ (Fla. June

11, 1998). There, this Court noted that the circuit court had erroneously found an ineffective assistance of counsel claim procedurally barred. In fact, Rule 3.850 was designed specifically for providing a vehicle to raise ineffective assistance of counsel claims.

The State also claims that the evidence that the jury did not hear due to ineffective assistance was cumulative to other impeachment evidence that was heard. This of course means by definition that the evidence supported and corroborated other evidence presented by the defense which failed to convince the jury to reject Bobby Davis' testimony as unworthy of belief. Thus, the evidence was relevant and should have been heard by the jury. Since the jury was not convinced to disregard Bobby Davis' testimony, it is hard to imagine how the evidence could have been cumulative.[24] In Black's Law Dictionary, "cumulative evidence" is explained as evidence "which goes to prove what has already been established by other evidence." Black's Law Dictionary, Fifth Edition at 343. Since Mr. Thompson was convicted on the basis of Bobby Davis' testimony and since the State makes no argument that a conviction could have been obtained without his testimony, the jury obviously did not find that the defense had established by other evidence that Bobby Davis was not to be believed. Either an evidentiary hearing is required because the jury did not hear the evidence corroborating the defense's theory of the case or the

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[24]The State clearly is using the word "cumulative" to mean evidence that is excludable because of its redundancy.

State is conceding that the jury was unreasonable in believing Bobby Davis given the impeachment evidence that was presented. In either event, a reversal is required.

The State also asserts: "The conclusory nature of this claim, however, made it virtually impossible for the State and the trial court to determine whether, in fact, the record refuted this claim. The State submits that it was Thompson's burden to identify specifically the witnesses that were available and the substance of their testimony" (AB at 70). The State's position here needs to be examined. The first sentence is a concession that the trial court erred in denying the 3.850 without an evidentiary hearing. If it was "virtually impossible for the State and the trial court to determine whether, in fact, the record refuted this claim", it is clear that under the law it was improper to deny the claim without an evidentiary hearing. Hoffman v. State, 571 So. 2d at 450. The State tries to justify the deviation from the established and controlling law by its second sentence suggesting that the law should be changed to require the 3.850 movant "to identify specifically the witnesses that were available and the substance of their testimony."[25] What the State fails to note is that this is precisely the position that it took in Valle, and that this Court rejected the State's position. The State's failure to cite Valle

[25]Of course at the time Mr. Thompson's 3.850 motion and rehearing motion were written, the law clearly did not require Mr. Thompson to identify witnesses and the substance of their testimony in his 3.850 motion. Valle. To try to change the law years later and apply it to Mr. Thompson in the circumstances would be, to say the least, unfair.

or attempt to distinguish the result there (remanding for an evidentiary hearing) is most telling. The result here must be the same. As the State concedes, the allegations cannot be refuted by record.[26] Since there is no obligation to identify witnesses in a 3.850 motion nor state the substance of their testimony, Valle controls.

ORIGINAL ARGUMENT V

This claim concerns ineffective assistance of counsel at the penalty phase portion of the trial, and most specifically at the judge sentencing. Having obtained a life recommendation from the jury, counsel failed to provide a reasonable basis for that recommendation. Below, the State's position was that the jury's life recommendation constituted "strong indication that trial counsel's performance was effective" (PC-R2 214). Beyond that the State's argument was simply as follows:

> The evidence presented at trial via the testimony of a mental health professional and family members was used in an attempt to establish statutory and nonstatutory mitigating evidence. (R. 2700-2842). The fact that defendant now presents a more detailed account of his background does not establish that the trial court improperly overrode the jury's recommendation. Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986). The information now being presented does little to diminish defendant's culpability given the fact that it either deals with events remote in time from the murder or focuses on defendant's parents. Francis v. State, 529 So. 2d 670, 672-673 (Fla. 1988). Hill v. State, 515 So. 2d 176, 178 (Fla. 1987).

(PC-R2 214). This is the extent of the reasoning which Judge Kaplan adopted in concluding the files and records conclusively

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[26]Of course this explains why Judge Kaplan engaged in no analysis of how the record refuted the allegations.

refute that numerous statutory and nonstatutory mitigating factors could have been established by trial counsel which if presented would have precluded an override. Under this logic, no individual sentenced to death as a result of an override of a jury's life recommendation could ever plead a basis for ineffective assistance of counsel as to the sentence of death. This is not the law. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994); Heiney v. State, 620 So. 2d 171 (Fla. 1993).

Perhaps sensing the weakness of its position below and Judge Kaplan's reliance on it, the State in its Answer Brief advances arguments never raised below.[27] As to the failure of trial counsel to obtain neuropsychological testing despite Dr. Stillman's specific request for such testing, the State alleges: "Thompson failed to allege, however, what Dr. Haber, or some other psychologist, would have found, whether Thompson would have presented these opinions, and what effect the lack of such would have had on Thompson's ultimate sentence." (Answer Brief at 75). However, Mr. Thompson specifically alleged on page 16-17 of his motion for rehearing:

> Postconviction counsel has provided what trial counsel failed to provide -- adequate background information, sufficient time and access to Mr. Thompson, and proper expert psychological testing. The test results fully substantiate Dr. Stillman's findings of profound memory impairment, increased impulsivity and significant irritability -- all pointing to cerebral damage or insult, most probably the result of Mr. Thompson's vast substance abuse. The expert who conducted this testing and reviewed the background information has concluded

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[27]As to these arguments the State ignores the fact that they were specifically rejected in Valle and Rivera.

> that a wealth of statutory and nonstatutory mitigation could have been documented and convincingly established had the proper time been given to the task before Mr. Thompson's trial. Had counsel provided the expert with sufficient time, the mitigation could not have been rejected by the sentencing judge and the life recommendation could not have been overruled.

(PC-RI 56).[28]

The State asserts even if Mr. Thompson has an expert who would identify statutory and nonstatutory mitigation and corroborate Dr. Stillman's testimony (which Judge Kaplan rejected as not credible), there is no possibility that a reasonable basis for the life recommendation could have been established which would have precluded an override. The State cites this Court's direct appeal opinion decided without the benefit of the additional evidence corroborating Dr. Stillman as its authority for its extraordinary proposition. It ignores the fact that in Heiney and Torres-Arboleda ineffective assistance was found in nearly identical circumstances. In neither case was the direct appeal opinion found to control since the unpresented evidence allegedly not presented due to ineffective assistance was not of record and before this Court at the time of the direct appeal.

Additionally, Mr. Thompson presented in the motion for rehearing a nine page account of his life history detailing numerous recognized nonstatutory mitigating circumstances. See PC-R1 91-111. In response to this detailed recitation of facts which were not presented at the time of the sentencing, the State argues

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[28]This motion for rehearing, as the State has noted, was drafted in fourteen days in order to be filed timely.

that Thompson improperly pled his claim because he "failed to allege, however, [] the names of the witnesses who would have testified to these alleged facts, whether these witnesses were available and willing to testify to such facts, and how these facts would have persuaded the trial court to follow the jury's life recommendation." (Answer Brief at 78). The State fails to acknowledge that this Court specifically rejected such a pleading requirement in Valle. Certainly such a pleading requirement was not found in Rivera. Nor was it found in cases in which ineffectiveness was alleged as to a judge's decision to override a jury's life recommendation. Heiney; Torres-Arboleda. Since such a pleading requirement has not been found in these other cases, it cannot be applied to Mr. Thompson and the pleading he filed in 1991. An evidentiary hearing is required.

ORIGINAL ARGUMENT VI

As to this claim that trial counsel was ineffective in failing to obtain psychological testing, the State asserted below that the claim was procedurally barred. Judge Kaplan adopted the State's response asserting that this ineffective assistance of counsel claim was procedurally barred (PC-R2 208--"The following three claims are procedurally barred...Claim III regarding ineffective assistance of trial counsel pertaining to the sufficiency of a mental health evaluation conducted for sentencing purposes"). In its Answer Brief the State ignores its response to this issue below and ignores the fact that the judge incorporated the response in his order and therefore found the claim procedurally barred.

Presumably, the State chose to ignore the record because this Court so recently noted that this kind of claim cannot be procedurally barred in an initial 3.850. Rivera, slip op. at 7 n.9. As in Rivera because the claim was improperly procedurally barred, the circuit court did not explain how the files and records conclusively refuted the claim nor attach those portions of the record. As in Rivera, an evidentiary hearing is required in Mr. Thompson's case.

ORIGINAL ARGUMENT VII

As to this claim, the State concedes that it was raised in the motion for rehearing, that the State failed to respond to this claim in response to that motion, that Judge Kaplan denied the motion for rehearing on the basis of the response and thus no basis whatsoever was given as to why this claim was denied. The State argues the obvious error was corrected when Judge Lebow entered her order denying relief during the limited remand.[29] However, Judge Lebow made clear she was not acting as an appellate court and would not review the correctness of Judge Kaplan's previous orders denying relief and rehearing. (PC-R2. 730-31). Her subsequent indication that this claim was "denied for the reasons explained in the State's Response to the Defendant's Motion" failed to comply with requirements of Hoffman. See Smothers v. State.

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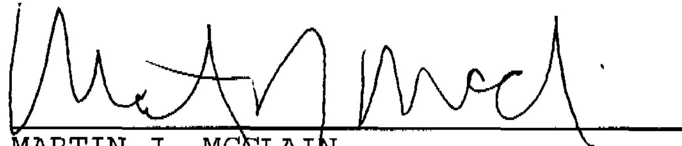
[29]The irony of the State's reliance on Judge Lebow's order is noteworthy given that the opposing counsel has harped for years that Judge Lebow exceeded the scope of the remand when she considered matters other than the in camera inspection of the State Attorney's file.

CONCLUSION

Based upon the reasons stated in the Initial Brief, in the Corrected Supplemental Brief and on the reasons stated herein, Mr. Thompson respectfully urges this Court to reverse and remand.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 17, 1998.



MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Sara D. Baggett
Department of Legal Affairs
1655 Palm Beach Lakes Boulevard
Third Floor
West Palm Beach, FL 33401-2299