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

CORRECTED SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
Florida Bar No. 0754773
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL - SOUTH
1444 Biscayne Boulevard
Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This supplemental initial brief involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the period of relinquishment of jurisdiction from this Court to the Circuit Court for the Seventeenth Judicial Circuit.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"PC-R2."-- corrected supplemental record following relinquishment by this Court.

"PC-T2."--corrected supplemental record (transcripts of proceedings) following relinquishment by this COurt

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson renews his request for an oral argument in this matter. Mr. Thompson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Thompson, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

This is Mr. Thompson's Supplemental Initial Brief. Counsel has endeavored not to repeat facts and arguments contained in the Initial Brief. All arguments and issues raised in the Initial Brief are expressly incorporated herein, an no argument is abandoned or waived. This brief is merely a supplement to the Initial Brief and addresses only those issues which arose during the remand.

SUPPLEMENTAL STATEMENT OF THE CASE AND THE FACTS

Raymond Thompson was found guilty of first degree murder on June 5, 1986. After a sentencing proceeding the jury recommended a life sentence by a vote of 10-2 (R. 2896). Judge Stanton Kaplan, however, overrode the jury recommendation and sentenced Mr. Thompson to death (R. 3340-51). Mr. Thompson appealed his conviction and sentence to this Court, which affirmed. Thompson v. State, 553 So. 2d 153 (Fla. 1989).

On September 19, 1991, a Motion to Vacate the Conviction and Sentence under Fla. R. Crim. P. 3.850 was filed in the circuit court (PC-R. 20). Amongst other claims, Mr. Thompson pled that the State had concealed significant impeachment evidence regarding its key trial witnesses, in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Rule 3.850 motion also pled ineffective assistance of trial counsel during guilt phase for his failure to present impeachment evidence on the key state's witness, to investigate an involuntary intoxication defense, and to retain a mental health expert to discuss the effect of massive

substance abuse on the ability to form specific intent. Mr. Thompson further pled ineffective assistance at penalty phase based on trial counsel's failure to prepare background information, to timely request a mental health evaluation to develop mitigation, and to develop and present statutory and nonstatutory mitigation. The Rule 3.850 motion also pled that state agencies' failures to comply fully with Chapter 119, Fla. Stat., had prevented Mr. Thompson from fully presenting his claims. Judge Kaplan summarily denied the Rule 3.850 motion on September 22, 1991 (PC-R. 39-40).

On November 4, 1991, a Motion for Rehearing was filed (PC-R. 41). Judge Kaplan denied the motion on May 10, 1993 (PC-R. 285). Even though the State withheld documents from Mr. Thompson after he had made requests under Chapter 119, Fla. Stat., Judge Kaplan conducted no review or hearing concerning these documents.

Mr. Thompson, through counsel, filed an Initial Brief with this Court on October 11, 1993. On motion by the State, this Court relinquished jurisdiction to the trial court for the purpose of in camera review of materials withheld by the State Attorney's office pursuant to Mr. Thompson's public records requests, and for such further proceedings as the trial court deemed necessary for proper disposition of the case (PC-R2. 1).

At a hearing held before Judge Kaplan on June 24, 1994, it was revealed there was a conflict of interest between the Assistant Attorney General assigned to the case and Judge Kaplan. Counsel for Mr. Thompson filed a motion to disqualify Judge

Kaplan on June 29, 1994 (PC-R2. 27-36). The motion stated that:

> Mr. Thompson's first opportunity to address this court occurred on June 23, 1994. At that hearing, counsel inquired as to a potential conflict of interest in the relationship between the Attorney General's office and the Court. The substance of the conflict revolves around the Attorney General's office simultaneously representing the Court in the State v. Lawrence Lewis, Case No. 82,930, then, attempting to appear before this Court to litigate the same types of issues on which the court must decide as a neutral arbiter in Mr. Thompson's case.
>
> 1. At the June hearing, the assistant attorney general, Ms. Baggett, stated that "to her knowledge" the office did not represent Judge Kaplan in the Lewis case. See, hearing transcript page 9.
>
> 2. However, during the Lewis oral argument before the Florida Supreme Court, she argued that they did represent the judge and that to represent both the state and the judge is a conflict of interest. See, Lewis oral argument on May 6, 1994.
>
> 3. The Court, then, discovered that he had requested representation by the Attorney General's office:
>
> > THE COURT: I don't know, there may have been contact. Just hold on a second.
> >
> > My secretary says that I didn't talk to them that she did. Your office, the Attorney General's office, and she had talked to the office and that I - they told me I could be represented by them. And that I - I told my secretary, okay fine, have them represent me. So it looks like I have asked for them to represent me.
>
> See, hearing transcript at page 13.
>
> Thereafter, Mr. Thompson moved for a continuance in order that he may file his

written motion to disqualify as is required by Rogers v. State, 630 So.2d 513 (Fla. 1993):

> MR. BRADEN: First off, I think we're losing track. We're not asking you to disqualify. We don't have the motion filed.
>
> We ask that this be stopped, under Rogers, as Rogers sets out by the Florida Supreme Court so we can file a motion to disqualify, also so you can make a decision whether you want to disqualify--
>
> THE COURT: I already made the decision, obviously I have asked the Attorney General to represent myself. If they're going to be involved in this and the State is going to be involved.

See hearing transcript at page 15.

(PC-R2.29-30)

Over a year after counsel for Mr. Thompson filed the motion to disqualify Judge Kaplan, Judge Kaplan recused himself on October 15, 1995 (PC-R2. 102). As grounds for recusing himself, Judge Kaplan noted his personal relationship with Mr. Thompson's trial counsel Roy Black, which had developed into a "close friendship" with Mr. Black and his wife since the conclusion of Mr. Thompson's trial. Judge Kaplan's order made no mention of the grounds set forth in Mr. Thompson's motion to disqualify.

The case was then transferred to Judge Cohn who sua sponte recused himself, due to the fact that his Judicial Assistant, Carol Lohsen, had formerly worked as the judicial assistant for Judge Kaplan, and was scheduled to be deposed in the Lewis proceedings (another capital case involving Judge Kaplan) (PC-R2.

114). The case was next assigned to the Honorable Sheldon M. Schapiro who, pursuant to a motion by the State (PC-R2. 118), recused himself on January 12, 1996 (PC-R2. 135). From Judge Schapiro, the case was then transferred to the Honorable Robert B Carney. Judge Carney sua sponte recused himself at a on January 18, 1996 (PC-R2. 130) At a hearing held on January 18, 1997, Judge Carney explained that his reason for recusing himself was that he was the original prosecutor on the case before his elevation to the bench (PC-T2.181-185). Finally, Judge Susan Lebow was assigned to the case on or about February 12, 1996, two years after this Court's order relinquishing jurisdiction.

Judge Lebow conducted several hearings on Mr. Thompson's outstanding public records issues. As a result of an evidentiary hearing held on August 23, 1996 (PC-T2. 93), numerous previously undisclosed files and documents from many state agencies were turned over to Mr. Thompson. Judge Lebow also attempted to conduct a hearing on exemptions claimed by the State Attorney, but was unable to rule on any of the claimed exemptions because the file had been lost or misplaced by Assistant State Attorney Paul Zacks (PC-T2. 61).

Judge Kaplan was deposed in the State v. Lewis case on August 25, 1996. See PC-R2.767-856 During the deposition, Judge Kaplan was asked about a program entitled "Rough Justice" which was aired by the CBS television network as a segment of its news documentary "48 Hours" Judge Kaplan had participated in the program to explain his personal sentencing philosophy.

In the deposition Judge Kaplan affirmed that the transcript of the "48 Hours" interview accurately represented his judicial philosophy.

> Q I'm turning your attention to page 16 which would be the left-hand side of this page that I'm showing you. About -- not quite halfway down, the transcript indicates, "Judge Kaplan," and then you are quoted as saying," I want to get rid of these people and keep them off the streets as long as possible."
>
> Do you see where that is?
>
> A Yeah. You're talking the middle of the page before you get to "The Punisher."
>
> A That's correct. There's a section titled "The Punisher" and its just above that.
>
> A Right.
>
> Q Do you recall making that --
>
> A And there's no question. There's no question to that. That's just an answer I gave.
>
> Q Correct.
>
> A Right.
>
> Q Well, do you recall giving that answer.
>
> A Oh, yeah. Definitely.
>
> Q What did you mean in terms of when you said, "I want to get rid of these people and keep them off the streets as long as possible?"
>
> MS. BAGGETT: Objection. Goes to the thought process.
>
> THE WITNESS: I'd like to ask the question -- I'd like to answer the question.

MS. BAGGETT: I just posed an objection for the record.

THE WITNESS: Yeah. Okay. I'm glad you do. Keep posing them.

But I would like to answer the question.

First, let me answer it this way.

I want you to understand that on the show, my participation was about seven minutes.

They interviewed me for an hour and 15 minutes here.

And what they did is they obviously had an agenda to make me look like the Public Defender's nightmare.

My purpose here, I'm sure what they used me for, is a tough sentencer.

And so they were asking me all kinds of questions for an hour and 15 minutes, and I believe we were talking about people who are convicted of crimes and are habitual offenders and are violent criminals.

And when they asked me these questions, that was one of the answers I gave why I was a tougher sentencer, or something of that nature.

Now, you won't see that question there because these are all overlays. These are not questions and answers as this was presented in the show, they were questions and answers when I was interviewed.

And that was the answer to one of the questions, "I want to get rid of these people and keep them off the streets as long as possible." And the reason is obviously they're habitual criminals and violent people and a pain in the neck to our -- to law abiding citizens.

So, I hope that answers your

question.

BY MR. SCHER:

Q In terms of that answer, "I want to get rid of these people and keep them off the streets as long as possible," is that -- in terms of is that how you see your -- or when you were explaining this to the reporter, your judicial role, your judicial purpose?

A Only on 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.

Q Now, would you classify that as your, so to speak, judicial philosophy?

A To be tough on criminals in sentencing that are people who are convicted? Certainly.

Q To get rid of these people and keep them off the streets as long as possible.

A Yeah.

These people are violent criminals, habitual criminals.

And, yeah, I want to get them off the streets if they're convicted of violent crimes, right.

Q How long has that been your philosophy or has that always been your thinking?

A That's always been my philosophy.

Q Now, going down to the bottom of that same column -- actually, it's really the same comment -- the second to last thing that's attributed to you, there's a voice-over and it says, "I want to get rid of these people," and then you are attributed -- there's an eclipses and it says, "and keep them off the streets as long as possible so that you and I can be rid of them."

A That's under "The punisher" now.

Right?

Q Yes, that's under "The punisher."

A Okay. Now we're getting into -- okay. The actual section.

Where were you looking at now? Where is that?

Q I'm looking on the bottom of 16, there's -- actually all four of those comments are attributed to you.

I'm looking at the third one down -- third time down where it says "Judge Kaplan," starts with three dots and then it says, "and keep them off the streets as long as possible so that you and I can be rid of them."

A Okay. Well, I guess what that means is they started saying -- this has nothing to do with what I was telling the person in the courtroom.

The sentence where it says "Judge Kaplan" and it starts, "that carries a 30 year jail sentence as a violent habitual offender," that happened in the courtroom.

In other words, I'm telling this -- somebody in front of me, who's a defendant, what he's looking at.

And then when I'm finished with him, in the courtroom, then they start with this voice-over which says, "I want to get rid of these people," and then they show me back here in the chambers and it says, "and keep them off the streets as long as possible so that you and I can be rid of them." <u>That's what I'm talking about, these people, somebody that's -- that's a violent habitual offender or habitual felony offender or someone who's a violent convicted criminal.</u>

(PC R2. 776-780) (emphasis added).

Judge Kaplan further elaborated on his judicial philosophy:

Q But in terms of the comments about

wanting to get rid of these people and keeping them off the streets as long as possible, that is, as you stated, a philosophy of yours so --

A If you're convicted of violent crimes and if you're a habitual offender, yeah, I want to get you off the streets. I don't want you bothering everybody. I don't want you bothering me, hurting me and my kids or you and your kids. That's right. That's my philosophy.

Q I'm turning to page 18 at the top, the first quotation that's attributable to you states, quote, "Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail."

A That's right.

Q Do you remember making that statement?

A Yes, I do.

Q And could you explain what you meant by that statement?

A It means --

MS. BAGGETT: Objection. Thought process.

THE WITNESS: Thanks.

I'm going to answer this one, too.

It means that you -- we all know that -- especially back at this time they were letting people out left and right. You were giving people 30 months and they weren't -- they were spending nine months, eight months. Something like that.

So, I -- in fact, right above I think explains where we're headed. It says, if you give them 15 years in prison, they're probably going to spend three. You see?

And that's something I'm talking about there.

Sometimes you give them a little stiffer sentence. So you give them more than -- if I want somebody to say spend five years in jail, if I give them a five year sentence, they may only spend two.

If I'm able to give them a ten year sentence, maybe they'll spend five.

Now, today, they're supposed to be serving more time.

But in those days, three years ago, forget about it. The state prisons were overcrowded.

Now they're not because now the county jails are overcrowded.

They changed the whole system. They don't let you put people in jail anymore for drug offenses or minor drug offenses.

Anyway, that's what I mean.

If you want me to explain more, I will, if it's not clear.

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.

And I think that's in there at some place, where I say you got to fight fire with fire. And that's what I mean. You've got to give them a little extra time so that they spend the time that you really want them to spend.

You've got to almost fight the system that -- where they're letting them out so soon. That's what I mean.

(PC-R2. 784-785) (emphasis added)

Judge Kaplan acknowledged that prosecutors got "excited" when their cases were assigned to him.

BY MR. SCHER:

Q Now, turning to the next -- the page 19 which is on the right-hand side of that page, which is actually the passages that you had referred to earlier where somebody by the name of Schlesinger (phonetic) --

A Yeah. He's the interviewer.

Q He says, quote, "Prosecutors have been quoted saying that they can get away with stuff in your court that they can't get away with in other courts," end quote. And then you're indicated as saying, "Guilty."

A "Guilty."

That's the point I'm trying to tell you. That's the time I raised my hand and said, "Guilty."

And you want to know what I mean?

Q Yes, please.

MS. BAGGETT: Same objection.

THE WITNESS: Okay. Well, what I mean by that was -- in for instance plea negotiations in my court, normally I don't try to undercut the prosecutors.

They can -- in my court, they know if somebody gets convicted of a serious crime, they're going to get a stiff sentence so they can hold out for more.

A lot of judges -- I don't know if it's in your circuit or some of the other circuits, but a lot of judges like to move cases. They'll take just about anything in plea negotiation. Whatever somebody agrees to, they're going to move their docket.

We got people in this circuit that have like 200 cases, 300. I got 500. Some have 600, some have 700, some have had 900 over the last year.

And, you know, so there's -- some judges will just take anything that's worked out and they work things out like that.

Also, some judges won't declare anybody a habitual offender. I will.

In fact, now the law has changed where you have to declare people habitual offenders if they qualify, and if you don't, you got to give a reason why you didn't.

Before, you didn't have to do that. Before, if somebody was a habitual offender, all you had to do is when you habitualize them is tell them why you habitualize them.

Now it's different. You got to tell them why you're not if you don't. So --

BY MR. SCHER:

Q Back when -- like you said it was discretionary as to whether to habitualize somebody, was it your practice to habitualize somebody so that you could impose a tougher sentence?

MS. BAGGETT: Same objection.

THE WITNESS: Not every case. But I habitualize people more than any other judge I would think, or at least as much as any other judge in the circuit.

BY MR. SCHER:

Q With the intent of being able to impose a stiffer sentence.

A With my intent to keep them off the street, right, as long as I could, so they don't hurt you and me.

Q Getting back to the prosecutors being quoted as they can get away with stuff in your court that they can't get away with in other counts, in terms of you mentioned plea agreements, what other sort of things can prosecutors, quote, get away with, end quote, in your court?

MS. BAGGETT: Same objection.

THE WITNESS: Well, I'm still going to answer it. Thanks, though.

They can't get the plea agreements, as I said, from other judges or some other judges.

There's a lot of judges like me, too, but there's a lot that aren't.

That they can get -- they can hold out for a better plea or stiffer sentence in my division than they can from other judges.

A lot of judges, as I say, won't habitualize defendants who should be habitualized, in my opinion.

You want to know what else they get away with?

BY MR. SCHER:

Q Yes.

A I don't know.

That's what I meant when I answered the question that way.

I don't know what else they get away with.

I don't think they get away with anything else.

They don't get away with that. That's not really a get-away. It's --

Q Something they already sort of know?

A Something that they can count on being backed up for -- to push their cases harder by me where some other judges wouldn't back them up.

Q On the next --

A And by the way, I don't back them up all the time. There's a lot of cases I tell them, hey, you got no case, get rid of this thing.

Q But as a general rule, prosecutors know that they can count on you, so to speak,

in your words.

A Right.

Q On page 20 --

A They can count on me?

Q I think that's what you said.

A I don't know if they can count of me.

They know my philosophies and they know that I'm a tough sentencer and I hold out for a tough sentence.

(PC R2. 786-790) (emphasis added).

Judge Kaplan also explained that he harbors suspicion towards defense attorneys and their clients, and is distrustful of mitigating evidence:

Q And you're attributed as saying, "I'm always looking at a negative approach. Somebody's trying to con me."

A Right.

Q And that's a quotation.

A Right.

Q Do you recall making that statement?

A Yes, I did.

Q And what did you mean --

A That had nothing to do with -- well, I think it did have something to do with Thomas Seebert, but, you know, listen, defendants and their -- and defense attorneys are always, you know, telling me, oh, well, I won't do it again, I'm -- you won't have to worry about me, I learned my lesson, I won't take drugs anymore, I won't hurt anybody anymore, I'll do what I'm supposed to, I'll do everything you say.

And that's what I mean. I always look out for that. Every case -- not every case, but many, many cases you see that come in one morning where I got 50 people on there and you'll hear 25 of them tell me the same thing, every single day.

Q So when you -- the somebody that you're referring to in that sentence is a defendant or defense counsel?

A It's just in general. Just in general.

Everybody's got a reason why you're -- they won't do it again or, you know, you could count on me now, I learned my lesson, I didn't think you meant business the first time when you put me on probation but -- and I already had a violation but now I really know you mean business, I'm willing to make my reports now and I'll show up when I'm supposed to and I'll go to my drug program. That's what I mean.

Now they start telling me that, I look at that with a jaundiced view.

Because, you know, everyday people are coming to me lying to me. It happens everyday. You know that.

Q Has that always been your belief about --

A No, not always.

It's just after years of this, you just -- just realize that, you know, that type of situation is going to call for people looking for mercy I guess, or looking to see if they could persuade me.

And I just look at them with skepticism on something like that.

Although I -- you know, a lot of them do still get me.

(PC-R2. 790-793 (emphasis added).

Mr. Thompson moved for leave to amend his Rule 3.850 motion

(PC-R2. 421). Pursuant to Judge Lebow's order, Mr. Thompson filed an amended motion on March 6, 1997 (PC-R2). The amended Rule 3.850 motion contained several new claims and additional facts to support preexisting claims. However, counsel for Mr. Thompson was only afforded twenty days in which to review the substantial volume of public records and other materials turned over as a result of the proceedings before Judge Lebow. As a result, the amended motion remained incomplete.

Following a Huff hearing on March 27, 1997 (PC-T2. 207), Mr. Thompson's request for an evidentiary hearing on his amended Rule 3.850 motion was denied (PC-R2. 729), and the amended motion itself was summarily denied on May 5, 1997 (PC-R2. 730). Judge Lebow ruled she would not address those issues raised in the original 3.850 motion which were denied by Judge Kaplan and were raised in Mr. Thompson's Initial Brief filed in this Court. She indicated she was not an appellate court and thus could not review Judge Kaplan's rulings (PC-R2. 731). As to the new matters raised in the amended 3.850 motion, she summarily denied relying on the State's Response.

SUMMARY OF THE ARGUMENTS

1. Judge Stanton Kaplan, the judge who presided over Mr. Thompson's trial and sentenced him to death after overriding the jury's 10-2 recommendation of life, has made statements to the media and in a deposition in another case revealing his bias and willingness to bend the law in order to accomplish his goal of incarcerating a convicted defendant for as long as possible. Judge Kaplan revealed once a defendant is convicted, he views anything the defendant and his lawyer argue with skepticism and will impose longer sentences that are otherwise unjustified in order to make the defendant serve the sentence the judge desires, as opposed to what the law dictates. As a result, Mr. Thompson was deprived of due process because a biased judge presided over his trial and sentenced him to death over a jury's life recommendation. At the very least, an evidentiary hearing was required.

2. An evidentiary hearing was required on Mr. Thompson's Rule 3.850 motion and the amendment thereto. Judge Lebow refused to revisit the issues Judge Kaplan had summarily denied in 1991, even though he disqualified himself because of his personal relationship with Mr. Thompson's trial attorney. The files and records do not conclusively refute those claims. Moreover, an evidentiary hearing was required on the newly added claims, specifically Mr. Thompson's claim of judicial bias on part of Judge Kaplan.

3. The circuit court erred in refusing to allow a sufficient time to review the newly-disclosed Chapter 119 public records and amend his Rule 3.850 motion with those records. The circuit court erred in not exercising jurisdiction over the Florida Department of Law Enforcement and Mr. Thompson's request for public records from that agency.

SUPPLEMENTAL ARGUMENT I

MR. THOMPSON WAS DENIED HIS RIGHT TO AN IMPARTIAL TRIBUNAL AT ALL PHASES OF HIS CAPITAL TRIAL AND POSTCONVICTION PROCEEDINGS

A. INTRODUCTION

> "I want to get rid of these people and keep them off the streets as long as possible."

(PC-R2. 776) (Deposition Testimony of Judge Stanton Kaplan).

Mr. Thompson was denied a fair trial, was wrongly sentenced to death by Judge Kaplan, and was denied a fair tribunal during his postconviction proceedings due to the lack of impartiality of Judge Stanton Kaplan.

The United States Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence and particularly to those charge with rendering the sentencing decision. Morgan v. Illinois, 504 U.S. 719 (1992).

Mr. Thompson's jury recommended a life sentence by a majority of 10-2. Yet, despite the "great weight" that is required to be afforded the jury recommendation, Espinosa v. Florida, 112 S. Ct. 2926 (1992); Tedder v. State, 322 So. 2d 909 (Fla. 1975), Mr. Thompson was predestined to receive a death

sentence due to Judge Kaplan's automatic predisposition to impose the maximum sentence in all circumstances. As such, Mr. Thompson was denied his right to an impartial tribunal at sentencing and thus an individualized sentencing proceeding required by the Eighth and Fourteenth Amendments. Mr. Thompson is entitled to a new sentencing hearing. Zant v. Stephens, 103 S. Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The Eleventh Circuit Court of Appeals recently recognized that "[t]he law is well settled that a fundamental tenet of due process is a fair and impartial tribunal." Porter v. Singletary, 49 F. 3d 1483, 1487-88 (11th Cir. 1995). Mr. Thompson was tried and sentenced by a judge whose skepticism towards him and his attorneys tainted his entire capital trial, sentencing and postconviction proceedings. He was tried by a judge who favored the prosecution. Mr. Thompson was tried by a judge whose self-proclaimed sentencing philosophy and whose disbelief in mitigation predestined Mr. Thompson to a death sentence where the jury decided he should be sentenced to life imprisonment. The allegations regarding Judge Kaplan's bias and lack of impartiality, which must be taken as true, show that Mr. Thompson was denied a fair trial, fair sentencing proceeding, and fair postconviction proceedings. An evidentiary hearing is warranted. Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995).

B. JUDGE KAPLAN LACKED IMPARTIALITY.

On August 21, 1996, Mr. Thompson's trial judge, Judge

Kaplan, was deposed in the case of State v. Lewis, Case No. 87-9095CF (Fla. 17th Cir. Ct.) (PC.R2 767-859). Mr. Thompson thereafter amended his Rule 3.850 motion based on the comments made by Judge Kaplan in that deposition which established that Judge Kaplan lacked impartiality as to Mr. Thompson. The lower court summarily denied Mr. Thompson's claim that he was denied a fair and impartial tribunal at his trial, penalty phase and postconviction proceedings based "on Judge Kaplan's deposition" and for "the reasons explained in the State's response to the defendant's Motion" (PC-R2. 732). The State had asserted that "[n]either the deposition testimony nor the comments which precipitated the deposition indicate that Judge Kaplan was biased against Thompson and predisposed to sentence him to death" (PC-R2. 726). However, both the court and the state ignored the clear and detailed evidence of Judge Kaplan's bias against Mr. Thompson. This information was extra-record information which required evidentiary development. Judge Kaplan's deposition from another case does not constitute "the record" for the purpose of determining the necessity for an evidentiary hearing in Mr. Thompson's case. The deposition was conducted during the postconviction case of another death-sentenced inmate and constituted extra-record information as to Mr. Thompson. Because the trial record does not conclusively refute Mr. Thompson's claim of judge bias, an evidentiary hearing was and is required. See Porter v. Singletary, 49 F. 3d at 1489-90.

During the deposition in the Lewis case, Judge Kaplan was

asked about a program called "Rough Justice" which was aired by the CBS television network as a segment of its news documentary "48 Hours." Judge Kaplan had participated in the program to explain his personal sentencing philosophy. In the deposition Judge Kaplan affirmed that the transcript of the "48 Hours" interview accurately represented his judicial philosophy:

> Q I'm turning your attention to page 16 which would be the left-hand side of this page that I'm showing you. About -- not quite halfway down, the transcript indicates, "Judge Kaplan," and then you are quoted as saying," I want to get rid of these people and keep them off the streets as long as possible."
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> A That's correct. There's a section titled "The Punisher" and its just above that.
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> A Right.
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> Q Do you recall making that --
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> A And there's no question. There's no question to that. That's just an answer I gave.
>
> Q Correct.
>
> A Right.
>
> Q Well, do you recall giving that answer.
>
> A Oh, yeah. Definitely.
>
> Q What did you mean in terms of when you said, "I want to get rid of these people and keep them off the streets as long as possible?"

MS. BAGGETT: Objection. Goes to the thought process.

THE WITNESS: I'd like to ask the question -- I'd like to answer the question.

MS. BAGGETT: I just posed an objection for the record.

THE WITNESS: Yeah. Okay. I'm glad you do. Keep posing them.

But I would like to answer the question.

First, let me answer it this way.

I want you to understand that on the show, my participation was about seven minutes.

They interviewed me for an hour and 15 minutes here.

And what they did is they obviously had an agenda to make me look like the Public Defender's nightmare.

My purpose here, I'm sure what they used me for, is a tough sentencer.

And so they were asking me all kinds of questions for an hour and 15 minutes, and I believe we were talking about people who are convicted of crimes and are habitual offenders and are violent criminals.

And when they asked me these questions, that was one of the answers I gave why I was a tougher sentencer, or something of that nature.

Now, you won't see that question there because these are all overlays. These are not questions and answers as this was presented in the show, they were questions and answers when I was interviewed.

And that was the answer to one of the questions, "I want to get rid of these people and keep them off the streets as long

as possible." And the reason is obviously they're habitual criminals and violent people and a pain in the neck to our -- to law abiding citizens.

So, I hope that answers your question.

BY MR. SCHER:

Q In terms of that answer, "I want to get rid of these people and keep them off the streets as long as possible," is that -- in terms of is that how you see your -- or when you were explaining this to the reporter, your judicial role, your judicial purpose?

A Only on 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.

Q Now, would you classify that as your, so to speak, judicial philosophy?

A To be tough on criminals in sentencing that are people who are convicted? Certainly.

Q To get rid of these people and keep them off the streets as long as possible.

A Yeah.

These people are violent criminals, habitual criminals.

And, yeah, I want to get them off the streets if they're convicted of violent crimes, right.

Q How long has that been your philosophy or has that always been your thinking?

A That's always been my philosophy.

Q Now, going down to the bottom of that same column -- actually, it's really the same comment -- the second to last thing that's attributed to you, there's a voice-over and it says, "I want to get rid of these

people," and then you are attributed -- there's an eclipses and it says, "and keep them off the streets as long as possible so that you and I can be rid of them."

A That's under "The punisher" now. Right?

Q Yes, that's under "The punisher."

A Okay. Now we're getting into -- okay. The actual section.

Where were you looking at now? Where is that?

Q I'm looking on the bottom of 16, there's -- actually all four of those comments are attributed to you.

I'm looking at the third one down -- third time down where it says "Judge Kaplan," starts with three dots and then it says, "and keep them off the streets as long as possible so that you and I can be rid of them."

A Okay. Well, I guess what that means is they started saying -- this has nothing to do with what I was telling the person in the courtroom.

The sentence where it says "Judge Kaplan" and it starts, "that carries a 30 year jail sentence as a violent habitual offender," that happened in the courtroom.

In other words, I'm telling this -- somebody in front of me, who's a defendant, what he's looking at.

And then when I'm finished with him, in the courtroom, then they start with this voice-over which says, "I want to get rid of these people," and then they show me back here in the chambers and it says, "and keep them off the streets as long as possible so that you and I can be rid of them." That's what I'm talking about, these people, somebody that's -- that's a violent habitual offender or habitual felony offender or someone who's a violent convicted criminal.

(PC-R2. 776-780) (emphasis added).

* * *

Q But in terms of the comments about wanting to get rid of these people and keeping them off the streets as long as possible, that is, as you stated, a philosophy of yours so --

A If you're convicted of violent crimes and if you're a habitual offender, yeah, I want to get you off the streets. I don't want you bothering everybody. I don't want you bothering me, hurting me and my kids or you and your kids. That's right. That's my philosophy.

Q I'm turning to page 18 at the top, the first quotation that's attributable to you states, quote, "Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail."

A That's right.

Q Do you remember making that statement?

A Yes, I do.

Q And could you explain what you meant by that statement?

A It means --

MS. BAGGETT: Objection. Thought process.

THE WITNESS: Thanks.

I'm going to answer this one, too.

It means that you -- we all know that -- especially back at this time they were letting people out left and right. You were giving people 30 months and they weren't -- they were spending nine months, eight months. Something like that.

So, I -- in fact, right above I think explains where we're headed. It says,

if you give them 15 years in prison, they're probably going to spend three. You see?

And that's something I'm talking about there.

Sometimes you give them a little stiffer sentence. So you give them more than -- if I want somebody to say spend five years in jail, if I give them a five year sentence, they may only spend two.

If I'm able to give them a ten year sentence, maybe they'll spend five.

Now, today, they're supposed to be serving more time.

But in those days, three years ago, forget about it. The state prisons were overcrowded.

Now they're not because now the county jails are overcrowded.

They changed the whole system. They don't let you put people in jail anymore for drug offenses or minor drug offenses.

Anyway, that's what I mean.

If you want me to explain more, I will, if it's not clear.

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.

And I think that's in there at some place, where I say you got to fight fire with fire. And that's what I mean. You've got to give them a little extra time so that they spend the time that you really want them to spend.

You've got to almost fight the system that -- where they're letting them out so soon. That's what I mean.

(PC-R2. 783-786) (emphasis added)

In his own words, Judge Kaplan wanted to keep "violent criminals" off the streets for as long as possible. He acknowledged that he would give a "stiffer sentence" in order to achieve his goal of sentencing criminals to "extra time so that they spend the time you really want them to spend". In Mr. Thompson's case, the stiffest sentence available was the death penalty. In order to sentence Mr. Thompson to death, however, Judge Kaplan had to override a life recommendation entitled to "great weight." Judge Kaplan was not entitled to override the jury's life recommendation based on his personal sentencing philosophies. Rather, when faced with a life recommendation in a capital case, a trial judge's role is significantly prescribed; "under Tedder, the trial court's role os solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely on recommending life." Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Mr. Thompson's life recommendation was overridden by a judge who imposed higher sentences to "keep these people off the streets as long as possible" rather than who followed Florida law regarding jury recommendations of life. An evidentiary hearing is warranted.

Judge Kaplan's predisposition towards imposing the stiffest sentence possible is plain from his acknowledgement that prosecutors got "excited" when their cases were assigned to him:

> BY MR. SCHER:
>
> Q Now, turning to the next -- the page 19 which is on the right-hand side of that page, which is actually the passages that you had referred to earlier where

somebody by the name of Schlesinger (phonetic) --

A Yeah. He's the interviewer.

Q He says, quote, "Prosecutors have been quoted saying that they can get away with stuff in your court that they can't get away with in other courts," end quote. And then you're indicated as saying, "Guilty."

A "Guilty."

That's the point I'm trying to tell you. That's the time I raised my hand and said, "Guilty."

And you want to know what I mean?

Q Yes, please.

MS. BAGGETT: Same objection.

THE WITNESS: Okay. Well, what I mean by that was -- in for instance plea negotiations in my court, normally I don't try to undercut the prosecutors.

They can -- in my court, they know if somebody gets convicted of a serious crime, they're going to get a stiff sentence so they can hold out for more.

A lot of judges -- I don't know if it's in your circuit or some of the other circuits, but a lot of judges like to move cases. They'll take just about anything in plea negotiation. Whatever somebody agrees to, they're going to move their docket.

We got people in this circuit that have like 200 cases, 300. I got 500. Some have 600, some have 700, some have had 900 over the last year.

And, you know, so there's -- some judges will just take anything that's worked out and they work things out like that.

Also, some judges won't declare anybody a habitual offender. I will.

In fact, now the law has changed where you have to declare people habitual offenders if they qualify, and if you don't, you got to give a reason why you didn't.

Before, you didn't have to do that. Before, if somebody was a habitual offender, all you had to do is when you habitualize them is tell them why you habitualize them.

Now it's different. You got to tell them why you're not if you don't. So --

BY MR. SCHER:

Q Back when -- like you said it was discretionary as to whether to habitualize somebody, was it your practice to habitualize somebody so that you could impose a tougher sentence?

MS. BAGGETT: Same objection.

THE WITNESS: Not every case. But I habitualize people more than any other judge I would think, or at least as much as any other judge in the circuit.

BY MR. SCHER:

Q With the intent of being able to impose a stiffer sentence.

A With my intent to keep them off the street, right, as long as I could, so they don't hurt you and me.

Q Getting back to the prosecutors being quoted as they can get away with stuff in your court that they can't get away with in other counts, in terms of you mentioned plea agreements, what other sort of things can prosecutors, quote, get away with, end quote, in your court?

MS. BAGGETT: Same objection.

THE WITNESS: Well, I'm still going to answer it. Thanks, though.

They can't get the plea agreements, as I said, from other judges or some other judges.

There's a lot of judges like me, too, but there's a lot that aren't.

That they can get -- they can hold out for a better plea or stiffer sentence in my division than they can from other judges.

A lot of judges, as I say, won't habitualize defendants who should be habitualized, in my opinion.

* * * *

Q But as a general rule, prosecutors know that they can count on you, so to speak, in your words.

A Right.

Q On page 20 --

A They can count on me?

Q I think that's what you said.

A I don't know if they can count of me.

They know my philosophies and they know that I'm a tough sentencer and I hold out for a tough sentence.

(PC R2. 786-790) (emphasis added).

Judge Kaplan's bias is further enhanced by his prejudice and suspicion toward defendants, defense attorneys, and especially against mitigation evidence, as he explained during his deposition in the Lewis case:

Q And you're attributed as saying, "I'm always looking at a negative approach. Somebody's trying to con me."

A Right.

Q And that's a quotation.

A Right.

Q Do you recall making that

statement?

A Yes, I did.

Q And what did you mean --

A That had nothing to do with -- well, I think it did have something to do with Thomas Seebert, but, you know, listen, defendants and their -- and defense attorneys are always, you know, telling me, oh, well, I won't do it again, I'm -- you won't have to worry about me, I learned my lesson, I won't take drugs anymore, I won't hurt anybody anymore, I'll do what I'm supposed to, I'll do everything you say.

And that's what I mean. I always look out for that. Every case -- not every case, but many, many cases you see that come in one morning where I got 50 people on there and you'll hear 25 of them tell me the same thing, every single day.

Q So when you -- the somebody that you're referring to in that sentence is a defendant or defense counsel?

A It's just in general. Just in general.

Everybody's got a reason why you're -- they won't do it again or, you know, you could count on me now, I learned my lesson, I didn't think you meant business the first time when you put me on probation but -- and I already had a violation but now I really know you mean business, I'm willing to make my reports now and I'll show up when I'm supposed to and I'll go to my drug program. That's what I mean.

Now they start telling me that, I look at that with a jaundiced view.

Because, you know, everyday people are coming to me lying to me. It happens everyday. You know that.

Q Has that always been your belief about --

A No, not always.

It's just after years of this, you just -- just realize that, you know, that type of situation is going to call for people looking for mercy I guess, or looking to see if they could persuade me.

And I just look at them with skepticism on something like that.

(PC-R2. 791-793) (emphasis added).

Mr. Thompson was tried and sentenced to death by a judge who would have imposed the death sentence no matter what mitigation had been presented, contrary to his obligation under Tedder and its progeny with respect to the jury's life recommendation. Judge Kaplan clearly believed that Mr. Thompson's attorney as trying to "con" him and was "constantly lying to me". His "skepticism" about people "looking for mercy" shows his unwillingness to consider or weigh any mitigating evidence and particularly his unwillingness to comply with Tedder and assess whether there was mitigation presented by counsel upon which the jury could reasonably have relied. Due to his inherent sentencing bias and beliefs about mitigation and mercy, Judge Kaplan was in no position to afford Mr. Thompson his right to have his jury recommendation evaluated by an impartial judge according to the dictates of Tedder and its progeny. See Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992) ("While some persons may disagree with the weight of this [mitigating] evidence, or may even disbelieve portions of it altogether, clearly other reasonable persons would be convinced by it); Parker v. State, 643 So. 2d 1037 (Fla. 1994). Mr. Thompson was thus denied an

impartial sentencing tribunal, in violation of the Eighth Amendment. The combination of Judge Kaplan's sentencing philosophy, his prejudice against defendants and any mitigating circumstances they may present, his favor with prosecutors and his suspicion of defense attorneys afforded Mr. Thompson a predetermined death sentence even before the start of the trial and certainly when the jury returned a life recommendation

Judge Kaplan's lack of impartiality towards Mr. Thompson became even more apparent after Mr. Thompson's conviction became final. Mr. Thompson, once convicted, faced a judge who was not only biased against him throughout his capital trial and penalty phase, but also throughout the pendency of his collateral proceedings. On September 22, 1991, Judge Kaplan summarily denied Mr. Thompson's original Rule 3.850 motion even before Mr. Thompson's two year filing deadline had passed (PC-R. 39-40). Mr. Thompson was not afforded any opportunity to litigate his public records requests, to amend his Rule 3.850 motion accordingly, or to present argument as to why an evidentiary hearing was warranted.

Judge Kaplan's lack of impartiality towards Mr. Thompson was further enhanced by his order recusing himself from Mr. Thompson's case following relinquishment of jurisdiction by this Court. Ignoring the grounds for recusal alleged by counsel, Judge Kaplan recused himself based on his relationship with Mr. Thompson's trial counsel, Roy Black, and his wife. Judge Kaplan's order recusing himself reads as follows:

> This cause, having come before the Court on the Defendant, Raymond Michael Thompson's Motion to Disqualify Trial Judge. Having reviewed Florida Rule of Judicial administration Rule 2.160 and applicable case law finds as follows
>
> 1. Since the conclusion of the trial in this matter this Judge has developed a personal relationship with trial counsel for the Defendant, Roy Black.
>
> 2. Within the last year or so, this Judge's personal relationship has developed in to a close friendship with Attorney Roy Black and Attorney Black's wife, Mrs. Lea Black.
>
> Accordingly, it is hereby
>
> ORDERED AND ADJUDGE that the undesigned Judge hereby recuses himself from further proceedings in this matter.

(PC-R2. 102-103).

Mr. Thompson's initial Rule 3.850 motion was predicated in large part on the ineffective assistance of counsel by Mr. Black to Mr. Thompson. However, Judge Kaplan summarily denied Mr. Thompson's Rule 3.850 motion without ever disclosing this information. If, as Judge Kaplan wrote, he "developed a personal relationship with trial counsel . . . [s]ince the conclusion of [Mr. Thompson's] trial" (PC-R2. 102), Judge Kaplan had the obligation to disclose this to collateral counsel back in 1991. See Argument II. Thus Mr. Thompson's initial collateral proceedings as invalid.[1] Judge Kaplan's recusal establishes his

[1]Below, Mr. Thompson re-raised all the issues previously raised before Judge Kaplan; the lower court failed to address these claims, holding that "the court will not act in an appellate capacity to address those claims previously raised and rejected on the merits, by the preceding trial judge" (PC-

unwillingness to entertain any claims which might damage the reputation or effectiveness of his close personal friend and therefore his impartiality during the initial Rule 3.850 proceedings. In turn this demonstrates his bias and prejudice against Mr. Thompson and his postconviction lawyers for seeking to litigate such claims.

At no stage of the proceedings against Mr. Thompson did Judge Kaplan disclose to counsel his bias and predisposition. See Morgan v. Illinois, 504 U.S. at 739 (if judge has announced a predetermination of sentence before evidence is presented, the judge "should disqualify himself or herself"). Judge Kaplan was obligated under the Canons of Ethics to disclose any evidence of bias or partiality which he maintained. Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995). Further, "[t]he Commentary to Canon 3E(1) provides that a judge should disclose on the record information which the parties or their lawyers might consider relevant to the question of disqualification." Id. Although "both litigants and attorney should be able to rely upon judges to comply with their own Canons of Ethics," id., Judge Kaplan violated the ethical canons with impunity.

Florida law also imposed an obligation on Judge Kaplan to disclose to the parties any evidence of bias that he possessed: "Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate *whether challenged or*

R2.731).

not." Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (emphasis in original). This Court discussed this principle in Crosby v. State, 97 So. 2d 181 (1957):

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

Id. at 184 (emphasis added). See also Heath v. State, 450 So. 2d 588 (Fla. 3d DCA 1984) (reversible error for trial judge not to disclose personal bias when judge knew that she was unable to fairly sentence defendant because of strong personal views concerning the crime in question). Under Florida law, Judge Kaplan was obligated to disclose to Mr. Thompson and counsel that he was biased against criminal defendants and especially toward convicted persons when it came to sentencing. Judge Kaplan's failure to disclose his bias to Mr. Thompson or defense counsel taints the entire proceeding over which Judge Kaplan presided, including the initial Rule 3.850 proceedings.

C. MR. THOMPSON IS ENTITLED TO RELIEF

"If the judge was not impartial, there would be a violation of due process. The law is well settled that a fundamental tenet of due process is a fair and impartial tribunal." Porter v. Singletary, 49 F. 3d at 1487-88. See also Bracey v. Gramley, 117 S.Ct. 1793, 1797 (1997) ("the floor established by the Due

Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of the particular case"); Knapp v. Kinsey, 232 F.2d 458, 465 (6th Cir. 1956) ("fairness requires an absence of actual bias or prejudice in the trial of the case. If this basic principle is violated, the judgment must be reversed"). Judge Kaplan's admitted distrust of defense attorneys and defendants, his concomitant lack of impartiality, and his failure to disclose his bias to trial counsel or recuse himself from Mr. Thompson's capital case establish that Mr. Thompson was not afforded a fair trial before an impartial tribunal. At a minimum, Mr. Thompson is entitled to an evidentiary hearing to establish his right to a new trial.

Mr. Thompson is also entitled to a new sentencing proceeding in light of Judge Kaplan's lack of neutrality. "In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process. Porter v. Singletary, 49 F. 3d at 1487. The facts described supra establish Judge Kaplan's lack of impartiality at the sentencing proceedings he presided over in Mr. Thompson's case, particularly in this, an override case.

Judge Kaplan had a fixed predisposition to sentence Mr. Thompson to death if he were convicted by a jury, even despite the jury's recommended life sentence. Justice Anstead has explained that:

> When trial judges take an oath to uphold the law, that includes taking on the

> responsibility for sentencing in capital cases, including the potential imposition of the death penalty in those cases where the circumstances mandate its application in accord with legislative policy and judicial restraints. However, such a decision is controlled by the circumstances of each particular case,and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process. Confidence in the outcome of such a process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty where there is "any" basis for doing so. Such a mindset is the very antithesis of the proper posture of a judge in any sentencing proceeding.

Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (Anstead, J., specially concurring) (emphasis added). Judge Kaplan's attitudes toward sentencing and mitigation evidence exemplifies "the very antithesis of the proper posture of a judge in a[] sentencing proceeding." Id. See also Porter v. Singletary, 49 F. 3d at 1489-90.

In Morgan v. Illinois, 504 U.S. 719 (1992), the United States Supreme Court addressed the analogous situation of whether a juror who was automatically predisposed to sentence a defendant to death violated that defendant's constitutional right to a fair and impartial jury and must be removed for cause. Id. at 726. In holding in the affirmative, the Supreme Court wrote:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or

> absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. at 729 (emphasis added). Because Judge Kaplan harbored a bias, including a belief that defense attorneys and convicted criminal defendants are always trying to "con" him with respect to sentencing issues and mitigation, "the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to [Judge Kaplan], or at the very least viewed with jaundiced eye imposing a very high burden of proof not consistent with the law." Id.

Just as a defendant is entitled to an impartial jury free from fixed predispositions about the sentencing issues, a defendant is entitled to a judge who is impartial. Marshall v. Jerrico, Inc., 446 U.S. at 242. After all, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Here, Judge Kaplan imposed death based upon his extra-judicial beliefs regarding sentencing issues and viewing with skepticism any mitigating evidence. As the Supreme Court observed:

> Surely if in a particular Illinois case the judge, who imposes sentence should the defendant waive his right to jury sentencing

> under the statute, . . . was to announce that, to him or her, mitigating evidence is beside the point and that he or she intends to impose the death penalty without regard to the nature and extent of mitigating evidence if the defendant is found guilty of a capital offense, that judge is refusing in advance to follow the statutory direction to consider that evidence and should disqualify himself or herself.

Morgan v. Illinois, 504 U.S. at 738-39.

At a minimum, Mr. Thompson is entitled to a new sentencing hearing before an impartial judge. At that sentencing hearing, Mr. Thompson would be entitled to the benefit of the jury recommendation of a life sentence. Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993) ("It is unnecessary to conduct the hearing before a jury because Heiney is entitled to the benefit of the previous jury's life recommendation"); Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994) (same).

According to the federal constitution, the right to be tried by an impartial judge "is not subject to the harmless error rule, so it doesn't matter how powerful the case against the defendant was, or whether the judge's bias was manifested in rulings adverse to the defendant." Cartalino v. Washington, 122 F. 3d 8, 10-11 (7th Cir. 1997) Accord Anderson v. Sheppard, 856 F.2d 741, 746 (7th Cir. 1988) ("Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding"). Relief is warranted.

SUPPLEMENTAL ARGUMENT II

MR. THOMPSON IS ENTITLED TO A FULL AND FAIR DETERMINATION OF HIS POSTCONVICTION CASE BEFORE AN IMPARTIAL TRIBUNAL, INCLUDING AN EVIDENTIARY HEARING.

A. REMAND BEFORE AN IMPARTIAL TRIBUNAL.

Mr. Thompson's original Rule 3.850 motion was presided over by Judge Stanton Kaplan (who was the trial judge). Judge Kaplan summarily denied Mr. Thompson's motion. After this Court relinquished jurisdiction on motion of the State after it conceded error with respect to the resolution of the Chapter 119 issues by Judge Kaplan, the case again went to Judge Kaplan.

Mr. Thompson thereupon sought to recuse Judge Kaplan based on statements Judge Kaplan had made on the CBS television program "Rough Justice," as well as the fact that the Attorney General handling Mr. Thompson's case had represented Judge Kaplan in litigation in Lawrence Lewis v. State, another capital case in which Judge Kaplan had been the presiding judge, and the ensuing conflict of interest created an appearance of impropriety.

Judge Kaplan thereafter entered an order of recusal not based on the grounds asserted in Mr. Thompson's motion, but rather due to the fact that since Mr. Thompson's trial, Judge Kaplan had begun a close personal friendship with Mr. Thompson's trial counsel, Roy Black. After a series of judges recused themselves either sua sponte or on motion by the State, Mr. Thompson's case was eventually assigned to Judge Susan Lebow.

At no time during the pendency of the initial Rule 3.850 proceedings before Judge Kaplan did he disclose to Mr. Thompson

that he had a close personal friendship with Mr. Black. Yet Judge Kaplan denied Mr. Thompson's initial Rule 3.850 motion (without affording him an evidentiary hearing), a motion which alleged numerous instances of ineffective assistance of counsel as to Mr. Black -- Judge Kaplan's "close personal friend." Judge Kaplan's failure to disclose his friendship with Mr. Black at the time Mr. Thompson was alleging that Mr. Black rendered ineffective assistance of counsel is plain error which requires that this case be remanded. Mr. Thompson is entitled to a full and fair determination of his entire postconviction case, including the allegations of ineffectiveness as to Mr. Black, before an impartial tribunal.

If Judge Kaplan's personal friendship with Mr. Black -- formed after the conclusion of Mr. Thompson's trial -- was sufficient to disqualify him in 1994, the same basis for disqualification clearly existed in 1991. However, Judge Kaplan failed to disclose this fact, in violation of Mr. Thompson's right to due process and an impartial tribunal. Judge Kaplan had a legal and ethical obligation to disclose his friendship with Mr. Black when Mr. Thompson filed his initial Rule 3.850. "Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate *whether challenged or not*. Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (emphasis in original). This Court discussed this bedrock principle of Florida jurisprudence in Crosby v. State, 97 So. 2d

181 (1957):

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. **It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question.** The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

Id. at 184 (emphasis added). See also Heath v. State, 450 So. 2d 588 (Fla. 3d DCA 1984) (reversible error for trial judge not to disclose personal bias when judge knew that she was unable to fairly sentence defendant because of strong personal views concerning the crime in question).

Judge Kaplan's failure to disclose to Mr. Thompson and his collateral counsel that he had a close personal friendship with trial counsel worked to Mr. Thompson's obvious prejudice. When faced with a motion alleging that his "close personal friend" rendered ineffective assistance of counsel, Judge Kaplan denied the motion without even affording Mr. Thompson an evidentiary hearing. Only recently did Judge Kaplan disclose this fact, and decided sua sponte that it required his disqualification from Mr. Thompson's case. A remand is now required to give Judge Lebow the opportunity to assess the entirety of Mr. Thompson's claims for postconviction relief, including his allegations of undisclosed exculpatory evidence and ineffective assistance of counsel.[2]

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[2]In his amended Rule 3.850 motion filed before Judge Lebow, Mr. Thompson re-raised all of the claims he had filed before Judge Kaplan. However, Judge Lebow did not address those claims,

B. MR. THOMPSON IS ENTITLED TO AN EVIDENTIARY HEARING.

Mr. Thompson is entitled to an evidentiary hearing on the claims raised by Mr. Thompson in his amended Rule 3.850 motion which were new claims based on new facts or newly discovered Chapter 119 materials. These claims presented allegations pled with specificity and based on extra-record information. The lower court summarily denied these amended claims, however.

For example, Mr. Thompson's claim that he was tried by a judge who lacked impartiality warrants an evidentiary hearing. Porter v. Singletary, 49 F. 2d 1483 (11th Cir. 1995). Nothing in the files and records of this case conclusively rebutted the allegations that Judge Kaplan was not impartial. The claim was premised on comments made by Judge Kaplan during a national news show many years after Mr. Thompson's trial; these comments reflected Judge Kaplan's personal sentencing philosophies. Moreover, the claim was premised on statements made by Judge Kaplan under oath in another pending death penalty case, Lawrence Lewis v. State of Florida.[3] These facts constitute extra-record

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believing that she could not act in an appellate capacity to review the decisions made by her predecessor judge, Judge Kaplan. Perhaps Judge Lebow felt constrained by this Court's relinquishment, which was solely to address the Chapter 119 issues and any new claims arising therefrom. Be that as it may, given the fact that it is now known that Judge Kaplan should have recused himself back in 1991, Mr. Thompson should be put back in the position he was in at that time -- he has the right to have his entire postconviction case heard by an impartial tribunal who is not "close personal friends" with trial counsel.

[3]In State v. Lewis, 656 So. 2d 1248 (Fla. 1995), this Court had allowed Mr. Lewis to depose Judge Kaplan with respect to his personal sentencing philosophies. It is from comments made by Judge Kaplan during this deposition that Mr. Thompson made his

information, yet the lower court relied on this information to summarily deny the claim. This was error. When summarily denying a Rule 3.850 motion, the court must attach portions of the record which conclusively demonstrate that the defendant is not entitled to relief; here, the CBS interview and the deposition from the Lewis case are not of record in this case, and therefore it was error to rely on them to summarily deny this claim. Judge Lebow was required to attach a portion of the record which conclusively rebutted Mr. Thompson's allegation of judicial bias. This was not done, nor could it be done. Judge Kaplan's comments to the media and in the Lewis deposition warrant an evidentiary hearing. See Porter v. Singletary. Mr. Thompson is entitled to an evidentiary hearing.

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claim in this case.

SUPPLEMENTAL ARGUMENT III

BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. THOMPSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES WAS WITHHELD, AND BECAUSE MR. THOMPSON WAS NOT AFFORDED ADEQUATE TIME TO REVIEW PREVIOUSLY UNDISCLOSED RECORDS PRIOR TO FILING HIS AMENDED RULE 3.850 MOTION, HE WAS UNABLE TO MAKE FULL AMENDMENT OF HIS RULE 3.850 MOTION.

Effective legal representation was denied Mr. Thompson because the Florida Department of Law Enforcement (FDLE) did not comply with Chapter 119, and other agencies did not timely comply and thereby deprived collateral counsel an adequate opportunity to review the material and amend the Rule 3.850 motion.

Following proceedings before the lower court, several agencies turned over numerous, hitherto undisclosed files and documents. These agencies included the Broward County Sheriff's Office, Ft. Lauderdale Police Department, Broward County State Attorney's Office, Department of Corrections, and the Hallandale Police Department. In addition, in the period before Mr. Thompson's amended Rule 3.850 motion was filed, boxes of materials had been provided by the Drug Enforcement Agency and Federal Bureau of Investigation.

Furthermore, Mr. Thompson sought to litigate the existence of additional previously undisclosed public records held by FDLE. However, the lower court refused to exercise jurisdiction over this agency. See PC-T2. 91.[4]

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[4]Mr. Thompson raised a challenge to FDLE's compliance with Chapter 119 in his Initial Brief. Mr. Thompson relies upon that argument since no additional proceedings occurred during the remand as to FDLE.

Also, Mr. Thompson was never afforded the opportunity to conduct an adversarial inquiry of the materials withheld as exempt from disclosure by the Office of the State Attorney because the files were lost or misplaced before the court had an opportunity for in camera inspection of the files. See PC-T2.

Notwithstanding the unresolved public records issues that remained, Mr. Thompson was ordered to file an amended Rule 3.850 motion without adequate time to review the boxes of materials which had only recently been made available to him. This Court's relinquishment of jurisdiction was originally scheduled to terminate on March 3, 1997. At a hearing held on January 28, 1997, counsel for Mr. Thompson stated:

> We've received records form virtually every agency. After I review the Fort Lauderdale, Broward County Sheriff's Department files. I will determine whether there is a need to amend and I will be making a request to amend at that time. -

(PC-T2. 202)

The trial court was under enormous time pressure to comply with the March 3, 1997 deadline as evinced by her response to Mr. Thompson's counsel:

> Here's the problem. If they're not going to give me any more time then you're going to have to do everything within the time period. I'm going to give you a schedule now.
>
> * * *
>
> Okay all right, I need, I need everything to be done by earlier than that date, because I'm going to have to set aside some other time for you all. In the meantime, you're going to have everything ready by Monday, give you two weeks, by Valentine's Day, the

> 14th. I'll need you back here on February 14th.
>
> Anything else that has to be filed has to be filed by then, anything that you're thinking about filing needs to be filed on the 14th so I can resolve it within the next week.

(PC-T2. 202; 204).

Following Mr. Thompson's motion for enlargement of jurisdiction filed in this Court, the relinquishment period was extended until May 6, 1997. In the meantime, counsel for Mr. Thompson filed with the lower court a motion for leave to amend Mr. Thompson's original Rule 3.850 motion with the new information released by the Hallandale Police Department, the Fort Lauderdale Police Department, the Broward County State Attorney's Office, the Department of Corrections and the FBI/DEA. (PC-R2. 421-423) Mr. Thompson requested sixty day within which to amend his Rule 3.850 motion pursuant to Ventura v. State, 673 So. 2d 479 (Fla. 1996) (PC-R2. 422). In an order dated February 14, 1997, the lower court only allowed Mr. Thompson twenty days to amend (PC-R2. 420).

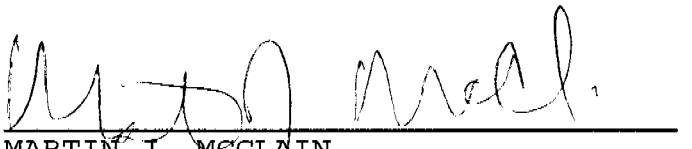
This rush to conclusion effectively prevented Mr. Thompson's counsel from properly prepare a complete Rule 3.850 motion for Mr. Thompson. There was inadequate time to review the newly disclosed files either for completeness or for content. Counsel was unable to ascertain whether and what further requests and investigation were necessary. There was, in any event, no time available to conduct follow up investigation and no time to develop new claims based on the newly disclosed public records.

Counsel for Mr. Thompson had the obligation to review the public records in order to determine whether any basis for postconviction relief is present therein. Porter v. State, 653 So. 2d 374 (Fla. 1995). Because of the impossible schedule imposed upon his counsel, Mr. Thompson was denied an opportunity to review all of the records and fully develop all of the claims. He was therefore denied his rights under Florida law and the Eighth and Fourteenth Amendments. Relief is warranted.

CONCLUSION

Based upon the supplemental record and the arguments presented herein and in Mr. Thompson's initial brief, Mr. Thompson respectfully urges the Court to reverse the lower court, order a full and fair evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing corrected supplemental initial brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 29, 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:

Ms. Sara Baggett
Assistant Attorney General
1655 Palm Beach Lakes Boulevard
Third Floor
West Palm Beach, FL 33401-2299