IN THE SUPREME COURT
OF FLORIDA

WALTER GALE STEINHORST, Appellant, vs. STATE OF FLORIDA, Appellee,	Appeal No. 82, 188 (Circ. Case Nos. 77-708 and 72,695)

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant Walter Gale Steinhorst (hereinafter "Steinhorst" or "Appellant") respectfully appeals to this Court from the Order of Fourteenth Judicial Circuit Court Judge, the Honorable Don T. Sirmons, entered on April 9, 1993, and the Order on Rehearing entered on July 8, 1993 (collectively, "the Orders"). The Orders denied Appellant's Motion for Relief From Judgment pursuant to Fla. R. Civ. P. 1.540(b)(4), which sought to set aside the judgment (the "Judgment") entered by Judge W. Fred Turner in June 1988 which denied Mr. Steinhorst's Motion to Vacate Conviction and Sentence filed pursuant to Fla. R. Crim. P. 3.850.

STATEMENT OF THE CASE AND OF THE FACTS

For purposes of this appeal, the history of this case is summarized as follows:

° On November 30, 1977, Walter Steinhorst, David Goodwin and Charlie Hughes were indicted by the Panama City Grand Jury for the first degree murders of Douglas Hood, Sheila McAdams and Sandra McAdams. Walter Steinhorst was also indicted for the premeditated first degree murder of Harold Sims. The three defendants' cases were severed.

On April 24, 1978 Mr. Steinhorst's trial commenced in the Circuit Court in and for Bay County, Panama City (the "Circuit Court") before then Florida Supreme Court Justice James C. Adkins, who was sitting by special designation. The

jury convicted Mr. Steinhorst of first degree murder on all four counts. It was not stated whether the verdicts were based on a finding of felony or premeditated murder. Following a jury recommendation, Mr. Steinhorst was sentenced to death on three of the four counts, and received a sentence of life imprisonment for the murder of Harold Sims.[1/]

° Rehearing was denied on April 27, 1982.

° On January 18, 1984, appellant filed a habeas corpus petition in this court, setting forth five claims for relief. On September 26, 1985, this Court denied the petition. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985). Rehearing was denied on November 19, 1985.

° On February 13, 1986, appellant filed a Motion for Post-Conviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850, in the Circuit Court. The motion was heard by Circuit Court Judge W. Fred Turner. Judge Turner denied the motion in a one page order, and without his ever having seen, let alone read, the trial record or any briefs, and without holding any evidentiary hearing, on March 24, 1986.

° Mr. Steinhorst and his attorneys received no notice of the denial of his 3.850 motion. His attorneys first learned of the decisions by reading a press release that the Governor of Florida had issued a warrant for Mr. Steinhorst's execution, on November 6, 1986.

1/ Justice Adkins also presided, several weeks later, over the separate trial of co-defendant David Goodwin. The other co-defendant, Charlie Hughes, was a fugitive from justice until 1981.

° On November 14, 1986, Mr. Steinhorst requested a stay of execution and moved the Circuit Court to vacate its order of March 24, 1986.

° On November 20, 1986, Judge Turner granted Mr. Steinhorst's request to vacate the March 24, 1986 order, but again summarily denied the Rule 3.850 motion and denied the request for a stay of execution.

° On November 21, 1986, Mr. Steinhorst appealed the denial of the Rule 3.850 motion to this Court and requested a stay of execution.

° On November 26, 1986, this Court granted petitioner's request for a stay of execution, vacated the Circuit Court's order, and remanded the case for further proceedings. Steinhorst v. Florida, 498 So.2d 414 (Fla. 1986).[2/]

° An evidentiary hearing on Mr. Steinhorst's Rule 3.850 motion was conducted in the Circuit Court on September 16-18, 1987.

2/ In so holding, the Florida supreme Court observed that Judge Turner had not even bothered to "examine the trial record and did not have the record before him when ruling on appellant's ... motion," in violation of Rule 3.850. Steinhorst v. State, 498 So. 2d 414, 415 (Fla. 1986). Consequently, Judge Turner also violated Rule 3.850 by failing to attach portions of the record conclusively showing that Mr. Steinhorst was entitled to no relief.

° Judge Turner entered an order denying the Rule 3.850 motion on June 23, 1988.[3/]

° On July 5, 1988, Mr. Steinhorst filed a notice of appeal of the Circuit Court's denial of his Rule 3.850 motion.

° On January 15, 1991, this Court affirmed the Circuit Court's denial of relief. Steinhorst v. State, 574 So.2d 1075 (Fla. 1991). Justices Kogan and Barkett dissented on the grounds that there was Hitchcock error at the penalty phases:

> The record before us discloses substantial mitigating evidence improperly excluded from Steinhorst's trial as a direct result of this Court's erroneous ruling in Cooper....For these reasons, I believe there is no question that the federal courts under their own precedent must grant relief if this Court fails to do so. No good reason exists to delay such relief any longer.

° On March 6, 1991, this Court denied appellant's motion for rehearing.

° On October 4, 1991, Mr. Steinhorst filed in the Circuit Court a Motion for Relief from Judgment pursuant to

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3/ In the course of reviewing materials for the record on appeal with the Assistant State Attorney, defendant's counsel learned that yet again Judge Turner had failed to read the trial record. The deputy clerk of the trial court informed defendant's counsel that the clerk's office did not have the transcript of Mr. Steinhorst's original trial because the trial court had never received that transcript back from the Supreme Court and it had no copy. Judge Turner confirmed this omission in his sua sponte order dated August 3, 1988 by acknowledging that "the original trial transcript ... is lodged in the Supreme Court of Florida." See, 3.850 ROA, 799. Appellant will cite to the Record on Appeal in the Rule 3.850 proceedings as "3.850 ROA" and to the record on appeal in the instant appeal as "MRJ ROA."

Florida Rule of Civil Procedure 1.540(b)(4), seeking to have Judge Turner's judgment on the Rule 3.850 motion declared null and void due to the judge's undisclosed conflict of interest.

° This matter was originally assigned to Judge N. Russell Bower. Judge Bower indicated that he would recuse himself from this cause in order to avoid any appearance of impropriety, as he had previously worked at the State Attorney's office. On December 4, 1992, Judge Bower entered an Order Recusing himself, and the matter was reassigned to Chief Judge Don T. Sirmons on December 7, 1992.

On February 12, 1993, after a telephone status conference call with counsel, the court entered an Order of Procedure directing as follows:

> (1) That the State of Florida has thirty (30) days from the date hereof to respond to defendant's Motion for Relief From Judgment and Defendant shall likewise have thirty (30) days from service of the State's response to respond.
>
> (2) Thereafter, the court will consider the written response; schedule a supplemental status conference; and set out any additional procedures it deems necessary to depose of the pending motion.

MRJ ROA, 44, Order, dated February 12, 1993 (emphasis added).

On March 15, 1993, the State filed its response, which was termed a "Motion to Dismiss and Response to Motion for Relief From Judgment," Mr. Steinhorst's Reply was therefore due on April 14, 1993.

° On April 12, 1993, however, without holding any hearing and without giving Mr. Steinhorst an opportunity to

respond to the State's motion to dismiss, Circuit Judge Don T. Sirmons denied the Rule 1.540 motion.

° On April 24, 1993, Mr. Steinhorst timely filed a motion for rehearing.

° On July 8, 1993, the Circuit Court granted the motion for rehearing but again denied the Rule 1.540 motion.

° On August 2, 1993, Mr. Steinhorst timely filed his notice of appeal.

SUMMARY OF ARGUMENT

The court erred in holding that Rule 1.540 is not the appropriate procedure for reopening the judgment. A 3.850 motion is, by its very terms, a motion to set aside the conviction and sentence and thus, contrary to the court's order, not the appropriate vehicle for challenging a 3.508 judgment. The Rule and case law make clear that Rule 1.540 is the correct vehicle. Further, the court erred in not finding the 3.850 judgment void since Judge Turner had a clear conflict of interest and a judgment entered by a judge with a disqualifying interest is void and has no effect at all. The judgment is also void since it failed to comply with fundamental principles of due process, since Judge Turner's conflict violated Mr. Steinhorst's right to an impartial tribunal. The court also erred in finding the 1.540 motion time barred since the motion was filed within a "reasonable time" of the discovery of Judge Turner's conflict. Finally, the court erred in finding that Mr. Steinhart needed to show

prejudice as a result of that conflict, since the mere fact of the conflict disqualifies a judge, and also in ignoring the undisputed evidence that Justice Adkins, had he heard the 3.850, would have imposed life sentences. Appellant requests relief from these errors. Because of the complexity and importance of the matters at issue in this appeal, appellant also respectfully requests a hearing on oral argument as to this appeal. See, attached Request.

ARGUMENT

THE COURT ERRED IN HOLDING THAT RULE 1.540 IS NOT THE APPROPRIATE PROCEDURE FOR REOPENING THE JUDGMENT.

Florida Rule of Civil Procedure 1.540(b) provides, in pertinent part,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: ... (4) the judgment or decree is void... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. ... Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review are abolished and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

Appellant's motion sought relief under Rule 1.540(b)(4), and was not a successor motion under Florida Rule of Criminal Procedure 3.850. A 3.850 motion, by its very

terms, is a motion to set aside the conviction and sentence. Here, Mr. Steinhorst was not attempting to set aside his conviction and sentence but rather, to set aside the 3.850 judgment entered by Judge Turner. Thus, contrary to the Court's Order a 3.850 motion would not be the appropriate vehicle for challenging that 3.850 judgment.

Both the Court and the State Attorney misinterpreted the Rule 1.540 motion. Mr. Steinhorst fully agrees that Rule 1.540 is not the appropriate vehicle for moving to vacate a conviction and sentence. But, as stated at the outset in his Rule 1.540 motion, Mr. Steinhorst was not seeking to vacate the conviction and sentence in this proceeding. Nor was the Rule 1.540 Motion an attempt to relitigate the issues raised by the Rule 3.850 motion. Rather, the motion is intended to vacate a void judgment.

As the rule states and case law makes clear, Rule 1.540 is the correct vehicle to set aside a judgment. See, e.g., Department of Transportation vs. Bailey, 603 So.2d 1384 (Fla. 1st DCA 1992) (holding that Rule 1.540 is the correct mechanism to attack a void judgment and analogizing to Federal Rule of Civil Procedure ("FRCP") 60(b)). As discussed therein, Rule 1.540(b) was modeled after FRCP 60(b), and Rule 60(b) is the appropriate vehicle to move to vacate a federal habeas determination. Id.; See also Gray vs. Estelle 574 F.2d 209

(5th Cir. 1978) (citing Pitchess vs. Davis, 421 U.S. 482 (1975)).[4/]

Bailey also makes clear that when it is asserted that the underlying judgment is void, the reviewing court must evaluate the underlying judgment in reviewing the order denying the motion. The Bailey court held as follows:

> Ordinarily, review of a trial court's denial of a 1.540(b) (or Federal Rule 60(b) motion) is limited to determining whether the denial amounts to an abuse of discretion. Where, however, it is asserted that the underlying judgment (or part thereof, as in the instant case) is void, it is necessary to evaluate the underlying judgment in reviewing the order denying the motion. VTA Inc. v. Airco Inc., 597 F.2d 220 (10th Cir. 1979).

Id. at 1386. The Bailey court also held that if it is determined that the judgment entered is void, "the trial court has no discretion, but is obligated to vacate the judgment." Id. at 1387. In Airco, cited with approval in Bailey, the court held that the reviewing court must determine whether the

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4/ Although Rule 3.850 is a rule of criminal procedure, proceedings under the rule are not steps in the criminal prosecution but are in the nature of independent, collateral civil actions; State v. White, 470 So. 2d 1377 (Fla. 1985) (the "post-conviction collateral remedies [such as those provided by rule 3.850 and writs of error coram nobis and habeas corpus] are not steps in a criminal prosecution but are in the nature of independent collateral civil actions"); State v. Lasley, 507 So. 2d 711 (Fla. 2d DCA 1987) ("Like a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of rule 3.850 within the criminal rules); Tolar v. State, 196 So. 2d 1, 3 (Fla. 4th DCA 1967). Thus, the proceedings are governed by the rules of civil procedure, except where those rules are inconsistent with the specific provisions of Rule 3.850. Green v. State, 280 So. 2d 701, 702 (Fla, 5th DCA 1973).

court rendering the judgment was without jurisdiction and whether that court acted in a manner inconsistent with the due process of law. See Airco, 597 F.2d 220, 225.

Where there is no existing rule of criminal procedure that fits the particular situation sought to be remedied, as in this case, a litigant must resort to the existing rules of civil procedure. See Luhra v. State, 394 So. 2d 137, 139 n.1 (Fla. 5th DCA 1981) (citing Boggs v. Wainwright, 223 So. 2d 316, 317 (Fla. 1969) for the proposition that a court may adopt a civil rule -- Rule 1.540(a) concerning correction of clerical errors -- for use in a criminal case when no comparable criminal rule exists). See also Tolar v. State, 196 So. 2d at 4 ("Rule 1 [now Rule 3.850], like [28 USC] § 2255, is not all comprehensive or exclusive of relief otherwise available by motion under the classical writs or under Rule 1.38 (now rule 1.540) of the Rules of Civil Procedure.").

Rule 3.850 was patterned after the federal post-conviction statute, 28 U.S.C. § 2255, and cases decided under the federal statute serve as a guide to the proper application and interpretation of the Florida rule where there is no Florida precedent. Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963); Tolar v. State, 196 So. 2d at 3. When a petitioner seeks to set aside a federal habeas determination, the avenue for doing so is Federal Rule of Civil Procedure 60, which is the federal counterpart to Fla. R. Civ. P. 1.540. See, e.g., Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978) (citing Pitchess v. Davis, 421 U.S. 482 (1975)). In fact, it is clear from the face of Rule 1.540 that it was modeled after

Fed. Rule Civ. P. 60 . See DeClaire v. Yohanan, 453 So. 2d 375, 377 (Fla. 1984).

Hence, it is incontrovertible that Rule 1.540 is the appropriate vehicle for attacking a 3.850 judgment that was entered by a judge who was subject to an unrevealed conflict of interest. See, Aetna Life & Casualty Co. v. Thorn, 319 So. 2d 82 (Fla. 3rd DCA 1975). In Aetna, the appellant moved to set aside the final judgment after learning that the judge had an undisclosed conflict. Aetna did not learn of the conflict until after entry of final judgment. The court there noted that "[a] judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil." Id., at 84. The court also noted that § 38.02, Fla. Stat. is not the exclusive remedy for the disqualification of a judge, because that statute by its terms applies only to those cases in which a final judgment has not been entered. Id. The court then reversed the order denying appellant's 1.540 motion and remanded the case to the trial court with directions to proceed to a hearing upon that motion. Id., at 85.

It is therefore apparent that the Court erred in finding that Rule 1.540 is not the appropriate vehicle for moving to set aside Judge Turner's Order.

THE COURT ERRED IN NOT FINDING THE 3.850 JUDGMENT VOID AS A RESULT OF JUDGE TURNER'S BLATANT UNDISCLOSED CONFLICT OF INTEREST

I. JUDGE TURNER HAD A CLEAR CONFLICT OF INTEREST

The Court erred both in failing to accept that Judge Turner's denial of the Rule 3.850 motion was void because he had a disqualifying interest due to his involvement with the victim's estate (which was a violation of Canon 3C of the Florida Code of Judicial Conduct), and in holding that § 38.01 Florida Statutes, was in any way implicated in this matter. The Court concluded, without any consideration of Mr. Steinhorst's arguments, as follows:

> The Court also finds that should Rule 1.540 be a valid ground to seek collateral attack, the judgment is not void because the Defendant's claim is barred by time, and is based upon the imagined bias of Judge W. Fred Turner without any showing under F.S. 38.01 (sic), that Judge Turner appeared as a party of record in this case.

See, MRJ ROA 67-68, 109. Although the Court acknowledged that Judge Turner recused himself in Hughes' cases in June 1981, the Court ignored the significance of that fact. Quite simply, the Court ignored the facts and binding legal authority to reach a decision unclouded by legal argument, evidentiary support or common sense.

In the relatively recent course of investigation of this case, attorneys for Mr. Steinhorst discovered that Judge Turner had a serious conflict of interest which compelled him to recuse himself from considering the 3.850 motion. Judge Turner had represented the estate of Harold Sims, one of the victims in this case, had had previous contact with the Sims'

family and on the basis of that representation had sua sponte advised counsel for co-defendant Charlie Hughes that he would recuse himself, upon request, from presiding over Mr. Hughes' trial. See, MRJ ROA 28, Order dated July 9, 1981. Hughes, who was a fugitive from justice until 1981, was indicted on the same charges as Walter Steinhorst and tried soon after his capture. As a result of Judge Turner's disclosure, the Hughes trial was promptly reassigned to another judge. See, MRJ ROA 29, Order of Consolidation and Reassignment, dated July 15, 1981.

Despite the fact that he had previously advised Hughes' counsel of and signed an order recognizing his "conflict of interest," Judge Turner failed to inform Mr. Steinhorst's counsel of this blatant conflict when counsel appeared before him in 1986 to prosecute defendant's 3.850 motion.[5/] The State Attorney's office, which was also aware of this conflict as a result of having prosecuted Mr. Hughes, similarly failed to inform Mr. Steinhorst's counsel of this matter.[6/]

Section 38.01, Florida Statutes, automatically disqualifies the judge who is a party in an action from sitting

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5/ Nor did Judge Turner advise counsel of this conflict at any time during the more than two year time frame in which he dealt with Mr. Steinhorst's 3.850 motion.

6/ State Attorney James Appleman's office both prosecuted Charlie Hughes in 1981 and opposed Mr. Steinhorst's 3.850 motion in 1986-87. Current counsel for Mr. Steinhorst, who are out-of-state pro bono counsel, did not become involved in the Steinhorst case until 1983.

in judgment in that same action. However, contrary to the Court's findings, this is not the only body of law in this state that governs judicial disqualifications and recusals. Since judicial disqualifications are procedural matters,[7/] the rules promulgated by the Florida Supreme Court take precedence over statutes enacted by the Florida legislature. That principle is found in the Florida Constitution, Article II, § 3 and Article V, § 2(a), as well as case law. See, e.g., Gator Freight Ways, Inc. vs. Mayo 328 So.2d 444 (Fla. 1976); Duval County School Board vs. Florida Public Employees Relations Commission 346 So.2d 1087 (Fla. 1st DCA 1977). Among the rules promulgated by the Florida Supreme Court are the judicial disqualification provisions of Florida Rule of Criminal Procedure 3.230 (which was the applicable rule at the time Mr. Steinhorst filed his 1.540 motion but which has since been superseded by Florida Rule of Judicial Administration 2.160) and the Florida Code of Judicial Conduct, Canon 3(C).

7/ The manner of judicial disqualification is without a doubt procedural. As stated in Johnson vs. State 308 So.2d 127 (Fla. 1st DCA 1975):

> Practice and procedure encompass the course, form, manner, means, method, mode, order process or steps by which a party enforces substantive rights or obtains redress for their invasion. Substantive law creates those rights. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof.
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> Id., at 129.

Thus, the rules promulgated and adopted by the Supreme Court are controlling.

Rule 3.230 mandates that a judge recuse himself whenever a lawyer files a legally sufficient affidavit asserting reasons for judicial disqualification. Had Mr. Steinhorst's counsel been aware of Judge Turner's representation of Harold Sims' estate, they would have moved for disqualification pursuant to that rule. Unfortunately, Judge Turner failed to disclose this information to counsel, as did prosecuting counsel and the courthouse files were incomplete and thus prevented counsel from discovering the conflict; thus no such motion was filed.

Moreover, the Code of Judicial Conduct clearly anticipates situations such as this one. The Code demands that judges should disqualify themselves on their own initiative when their impartiality might reasonably be questioned. In the instant case, it is incontrovertible that a reasonable person would question the impartiality of a judge that represented the estate of the victim.[8/]

8/ Judge Turner's failure to disqualify himself from hearing Mr. Steinhorst's 3.850 Motion is a clear violation of Canon 3, subd. C(1) of the Code of Judicial Conduct. The Preface to the Code of Judicial Conduct states that the provisions of the Code and the standards that judges should observe "are mandatory unless otherwise indicated." See also, Department of Revenue v. Golder, 322 So. 2d 1, 3 n.8 (Fla. 1975). The Code provides in relevant part:

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

Footnote Continued

If Judge Turner believed himself to be impartial, then at the very least he should have abided by Canon 3(D) and disclosed his participation in the representation of Sims' estate and allowed the attorneys to make an informed decision regarding his disqualification.[9/]

Here, Judge Turner represented Harold Sims' estate. Mr. Steinhorst was convicted of killing Harold Sims. Moreover, in representing Sims' estate, Judge Turner listed the value of the estate as including the proceeds of a "wrongful death" claim. See, MRJ ROA 97, In Re Estate of Harold George Sims,

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8/ Footnote Continued From Previous Page

> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

9/ Canon 3(D) provides:

> A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. It is important to note however, that when the reason for disqualification is the possibility of bias, prejudice, or personal knowledge of facts, mere disclosure is not sufficient; in those cases the judges must disqualify. [Emphasis added.]

Case No. 78-182-CP. The implication is clear: Judge Turner was aware of the facts surrounding Sims' life and death, and he made an evaluation that there was a possibility of prevailing in a wrongful death action.[10/] Based on those facts a reasonable person would doubt the impartiality of Judge Turner.[11/] Thus, Judge Turner was disqualified from

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10/ Judge Turner therefore at least implicity concluded that Sims had no role in bringing about his own death, which is directly contrary to the allegations contained in the Rule 3.850 motion. As noted in the Rule 1.540 motion, much of the evidence presented at the 3.850 hearing pertained to the background and character of Mr. Sims and that he was not an innocent victim but rather was armed and went to Sandy Creek to "rip off" the drug deal.

11/ The case law in this jurisdiction clearly establishes that "[t]he burden is upon the individual judge to determine his qualification to sit on a particular case." Aetna Life & Casualty Company v. Thorn, 319 So. 2d 82, 84 (Fla. 3d D.C.A. 1975). At the core of the due process guarantee of a fair trial is the principle that every litigant is entitled to nothing less than the "cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (Fla. 1939); Pistorino v. Ferguson, 386 So. 2d at 67; McGregor v. Hammock, 101 Fla. 1170, 132 So. 815 (Fla. 1931); State v. Cannon, 166 So. 2d 625, 627 (Fla. 3d D.C.A. 1964); see also, State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (Fla. 1930) ("It is the duty of the courts to scrupulously guard [the] right of the litigant [to an impartial judge] and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.")

> "No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. . . ." It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. . . . The

Footnote Continued

considering all Steinhorst proceedings, and his 1988 Order Denying Rule 3.850 Relief was void ab initio.

It is perfectly clear that in this case Judge Turner failed to fulfill his judicial duties. The question of disqualification of a judge focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially. Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). Under this standard a motion for disqualification clearly would have been granted since Judge Turner's prior representation of the Sims' estate presents a situation where the Judge's impartiality could reasonably be questioned. Not only was Mr. Sims a victim in this case, but also much of the evidence presented at the 3.850 hearing pertained to the background and character of Mr. Sims and the fact that he and one of the other victims, Doug Hood, were not innocent victims as portrayed at the trial but rather were armed and went to Sandy Creek to "rip off" the marijuana that was being unloaded.

More importantly, Judge Turner's determination that his representation of the estate of Harold Sims disqualified him from presiding over Hughes' trial leaves no question that

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11/ Footnote Continued From Previous Page

> judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

Dickinson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932).

he was not qualified to hear defendant's 3.850 motion since both men were charged with having committed the same crimes. See Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d D.C.A. 1980) (judge's spontaneous commitment to recuse himself at the option of counsel is convincing evidence of his own awareness of bias).

The conflict at issue in this capital case renders the failure by Judge Turner to disclose this conflict inexcusable, and irreparably undermines the reliability of his findings regarding Mr. Steinhorst's challenge to his convictions and death sentences.[12/] If defendant's counsel had known of Judge Turner's conflict of interest at the time that defendant's 3.850 Motion was heard, they most certainly would have moved for his recusal.

The court's refusal to acknowledge this blatant conflict of interest constitutes reversible error.

12/ Not surprisingly, this was not the first time that Judge Turner had deviated from properly fulfilling judicial duties. In October 1982, the Supreme Court of Florida, on recommendation from the Florida Judicial Qualification Commission, held that certain conduct by Judge Turner, which "[brought] the Judiciary into disrepute...", warranted public reprimand. See In re Turner, 421 So. 2d 1077 (Fla. 1982). That conduct included a "direct violation of the Code of Judicial Conduct" by initiating ex parte communications with one of the parties to a custody matter; the deprivation of two individuals of "elementary due process" through the "arrogant, arbitrary and capricious abuse of his powers as a Circuit Judge" and the "impeach[ment] [of] the public's confidence in the integrity and impartiality of the Judiciary" by failing "to observe elementary standards of judicial conduct" by arrogantly and improperly admonishing attorneys appearing before him. Id. at 1079-80.

II. DUE TO JUDGE TURNER'S CLEAR CONFLICT, THE 3.850 JUDGMENT IS NULL AND VOID

The 3,850 judgment entered against Mr. Steinhorst is null and void under Rule 1.540(b)(4). It is well established that a judgment entered by a judge with a disqualifying interest is void and should have no effect at all. See, e.g., American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372, 287-88 (1893) (where circuit judge was disqualified by law to take part in the case, decree entered by such judge is void and must be set aside); State ex rel. Central Farmers' Trust Co. v. Chillingworth, 107 Fla. 747, 143 So. 294 (1932) (a circuit judge who has a disqualifying interest in the litigation is ipso facto cut off and disqualified to make any order or decree in the cause, and any such order or decree entered by such judge, even when done in good faith and without knowledge of the disqualifying circumstances, is void); Hogan v. State, 89 Fla. 388, 104 So. 598 (1925) (recognizing right of every litigant to a trial by a tribunal uninfluenced by a taint of interest or partiality and holding that the orders entered by the disqualified judge were void).

The decision in Boyer v. State, 486 So. 2d 70 (Fla. 4th DCA) cert. denied, 494 So. 2d 1149 (Fla. 1986), is instructive. Boyer involved an appeal of the denial of the defendant's 3.850 motion, in which he raised for the first time the issue that one of the judges who presided on his direct appeal should have recused himself based on the judge's prior involvement 16 years earlier. The District Court of Appeal,

treating this prong of the 3.850 appeal as a petition for a writ of habeas corpus, held that "the judge's presence on the panel that reviewed appellant's conviction could not so flagrantly have affected appellant's due process rights as to void the appellate proceedings." Id. at 72. In so holding, the court concluded that the chances were remote that the judge's opinion was influenced by his prior involvement, and there were two other judges on the appellate panel that unanimously affirmed Boyer's conviction. See also, Giuliano v. Wainwright, 416 So. 2d 1180 (Fla. 4th DCA 1982) (connection between the judge's presiding over petitioner's prior conviction and his position as a member of the appellate panel regarding a different conviction was too attenuated to mandate voiding the appellate decision in the latter case); cf., Muina v. Hood, 516 So. 2d 1117 (Fla. 1st DCA 1987) (denying appeal of 1.540 motion wherein appellant claimed that final judgment entered six years before by biased judge was a nullity; court held that appellant's asserted grounds for disqualification -- that in a separate case the judge refused to grant a stay of execution and failed to send him a copy of the judgment -- had no factual basis and were insufficient to show a well-founded fear of prejudice).

These cases clearly contemplate that where there is a sufficient showing of judicial bias, such bias does render the judgment void. It is clear that Judge Turner's consideration of Mr. Steinhorst's 3.850 motion did "so flagrantly affect [Mr. Steinhorst's] due process rights as to void the [3.850] proceedings." Boyer, 486 So. 2d at 72.

III. THE JUDGMENT IS VOID BECAUSE IT FAILED TO COMPLY WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

It is well established that any judgment entered in a manner that fails to comply with fundamental due process principles is void. Pennoyer v. Neff, 95 U.S. 714 (1878). Rule 3.850 proceedings are governed by due process principles, Holland v. State, 503 So. 2d 1250, 1252 (Fla. 1987), and when Judge Turner presided at Mr. Steinhorst's 3.850 proceeding, he violated Mr. Steinhorst's fundamental due process right to an impartial tribunal. As stated in In re Murchison, 349 U.S. 133 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

Id. at 136 (citations omitted); See, Mayberry v. Pennsylvania, 400 U.S. 455, 464-65 (1971) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt); Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (due process requires that criminal defendant's case be heard by an impartial judge); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (to subject a defendant to trial in a criminal case involving his liberty or property before judge having a direct, personal,

substantial interest in convicting him is a denial of due process of law); Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985) (acknowledging fundamental due process right to impartial tribunal and affirming district court's order granting habeas corpus petition due to trial judge's failure to recuse himself from determining whether petitioner was in contempt of court); Scott v. Anderson, 405 So. 2d 228, 236 (Fla. 1st DCA 1981), cert. denied, 415 So. 2d. 1359 (Fla. 1982) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt).

The conflict in the instant case was so obvious that Judge Turner, in co-defendant Charlie Hughes' case, sua sponte apprised his counsel of the conflict. As a matter of simple fairness, Mr. Steinhorst should have been given the same opportunity that Charlie Hughes was given. The duty was on the judge, and Mr. Steinhorst should not be penalized because Judge Turner revealed the conflict to Hughes but declined to do so for Mr. Steinhorst.[13/]

In addition to Judge Turners' undisclosed conflict of interest, the fact that he had already recused himself from the case renders his judgment void. Florida case law indicates

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13/ Here, Judge Bower, who was originally assigned the motion, recused himself, because of the fact that he was in the State Attorneys office at the time of the Sandy Creek trials, although not personally involved in and had no personal knowledge of the case. If merely being "in the office" at the time another attorney was trying a case is sufficient to warrant recusal, the actual representation of the estate of the victim is clearly sufficient grounds.

that where a judge recuses himself in a case, subsequent orders in that case are a nullity. Bolt v. State, 594 So. 2d 864 (Fla. DCA 5th 1992) (civil); Swartz v. Swartz, 431 So. 2d 716, 717 (Fla. DCA 3rd 1983) (civil); State ex. rel. Cobb v. Bailey, 349 So. 2d 849, 850 (Fla. DCA 1st 1987); cert. denied 348 So. 2d 953 (Fla. 1977) (criminal); Vaughn v. State, 226 So. 2d 459, 462 (Fla. DCA 2nd 1968) (criminal); Hooks v. State, 207 So. 2d 459, 462 (Fla. DCA 2nd 1968) (criminal). On July 15, 1981, when Judge W. Fred Turner recused himself by written order in Case No. 77-708, see, MRJ ROA 28. Mr. Steinhorst remained a co-defendant in that case. As such, Judge Turner recused himself from taking any further action with respect to Case No. 77 - 708 and therefore rendered his future orders in Mr. Steinhorst's 3.850 motion -- filed in that same case -- nugatory.

Rule 3.850 is an equitable remedy, patterned after its federal counterpart, 28 U.S.C. § 2255. Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963). In a related context, the United States Supreme Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)). This is a unique situation, and equity demands that Mr. Steinhorst be

given a fair and impartial 3.850 proceeding.[14/] This is all the more true in a case in which a man's life is at stake.

The United States Supreme Court has dealt with precisely this issue in a case on point, Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). In that case which involved a Judge with a conflict of interest in the case before him, a dispute arose between plaintiff and Health Services regarding the site of a proposed hospital. Plaintiff wanted to build the hospital on a site that was owned by Loyola University, and negotiated a purchase price for the land, a price approved by the board of trustees for the university.

The case was heard by federal district court Judge Collins, who also happened to be a trustee for Loyola University. Judge Collins failed to disqualify himself as required by 28 U.S.C. Section 455(a).[15/] Nor did Judge Collins disclose his relationship with Loyola University. Defendant learned of Judge Collins' involvement with Loyola ten

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14/ Factual findings by a conflicted judge would not, of course, be entitled to any deference from a federal habeas court. See 28 U.S.C. § 2254(d)(2) (fact finding process not adequate to afford a full and fair hearing), (6) (applicant did not receive a full, fair and adequate hearing in the state court), and (7) (applicant was otherwise denied due process of law in the state court proceeding).

15/ Title 28 U.S.C. Section 455(a) is based on, and virtually identical to, Canon 3(C) of the ABA Judicial Code of Conduct, as is the Florida Code of Judicial Conduct. Section "455 was amended to bring the statutory grounds for disqualification of judges into conformity with the recently adopted Canon 3(C) of the Code of Judicial Conduct relating to disqualification of judges for bias, prejudice, or conflict of interest." See H.R. Rep. No. 93, 93d Congress, 2d Sess. (1974).

months after the entry of final judgment in favor of plaintiff. Thereupon, defendant filed a motion requesting that the orders entered by Judge Collins be vacated because he was disqualified to act in the matter.[16/] The Supreme Court held:

> It is remarkable--and quite inexcusable--that Judge Collins failed to recuse himself on March 24, 1982. A full disclosure at that time would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests--and appearance--of justice would have been served by a retrial. Another two-day evidentiary hearing would surely have been less burdensome and less embarrassing than the protracted proceedings that resulted from Judge Collins' nonrecusal and non disclosure. Moreover, as the Court of Appeals correctly noted, Judge Collins' failure to disqualify himself on March 24, 1982, also constituted a violation of Sec.455(b)(4), which disqualifies a judge if he "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." This separate violation of sec. 455 further compels the conclusion that vacatur was an appropriate remedy; by his silence, Judge Collins deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.

Id., at 866-867.

The preceding passage is quite instructive here. Judge Turner represented the estate of Harold Sims, while still

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16/ Judge Collins claimed that he had no actual knowledge of the pending transaction between Plaintiff and Loyola due to his absence from a meeting of the board of trustees. Judge Collins also insisted that since Loyola was not a party of record, there was no appearance of bias.

a lawyer.[17/] Again while still a lawyer, Judge Turner filed an initial petition for the administration of Harold Sims' estate on April 14, 1978 (the same month that Mr. Steinhorst was convicted) and several subsequent documents within the months that immediately followed. Subsequently, Judge Turner was appointed to the bench of the Fourteenth Judicial Circuit. However, the circuit court records for the Fourteenth Judicial Circuit (Probate Division) do not reflect that Judge Turner ever withdrew from the representation of Sims' estate. Judge Turner apparently failed to properly close the estate. On April 16, 1986, shortly after Judge Turner initially denied Mr. Steinhorst's Rule 3.850 motion without notice to the parties, the clerk of the Circuit Court for Bay County instituted proceedings to close the probate file of Harold Sims due to Judge Turner's failure to file the final accounting and petition for discharge (which should have been filed on or before April 14, 1979). Judge Turner never filed the final Accounting and Petition for Discharge as required by § 733.901(1) Florida Statutes, and the probate file was finally closed on May 1, 1986 due to inactivity. A search of the court records has failed to uncover any materials indicating that Judge Turner ever transferred the administration of the estate to another lawyer upon his appointment to the bench.

Moreover, on April 16, 1986, the Clerk of the Circuit Court in Bay County served a notice of hearing on Judge Turner

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17/ It is worth noting that Mr. Steinhorst was the only defendant indicted and convicted for Sims' death.

on an order to show cause why the inactive Sims probate file should not be closed. MRJ ROA 97. At that time Judge Turner must have realized that he was still the attorney of record in Sims' probate case, yet he still chose not to inform Mr. Steinhorst's attorney of the conflict, as he was required to do pursuant to Canon 3C of the Florida Code of Judicial Conduct. Judge Turner had ample opportunity to advise Mr. Steinhorst's counsel of the conflict, as the Rule 3.850 motion was again before him in November 1986, when he vacated his prior order and reconsidered the matter. Additionally, the matter was again before him after the Florida Supreme Court vacated and remanded his Order denying Rule 3.850 relief due to his failure to review the record on appeal.

Interestingly, Judge Turner offered to recuse himself in the trial of a co-defendant less than five years earlier, even though that co-defendant (Hughes) was not charged in the death of Harold Sims. Certainly, if there was a reason for recusal by Judge Turner in the trial of co-defendant Hughes, who was not charged in the death of Sims, the same action should have been taken in a proceeding involving the individual convicted of killing Sims.

The Liljeberg Court created a three-prong test to determine when a judgment should be vacated: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform

its high function in the best way 'justice must satisfy the appearance of justice.'" Liljeberg, 486 U.S. at 860.

Examining each of the components of the Liljeberg test in turn, the conclusion is clear: the judgment must be vacated. Concerning the first prong, in this case the risk of injustice is overwhelming: Mr. Steinhorst is facing execution. There can be no greater injustice than for a capital case to be heard by a judge who had a blatant conflict of interest and obvious sympathy for the victim. This is especially true in light of the fact that neither of his co-defendants, each of whom were considered equally blameworthy by the sentencing judge, are facing a death penalty. See, MRJ RDA 21-26, affidavit of Justice Adkins. Second, there is a high probability that denying relief in this case will result in injustice in other cases. The message that the Court will send is clear: judges can openly disregard the Judicial Code of Conduct, and nothing will come of it. Finally, the public's confidence in the judiciary will certainly be undermined. Judge Turner was the attorney of record in Sims' probate case while simultaneously passing judgment on the man convicted of killing Sims. This case therefore passes all three prongs of the Liljeberg test.

Moreover, like Judge Collins' actions in Liljeberg, Judge Turner's silence deprived Mr. Steinhorst of the basis for making a timely motion for disqualification. It is submitted that Mr. Hughes' counsel would not have learned of the conflict had Judge Turner not so advised him in 1981. Similarly, Mr. Steinhorst's counsel was given no notice of the conflict

during the entire two year period that Judge Turner had this case before him. Therefore, any delay in filing the motion to vacate Judge Turner's rulings is attributable to Judge Turner and, indeed, to the State.

Judge Turner had numerous opportunities to inform Mr. Steinhorst's attorney of his relationship with Sims' estate. His failure to do so, and the fact that he had already disqualified himself from hearing the case, render his 1988 judgment void. The State was also aware of Judge Turner's representation of Sims' Estate and his recusal in the Hughes case. Yet the State failed to raise the issue or inform Mr. Steinhorst's counsel. Thus, the court erred in not finding that the correct remedy is vacation of Judge Turner's void judgment denying the Steinhorst Rule 3.850 motion.

THE COURT ERRED IN FINDING THE 1.540 MOTION TIME BARRED.

As the affidavits of Christian Cox and Ian Haigler establish, and as Mr. Steinhorst would have established through the testimony of additional witnesses if he had been given the opportunity, Mr. Steinhorst's counsel was unaware of Judge Turner's conflict of interest and his recusal from Hughes' case until September 1991, at which time he promptly filed his Rule 1.540 motion.[18/] Hence, Mr. Steinhorst's motion under Rule 1.540(b)(4) was filed within a "reasonable time."

18/ Indeed, the State apparently concedes that Mr. Steinhorst did not discover the conflict of interest until 1991.

As the affidavits further establish, individuals working on behalf of Mr. Steinhorst made a good faith, diligent effort to uncover any possible conflict and to search the courthouse records back in 1986, when this matter was before Judge Turner. Those records were incomplete and in disarray. Despite diligent, good faith efforts, the conflict was not discovered until late 1991, three years after the entry of Judge Turner's order denying Rule 3.850 relief. Mr. Steinhorst should not suffer a violation of his due process rights due to the judge's failure to disclose the blatant conflict.

In Osceola Farms Co. v. Sanchez, 238 So. 2d 477 (Fla. 4th DCA 1970), the court considered a Rule 1.540 motion filed more than a year after the entry of a void judgment. The Osceola court held:

> Under the specific provisions of Rule 1.540(b) F.R.C.P., a motion to set aside a final judgment bottomed upon the reason that the judgment is void is not subject to the one-year limitation but must be brought within a reasonable time. We glean from the record that defendant's motion to set aside default and final judgment was filed when knowledge first came to the defendant that the plaintiff was seeking satisfaction of final judgment. Such, in our opinion is within the reasonable time requirement of the rule.

Id., at 480. Osceola demonstrates not only the correctness of using Rule 1.540 to vacate a void judgment but also that a motion filed as soon as the movant learns of the basis for the judgment being void is timely within the meaning of Rule 1.540. Id.

Additionally, the United States Supreme Court has held that Rule 60(b) authorizes a court to set aside "a void

judgment" without regard to the one-year limitation applicable to motions to set aside on some other grounds. Klapprott v. United States, 336 U.S. 942, 944 (1949). Thus, it is abundantly clear that a void judgment is never barred by time.

In the instant case, Mr. Steinhorst filed his Motion For Relief From Judgment as soon as he learned of the relationship of Judge Turner and Harold Sims' estate. Thus, contrary to the Court's findings, the Motion For Relief From Judgment was proper, and it was timely filed.

THE COURT ERRED IN FINDING THAT PREJUDICE NEED BE SHOWN.

In denying the Motion For Relief From Judgment, the Court erred in implying that Mr. Steinhorst had to demonstrate# actual bias to prevail on his motion. Adopting the State's argument verbatim, the court stated that Mr. Steinhorst's claim "is based on Defendant's imagined bias of Judge W. Fred Turner without any showing under F.S. 38.01 that Judge Turner appeared as a party of record in this case." See, MRJ ROA 67-68, 108-09.

First, the bias alleged by Mr. Steinhorst is not "imagined". The conflict of interest is clear. See, Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (judge's spontaneous commitment to recuse himself at the option of counsel is convincing evidence of his own awareness of bias). Furthermore, the court's statement does not reflect the current state of the law. The test for the appearance of judicial bias or prejudice is an objective, "reasonable man" test. See, e.g., Parliament Ins. Co. v. Hanson, 676 F.2d 1069 (11th Cir. 1982); Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981).

Second, contrary to the Court's holding, and as noted above, the law does not require a showing of actual bias or prejudice by the judge. Similarly, the law does not require that the judge be a party of record in a proceeding, in order to demonstrate an appearance of impartiality, thus necessitating disqualification. In the instant case, a reasonable person informed of the facts that Judge Turner was the attorney of record for the estate of Harold Sims, while simultaneously considering a post-conviction relief motion by the man convicted of killing Sims would doubt the judge's impartiality.

Moreover, several states have interpreted provisions of their judicial code of conduct identical to Canon 3(C) of the Florida Judicial Code of Conduct as requiring sua sponte disqualification whenever a judge's impartiality might reasonably be questioned, without any request from defense counsel.

> These principles have been reinforced by our Code of Judicial Conduct. Canon 3C(1)(a) requires that A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including, but not limited to, instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. In the context of our consideration of other subsections of this Canon, we have held repeatedly that it imports an objective standard. Pearson v. Parsons, 541 So.2d 447, 454 (Miss.1989); Jenkins v. Forrest General Hospital, 538 So.2d 1162, 1163 (Miss. 1988); Cantrell v. State, 507 So.2d 325, 328 (Miss.1986); Rutland v. Pridgen, 493 So.2d 952, 954 (Miss.1986); see also Craig v. Barber, 524 So.2d 974, 978 (Miss.1988). Moreover, the Canon enjoys the status of law such that we

> enforce it rigorously, notwithstanding the lack of a litigant's specific demand.

Collins v. Dixie Transport, Inc., 543 So.2d 160, 166 (Miss.1989).

In a similar case, In The Matter Of The Estate of Frank Risovi, 429 N.W.2d 404 (N.D. 1988), a judge had given legal advice to the party contesting a will prior to taking the bench. Prior to recusing himself, the judge made certain rulings. The will contestant moved to vacate the previous orders, arguing that they were void because the judge should have disqualified himself prior to making the rulings. The North Dakota Supreme Court agreed, stating as follows:

> It is sufficient to disqualify a judge that he had given legal advice to a party in connection with the subject matter before litigation began; it is not necessary that he was connected with the particular matter as a pending suit. As the United States Supreme Court reiterated recently in a more difficult decision about judicial disqualification: "We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'" Liljeberg v. Health Services Acquisition Corp., --- U.S. ---, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988).

Id., at 406.

The Arkansas Supreme Court has held that Judges must disqualify themselves sua sponte when they realize that their impartiality may be objectively questioned, Adams v. State, 269 Ark. 548, 601 S.W.2d 881 (Ark. 1980).

> Other courts have held, under similar disqualification provisions of their judicial conduct rules, that disqualification is mandatory unless specifically stated to be waivable in the rules. For example, Green v. State, 21

> Ark.App. 80, 729 S.W.2d 17, 20 (1987) said: "'We hold that Canon 3C is applicable in . . . civil cases, . . . that no request to disqualify and no objection for failure to disqualify is necessary to be made either by a trial attorney or by a party representing himself, that the trial judge must take the initiative to disqualify or, in the alternative, to comply with the procedure set out in Canon 3D, that this Court can, on its own initiative, examine the record to notice compliance or noncompliance, and that failure to comply is reversible error.' citation omitted. "Although we do not mean to impugn the integrity of the trial judge, we believe the law simply required a disqualification under the circumstances relating to the . . . case." [citations omitted]. In Grant v. State, 700 S.W.2d 170, 171 (Mo.App.1985), the appeals court vacated judgment and "any and all orders or rulings" made by the disqualified judge and remanded, saying" "The duty of [the judge] to disqualify himself was absolute. It did not 'depend on the waiver of the issue by the parties.' [citations omitted]. Although . . . Canon 3D permits 'remittal of disqualification' in certain situations, the instant situation is not within those exceptions." See Edmonson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978); Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436, 438 (1976) ("Disqualification under Canon 3C is mandatory." However, where 3D permits waiver, it need not be in writing and may be implied.)' Citizens First Nat. Bank v. Hoyt, 297 N.W.2d 329 (Iowa 1980) (disqualification is ordinarily automatic and should be on judge's own initiative; however, where waiver is permitted it may be implied as well as express). See also, United States v. Nobel, 696 F.2d 231 (3rd Cir.1982) (interpretation of comparable federal statute).

Id., at 883.

In Adams, the presiding judge at the defendant's arraignment was the prosecutor's uncle. At arraignment the defendant was not represented by an attorney and did not object to the uncle-nephew relationship. At a subsequent

post-conviction proceeding, defense counsel also failed to object to the earlier Canon violation. However, the Arkansas Supreme Court raised the issue sua sponte and remanded the case with instructions that it be heard before an impartial judge. The Adams court noted that defense counsel's failure to raise the issue of non-compliance with the disqualification canon was not relevant:

> We regard these failures to request compliance and object to non-compliance as being immaterial because the sense of Canon 3C is that the judge should take the initiative under Canon 3C, and also under Canon 3D if the judge elects to take advantage of the Canon 3D procedure.

Id., at 884. The Arkansas judicial disqualification canon is identical to the Florida disqualification canon and should be interpreted in the same manner.

As the preceding case citations indicate, and as the Court erred in ignoring, any time there is an appearance of bias, prejudice or judicial impartiality, the judge is under a duty to disqualify himself on his own initiative. Furthermore, the failure to object to a potentially biased judge does not waive the matter. At the very least, the judge must disclose on the record the basis for his potential bias, then allow the parties and their attorneys to decide whether or not to move for disqualification. Neither was done here.

THE COURT ERRED IN IGNORING THE UNDISPUTED EVIDENCE THAT JUSTICE ADKINS, HAD HE HEARD THE 3.850, WOULD HAVE IMPOSED LIFE SENTENCES

Even if the Court were correct and a showing of prejudice required, the patent prejudice resulting to Walter

Steinhorst as a result of Judge Turner's conflict is most easily demonstrated by additional new information provided by Justice James Adkins who, as a Florida Supreme Court Justice sitting by special designation, presided over the separate trials of Walter Steinhorst and co-defendant David Goodwin, and sentenced both of them to death. Justice Adkins, who but for the unique circumstances of being a sitting Supreme Court Justice would have heard Mr. Steinhorst's 3.850 motion, has stated that if he had heard the 3.850, he in all probability would have imposed a life sentence. See, MRJ ROA 25-26, Adkins Aff., para. 14. Since the Florida Supreme Court reduced David Goodwin's death sentence to life, Justice Adkins firmly believes that it should have done the same for Walter Steinhorst, and that in view of the fact that the third co-defendant, and another possible triggerman, Charlie Hughes, served only five years of a mere fifteen year sentence, it would be grossly unfair for Mr. Steinhorst to be executed. In this regard he has stated that this sentence "is a horrible, disproportionate situation that ought to be corrected." See, MRJ ROA 25, Adkins Aff., para. 13.

Had he been the judge hearing Steinhorst's 3,850 motion, Justice Adkins has stated that he "would have, at a minimum, raised the question of the sentences being disproportionate and requested briefs from the lawyers on these and other issues, and in all probability I would have granted Mr. Steinhorst's 3.850 motion and changed the sentence to life imprisonment." See, MRJ RDA 25-26, Adkins Aff., para. 14.

In ignoring these facts, the Court committed reversible error.

VIII. CONCLUSION

For all of the foregoing reasons, - particularly the undisclosed conflict of Judge Turner which irreparably undermines the reliability of the findings and determinations - Mr. Steinhorst respectfully requests that this Court grant relief from the judgment entered on his 3.850 motion, and order that a new hearing be conducted on his 3.850 motion before an impartial judge.

DATED: October 28, 1993

Respectfully submitted,

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