IN THE SUPREME COURT
OF FLORIDA

WALTER GALE STEINHORST,	:	Appeals No. 82,188
	:	C. Circ. Case Nos. 77-708
Appellant,	:	and 72,695
	:	
vs.	:	
	:	
STATE OF FLORIDA,	:	
	:	
Appellee,	:	

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellant, WALTER GALE STEINHORST, respectfully submits this Reply Brief in response to the Answer Brief filed by the Appellee, the State of Florida.

THE STATE HAS DISTORTED THE FACTUAL RECORD IN THIS CASE.

The State has misrepresented, or possibly misapprehended several key facts pertaining to this appeal.

First, although Judge Turner recused himself from presiding over Charlie Hughes' trial "on motion by the defense," (see Brief of Appellee at 1), it is important to note that it was Judge Turner himself -- rather than Charlie Hughes' defense counsel -- who brought the conflict of interest to the attention of the parties:

> This Court has heretofore made known to Counsel in this case that, as an attorney, he represented the Estate of one of the alleged victims in this case and indicated to Counsel that he would recuse himself from this cause upon request. A Motion for recusal having been filed by the Defendant, the Court is in agreement and therefore, it is
>
> ORDERED AND ADJUDGED that the undersigned does hereby recuse himself ....

MRJ ROA 28 (Order of Judge Turner dated July 9, 1981). Hence, any inference by the State that Mr. Hughes' counsel acted diligently in discovering the conflict is unfounded.

Second, the State is incorrect in asserting that "Steinhorst requested Rule 1.540 relief on the grounds that the original trial judge had developed second thoughts about the sentence...." (See, Brief of Appellee at 1). Mr. Steinhorst included Justice Adkins' affidavit merely as one means of establishing that he was prejudiced when Judge Turner -- a judge who himself acknowledged that he had a conflict of interest -- presided over his Rule 3.850 proceedings. Had an unbiased tribunal heard his claims, not only would that tribunal not have summarily dismissed Mr. Steinhorst's Rule 3.850 motion without even reviewing the record, as Judge Turner did (Brief of Appellant at 4, fn.2) an unbiased

judge might well have granted relief to Mr. Steinhorst. It is submitted that Judge Turner's conflict prevented him from examining Mr. Steinhorst's claims in an impartial, unbiased fashion.

Third, the State mistakenly portrays Justice Adkins as now having "second thoughts" about sentencing Mr. Steinhorst to death. It is clear from Justice Adkins' affidavit that he continues to believe that if Mr. Steinhorst's two co-defendants had received the death penalty, he would have stood by his decision to sentence Mr. Steinhorst to death. Justice Adkins' so-called "change of heart", (see Brief of Appellee at 8), is merely an acknowledgment that when this Court vacated co-defendant David Goodwin's death sentence and Charlie Hughes received a mere 15-year sentence, Mr. Steinhorst's death sentence became disproportionate, as his co-defendants were equally if not more culpable than Mr. Steinhorst, based on the evidence presented to Justice Adkins at the trial level. This Court has recognized "the very special and unique fact finding responsibilities of the sentencing judge in death cases." Corbett v. State, 602 So. 2d 12140, 1243 (Fla. 1992). While certainly not dispositive, Justice Adkins' statement that he would in all probability have granted Rule 3.850 relief is certainly relevant to an inquiry about the prejudice suffered by Mr. Steinhorst as a result of having a biased judge preside over his 3.850 proceedings.[1]

Fourth, the State argues that Mr. Steinhorst's counsel failed to exercise due diligence in reviewing the court file because they "never noticed the order in prior examinations of the Hughes file ....." Brief of Appellee at 6. The State thus seeks to put the onus on Mr. Steinhorst's counsel for failing to discover an Order that was not even produced for their inspection. The affidavits presented in support of Mr. Steinhorst's Rule 1.540 motion establish that despite diligent efforts by those working on behalf of

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[1] It should be noted that Mr. Steinhorst does not concede that he must demonstrate prejudice under the circumstances presented here. He has contended throughout that prejudice is presumed under these circumstances. See Brief of Appellant at 7-8.

Mr. Steinhorst, no Order of Recusal was found in the courthouse file. Had Mr. Steinhorst's Rule 1.540 motion not been summarily denied by the court below, he was prepared to present testimony regarding the diligent efforts made to discover any possible conflict or bias by Judge Turner. What Mr. Steinhorst did present were affidavits indicating that the Bay County Courthouse records were in serious disarray when they were examined by the Steinhorst defense team and that the files were incomplete. See MRJ ROA 93-96. The affidavits also indicate that when an attorney and paralegal again reviewed the file in September 1991, in preparation for the filing of a petition for a writ of federal habeas corpus, they asked for all files concerning the Sandy Creek trial. It was only after it became apparent that the files were incomplete and the court clerk was asked specifically to look for additional files that the clerk, several hours later, located additional files, in which the Recusal Order was contained. (See, MRJ ROA 95-96). Given the disarray of the courthouse files, it is not at all surprising that a diligent search of the files by the defense team failed to uncover the Order of Recusal.[2] The affidavits presented by Mr. Steinhorst, which establish both the diligent efforts made to uncover any possible conflict by Judge Turner and the disorderly state of the courthouse files, were not controverted in any way, shape or form by the State. Short of moving heaven and earth, Mr. Steinhorst's counsel did all that they could to discover the conflict, and Judge Turner had a duty to reveal that conflict to counsel just as he did to counsel for Charlie Hughes.

MR. STEINHORST TIMELY EMPLOYED THE PROPER PROCEDURE FOR CHALLENGING JUDGE TURNER'S ORDER

As Mr. Steinhorst has repeatedly argued, the motion for relief from judgment is not a successive Rule 3.850 motion, for Mr. Steinhorst is not seeking in this proceeding to vacate the conviction and sentence. Rather, Mr. Steinhorst is seeking to set aside

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2 As noted in Appellant's Initial Brief at 5, fn.3, not even the trial record was housed in the courthouse at the time that Judge Turner presided over Mr. Steinhorst's 3.850 proceedings.

Judge Turner's judgment (denying Rule 3.850 relief) on the ground that it is void. For some reason, neither the lower court nor the State has been able to grasp the distinction between a Rule 3.850 proceeding and a proceeding to set aside a judgment under Rule 1.540.

The State also incorrectly asserts that "[a]ctions filed under the auspices of Fla.R.Civ.P. 1.540(b) must be initiated within one year of the judgment" and that Appellant failed to request relief within one year of the entry of the judgment. Brief of Appellee at 4. To the contrary, a party is not required to file within one year under subsection (b)(4), when the party seeks to have a judgment set aside on the ground that it is void. Rather, the party must file the motion within a reasonable time. Fla. R. Civ. P.1540(b). In the instant case, Mr. Steinhorst filed the motion within a couple of weeks of discovering that Judge Turner had recused himself from the case because he had represented the estate of the victim. (See, MRJ ROA96).[3] Hence, the motion for relief from judgment was timely filed.[4]

The State attempts to circumvent subsection (b) (4) by asserting that Judge Turner's order is not void because Mr. Steinhorst has failed to show under Fla. Stat. 38.01 that Judge Turner appeared as a party of record in this case. Brief of Appellee at 4. As argued in Appellant's Initial Brief, however, Chapter 38 of the Florida Statutes is not the exclusive provision dealing with judicial disqualification in the event of a conflict of interest. Brief of Appellant at 15.

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3 The State argues that Mr. Steinhorst's counsel mysteriously "waited until seven months after the decision [on appeal of the Rule 3.850 denial] to suddenly begin reexamining available files" and that this "belated investigation is most curious, since Steinhorst had no right to file any successive Rule 3.850 petition." Brief of Appellee at 6. There is nothing mysterious or "curious" about it. Post-conviction representation entails reviewing court files at several junctures in the collateral appeals process, including the transition from state to federal post-conviction proceedings.

4 Contrary to the State's speculation, appellant never "mistakenly believed," (see Brief of Appellee at 4), "that the direct appeal from the order denying Rule 3.850 relief tolled the time for bringing the Rule 1.540 motion." Id.

Mr. Steinhorst has set forth three separate grounds as to why Judge Turner's Order denying rule 3.850 relief is void. The State has failed to address any of these grounds except to say that under Fla. Stat. 38.01, Judge Turner is neither a party, related to a party, nor financially interested in the outcome of the case. Notably, the State has completely failed to address Mr. Steinhorst's argument that the judgment is void because (1) Judge Turner, having already recused himself in this case, was therefore disqualified from entering any further orders in the case, (Brief of Appellant at 13-15, 23), and (2) Judge Turner's participation in this case violates Mr. Steinhorst's right to due process.

MR. STEINHORST'S COUNSEL DILIGENTLY SOUGHT TO DISCOVER ANY CONFLICT OR BIAS BY JUDGE TURNER

The State apparently is attempting to pigeonhole Mr. Steinhorst's motion as one arising under rule 1.540(b)(1) ("mistake, inadvertence, surprise, or excusable neglect") by asserting that counsel made a "unilateral mistake" in failing to find any order of recusal when counsel's investigator reviewed the court files in 1986[5] As discussed above, no mistake was made by those working on behalf of Mr. Steinhorst. His defense team undertook a diligent search of the records in 1986, but the records were in a state of disarray and a diligent search of the records failed to uncover any evidence of a conflict of interest. Mr. Steinhorst's investigators found no order of recusal contained in the file that the clerk produced for inspection in 1986. (See, MRJ ROA 93-94). It is certainly not correct to say that it is "beyond dispute that the order was in the file...." Brief of Appellee at 6. That is precisely what is in dispute; Mr. Steinhorst has submitted affidavits to support his claim that the records were incomplete and that no such order was produced by the Clerk. The State has failed to controvert those affidavits in any way.

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5 Motions brought pursuant to Rule 1.540(b)(1) must be filed within one year of the judgment that the party seeks to have set aside. Fla. R. Civ. P. 1.540(b).

JUDGE TURNER'S REPRESENTATION OF THE SIMS ESTATE REQUIRED THAT HE RECUSE HIMSELF FROM THIS CASE.

The State also makes the bold assertion that even if post conviction counsel had known of Judge Turner's earlier recusal from this case and then moved for recusal, such motion would have been denied. How the State can argue that the motion would have been legally insufficient is beyond comprehension, in light of Judge Turner's own acknowledgment of the conflict. Judge Turner most certainly would have been required to grant a recusal motion filed by Mr. Steinhorst's post-conviction counsel, had counsel known that Judge Turner had represented the estate of the victim.

The State also argues that there is nothing wrong with Judge Turner presiding over Mr. Steinhorst's Rule 3.850 motion -- in which Mr. Steinhorst alleged that the victim Harold Sims was not an innocent victim, but rather played an active role in the events leading to this death -- while simultaneously acting as counsel of record for Sims' estate.[6] Yet the conflict was certainly troubling enough to Judge Turner that he sua sponte brought the issue to the attention of Charlie Hughes' counsel.

The State also assails Mr. Steinhorst for failing to produce any probate files. See Brief of Appellee at 10. In fact, a portion of that file is contained in the Record on appeal now before this Court. (See, MRJ ROA 97). Additionally, the State contends that there is no evidence of any wrongful death action having been brought against Steinhorst or Hughes. Whether a wrongful death suit was ever brought is irrelevant. What is relevant is the fact that Judge Turner apparently determined that the only asset of the Sims estate was a wrongful death claim, (see Petition for Administration in Estate of Harold George Sims. No. 78-182-CP, attached hereto as Supplemental Appendix A), thereby indicating Judge Turner's belief that Sims was an innocent victim who played no role in his demise.

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6 It must be remembered that Judge Turner never closed out the estate's file and never withdrew from representation after assuming the bench. (See, Brief of Appellant at 28).

The cases cited by the State to support its argument that Judge Turner's representation of the victim's estate did not disqualify him are plainly inapposite. The instant case presents a unique factual situation that has not previously been addressed in this State and that is unlikely to present itself again. Nor do the cases cited by the State present a situation in which the judge sua sponte offered to recuse himself, which is convincing evidence of the judge's awareness of the conflict. See Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980).

FLA. R. JUD. ADMIN. 2.160 DOES NOT APPLY TO THIS CASE

The State disingenuously argues that Fla. R. Jud. Admin. 2.160 governs these proceedings. Rather than pointing to the date upon which Mr. Steinhorst discovered the conflict of interest -- September 1991 -- or the date upon which Mr. Steinhorst filed his Rule 1.540 motion -- October 4, 1991 -- the State references the date when Chief Judge Sirmons denied the Rule 1.540 motion. Fla. R. Jud. Admin. 2.160, which superseded Fla. R. Crim. P. 3.230, took effect on January 1, 1993. Mr. Steinhorst's Rule 1.540 motion had already been filed prior to that time, and therefore Rule 2.160 does not apply here.

Conclusion

For all the foregoing reasons, Mr. Steinhorst respectfully requests that this Court reverse the lower court's denial of his motion under rule 1.540, grant relief from the judgment entered by Judge Turner, and order that a new rule 3.850 proceeding be conducted before an impartial judge.

DATED: January 21, 1994

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 725 South Figueroa Street, Suite 3890, Los Angeles, California 90017-5438.

On January 21, 1994, I served the foregoing document(s) described as **APPELLANT'S REPLY BRIEF** on the parties in this action by placing a true copy(ies) thereof enclosed in a sealed envelope addressed as follows:

Alton Paulk,, Esq.
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Fourteenth Judicial Circuit
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Robert Butterworth, Esq.
Attorney General
Department of Public Affairs
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Tallahassee, Florida 32399

_____ (By Mail) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on Motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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_____ (BY PERSONAL SERVICE) I delivered such envelope to the offices of the addressee.

_____ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

XXXX (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.
Executed on November 10, 1993, at Los Angeles, California.

Executed on January 21, 1994 at Los Angeles, California.

CYNTHIA BRADLEY

Cynthia Bradley
Signature