IN THE SUPREME COURT OF FLORIDA

CASE NOS. 82,930 & 78,199

STATE OF FLORIDA,

Petitioner/Appellant,

v.

LAWRENCE FRANCIS LEWIS,

Respondent/Appellee.

STATE OF FLORIDA

Petitioner/Appellant,

v.

FRANK LEE SMITH,

Respondent/Appellee.

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

ANSWER BRIEF OF RESPONDENTS/APPELLEES

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PRELIMINARY STATEMENT

This proceeding involves two actions, consolidated by this Court for briefing purposes, instituted by the State of Florida from postconviction proceedings in the circuit court in the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Citation in this Brief will be to the accompanying Appendix and shall appear as (App. ___). All other citations and references to the record will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Oral argument has already been scheduled by this Court to take place on May 6, 1994.

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STATEMENT OF THE CASE AND FACTS

1. LAWRENCE FRANCIS LEWIS.

Mr. Lewis takes exception to the "facts" set forth in the State's brief. First, most of these "facts" are not relevant to the issue at hand. Second, the State does not accept the allegations contained in the Rule 3.850 motion as true. For example, the State asserts, "Lewis voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation after consulting with counsel" (Initial Brief at 3 n.2). Mr. Lewis has alleged exactly the opposite (App. 2 at 25-29). There could be no knowing, voluntary and intelligent waiver because there was inadequate investigation. See Deaton v. Dugger, 18 Fla. L. Weekly S529 (Fla. Oct. 7, 1993). Until an evidentiary hearing has occurred, Mr. Lewis' allegations must be accepted as true. Because an evidentiary hearing has yet to be held, the law is quite clear that at this stage, the facts set forth in Mr. Lewis' motion to vacate must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

The relevant facts are simply that Mr. Lewis is under a sentence of death.[1] As a result, the Office of the Capital Collateral Representative (CCR) is obligated to represent him and provide him with effective assistance of counsel in pursuing collateral relief. See Spalding v. Dugger, 526 So. 2d 71 (Fla.

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[1]This Court upheld Mr. Lewis' conviction and sentence of death on direct appeal. Lewis v. State, 572 So. 2d 908 (Fla. 1990), cert. denied, Lewis v. Florida, 111 S. Ct. 2914 (1991).

1988). To that end, CCR filed on behalf of Mr. Lewis a motion to vacate his conviction and sentence of death (App. 1).

Subsequent to filing the motion to vacate, CCR filed a motion to disqualify the trial judge, the Honorable Stanton Kaplan, because the trial judge had a personal relationship with Mr. Lewis' trial attorney, the trial judge had personal animosity towards Mr. Lewis that was expressed in a letter not part of the judicial proceedings, the trial judge had expressed to the media his view that his goal is to put criminal defendants who walk into his courtroom away for as long as possible, and the judge had a conflict of interest due to Broward County's budgeting practices of taking the cost of appointed special public defenders and expert witnesses from the funds available to a judge for administrative costs and capital improvements (App. 14, 16). The pleadings filed by Mr. Lewis, including the Motion to Disqualify and the Motion to Vacate, set forth the factual bases for these claims establishing Mr. Lewis' entitlement to relief. In the Motion to Disqualify, Mr. Lewis included an affidavit from attorney Ed Stafman, who provided a sworn statement to the effect that Judge Kaplan had worked for Mr. Lewis' trial counsel, Richard Kirsch, and was still a personal friend of Mr. Kirsch (App. 14 at 2-3). Because of Judge Kaplan's personal history and friendship with Mr. Kirsch, Mr. Lewis argued that the situation constituted grounds for recusal because Mr. Kirsch would be a witness in the Rule 3.850 proceedings (Id.). Mr. Lewis also alleged that he had a fear that Judge Kaplan would not be fair

and impartial in evaluating his claims for postconviction relief because of a letter that Judge Kaplan had written to the Clemency Board (Id. at 3). In the letter, Judge Kaplan expressed his view that "Mr. Lewis was unfit to live in society. . . . Lewis enjoyed every minute of the abuse, showing no mercy, no compassion and no humanity. He will kill again and should never be released" (Id.). Mr. Lewis' pleadings also alleged that Judge Kaplan, while being interviewed for the television program "48 Hours," made inappropriate remarks that established that Judge Kaplan cannot be fair and impartial (App. 16 at 2-5). Described as "a hanging judge, death on wheels," Judge Kaplan explained that his job in dealing with accused criminals was "to get rid of these people . . . and keep them off the streets as long as possible so that you and I can be rid of them." He further elaborated that his policy was that "you've got to fight fire with fire." (Id.). Prosecutors who were interviewed discussed how "excited" they were when they were assigned cases in front of Judge Kaplan because, as Judge Kaplan himself explained, "Sometimes you give them [the defendants] a little stiffer sentence so they'll spend some more real time in jail." (Id.). Mr. Lewis' pleading also set forth the basis for his conflict of interest claim. Mr. Lewis alleged that Judge Tyson, when recently faced with a request for funds to pay the fee of a special public defender, revealed the difficult position he and other Broward County circuit judges faced due to the budgeting conflict:

THE COURT: And yet they have not funded enough money.

I'm in a bad position in that way.

In a way, I have a conflict of interest because the funds that the County Commission gives the Judiciary is for administrative purposes and also to cover the special public defenders that have been appointed and the costs.

If there are overruns on that, they will take it from the Judiciary, such as that phone in there, they wanted to take that out in order to operate the Judiciary.

They're thinking a bunch of things, so I have a conflict of interest as to whether I want his client any money in a broad sense.

We're having overruns with the special public defenders, particularly with the homicides and other items.

We're trying to keep it down.

* * *

So I'm now putting it to the test in light of the pressure that the County Commission placed upon us, for the purposes of appointing a special public defender in homicides or anything else.

They say this is a money problem and you're here to represent them.

How do you want me to do this? Are they going to reimburse the Judiciary more money because he's charged with a crime?

Are you going to say, Judge, do what you have to do, but we have to take your telephone out of your Courtroom and take a few chairs out so you can pay for this?

(App. 16 at 2-3, 5-6, Attachment B) (emphasis added).

This motion to disqualify was based upon information collateral counsel learned through investigation of Mr. Lewis' case. The motion to disqualify was granted (App. 18). Based

upon collateral counsel's investigation thus far, Judge Kaplan likely possesses additional information that may provide a basis for claims for relief. However, Mr. Lewis' collateral counsel represent other individuals sentenced to death by Judge Kaplan who have litigation currently pending before Judge Kaplan raising the same issues.[2] Mr. Lewis' attorneys cannot ethically discuss the facts giving rise to these claims with Judge Kaplan because to do so would violate the prohibition against initiating ex parte contact. See Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Lewis' attorneys are nonetheless obligated to learn the facts so that they may diligently pursue available collateral relief. Because Judge Kaplan is a material and necessary witness who possesses important information which needed to be investigated, Mr. Lewis' counsel scheduled a deposition of Judge Kaplan -- the only ethical way to interview him so as not to engage in ex parte contact (App. 20). The State filed a motion to quash, (App. 22), and the deposition was postponed at the State's request pending resolution of the State's motion (App. 21). After hearing argument by counsel for Mr. Lewis and the State, the motion to quash was denied because Judge Lebow agreed that Judge Kaplan was a necessary and material witness and that the only way for Mr. Lewis' counsel to ethically communicate with him regarding the

[2]In fact, collateral counsel have sought to consolidate these cases because they raise some of the same issues.

facts, given his presiding over similarly situated clients, was via a deposition (App. 25).[3]

2. FRANK LEE SMITH.

Mr. Smith takes exception to the "facts" set forth in the State's brief. Most of these "facts" are not relevant to the issue at hand. In Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990), this Court ordered an evidentiary hearing based on Chiquita Lowe's affidavit stating that she had testified against and identified the wrong man in open court -- Frank Lee Smith. This Court acknowledged that "[o]f the witness identifications presented at trial, that of Lowe clearly was the most credible." Smith, 565 So. 2d at 1297. On March 7, 1991, the circuit court held an evidentiary hearing as ordered by this Court. The circuit court subsequently signed the State's proposed order denying Mr. Smith's Rule 3.850 motion.

On October 2, 1992, Mr. Smith filed his Initial Brief in this Court, alleging, inter alia, a denial of due process because of the impermissible ex parte contact between Judge Tyson and the Assistant State Attorney (App. 34). On October 12, 1992, the State filed a Motion to Relinquish Jurisdiction in this Court "so that the true facts concerning a claim [Argument I(A)] raised by appellant can be brought to this Court's attention." (Appendix 35 at 3). On October 30, 1992, this Court granted the State's

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[3]During the hearing, Mr. Lewis' counsel did offer to simply "go talk to Judge Kaplan on our own without the State present" (App. 23 at 14). However, the State objected to collateral counsel speaking with Judge Kaplan in such a fashion.

motion and relinquished Mr. Smith's case to the circuit court "for the purpose of getting the facts concerning a claim raised by the appellant that there was an ex parte communication between the State and the trial judge" (App. 37). Thereafter, Judge Tyson granted Mr. Smith's recusal motion (App. 40), and the case was reassigned to Judge Mark Speiser.

Pursuant to this Court's order, Judge Speiser set a hearing date for January 21, 1994 (App. 45). In order to comply with the State's request to get the "true facts," Mr. Smith issued a subpoena for deposition to Judge Tyson, the presiding judge at Mr. Smith's March 7, 1991, hearing (App. 44). A subpoena was issued because Judge Tyson is a presiding judge in Broward County in front of whom other capital defendants have appeared, and Mr. Smith's attorney did not wish to initiate ex parte contact (App. 50 at 8-9). The State filed a motion to quash the subpoena, (App. 46) and, after a hearing, Judge Speiser, recognizing that a deposition was the only ethical way for Mr. Smith's attorneys to talk with Judge Tyson, denied the motion to quash but granted a protective order limiting the scope of the deposition to the circumstances surrounding the ex parte contact, the very reason the State requested the relinquishment of jurisdiction in the first place (App. 48). The State then requested a stay of proceedings from Judge Speiser pending further proceedings (App. 47). Judge Speiser denied the stay, (App. 49), and the State then sought an Emergency Motion to Stay Proceedings and Motion for Protective Order in this Court (App. 52). The State's

request was granted on January 19, 1994, and the Court ordered that "the relinquishment proceeding in the trial court is hereby stayed pending the disposition of State v. Davis, Case No. 82,651 and State v. Lewis, Case No. 82,930, which are now pending in this Court." (App. 54).

SUMMARY OF ARGUMENT

I. There is no dispute regarding the fact that there is no discovery in postconviction proceedings. Neither Mr. Lewis nor Mr. Smith argued that discovery was authorized, nor are they asking this Court to authorize discovery in post-conviction. The lower courts correctly recognized that under the unique circumstances presented, the only ethical manner for postconviction counsel to talk with Judge Kaplan and Judge Tyson in furtherance of the investigation into claims for postconviction relief was to conduct a deposition with the State present. This Court has placed on postconviction counsel a duty to investigate, and Mr. Lewis and Mr. Smith have the right to the effective assistance of postconviction counsel. In order to properly discharge these duties, collateral counsel must have the opportunity to pursue all potential investigatory avenues. The State's actions have obstructed collateral counsel's obligation to investigate their clients' case and have effectively cut off the clients' right to the effective assistance of collateral counsel.

ARGUMENT I

THERE IS NO DISCOVERY IN POSTCONVICTION PROCEEDINGS, AND THE LOWER COURTS DID NOT AUTHORIZE MR. LEWIS AND MR. SMITH TO ENGAGE IN PRE-HEARING DISCOVERY; THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION IN FINDING THAT UNDER THE UNIQUE CIRCUMSTANCES PRESENTED, THE ONLY PROPER WAY FOR COLLATERAL COUNSEL TO ETHICALLY INVESTIGATE CLAIMS FOR POSTCONVICTION RELIEF WHILE SIMULTANEOUSLY AVOIDING EX PARTE COMMUNICATIONS WAS TO PERMIT COLLATERAL COUNSEL TO CONDUCT DEPOSITIONS WITH THE STATE PRESENT.

There is no dispute between the State and Mr. Lewis and Mr. Smith regarding the fact that the Florida Rules of Criminal Procedure do not provide for discovery in postconviction proceedings. Neither Mr. Lewis nor Mr. Smith argued to the lower court that discovery in postconviction proceedings was permissible, nor are they now asking this Court to authorize discovery in postconviction. Likewise, the State has not nor is it currently requesting that discovery be permitted in postconviction.[4] What the lower courts did was recognize that,

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[4]In fact, in State v. Davis, Case No. 82,651, currently pending before this Court, the State has petitioned for the Court to exercise its discretionary review and quash the Third District Court of Appeals decision which authorized limited pre-trial discovery in a non-capital postconviction case. See Davis v. State, 624 So. 2d 282 (Fla. 3d DCA 1993). The State has argued that the decision of the Third District Court of Appeals "has set dangerous precedent" (Initial Brief at 10). The State's Brief details a lengthy list of policy considerations that would arise should discovery be permitted in postconviction, and concludes that authorizing discovery would "open[] Pandora's box." (Initial Brief at 11). Mr. Lewis and Mr. Smith agree that authorizing discovery would open the floodgates with respect to the numerous and complex issues that would necessarily be implicated. However, Mr. Lewis was not seeking authorization to engage in pre-hearing discovery (an evidentiary hearing has not even been granted), but only wanted to investigate his case.

under the unusual and unique circumstances presented, the only way for postconviction counsel to investigative their clients' cases was to permit depositions to take place.

Throughout the lower court proceedings in both these cases, the State has consistently maintained that there is no discovery in postconviction:

> "Traditionally, there has been no pre-hearing discovery pursuant to 3.850 motions."

(App. 22 at 1).

* * *

> "[T]he State does not believe that the defense is entitled to discovery, specifically, depositions, and in this case, deposing the original trial Judge."

(App. 23 at 6).

* * *

> "Traditionally, there has been no discovery in post-conviction proceedings. Florida Rule of Criminal Procedure 3.850 makes no provision for discovery, and none has been traditionally allowed."

(App. 30 at 8).

* * *

> "[T]he State takes issue with the holding and rationale of Davis [v. State], . . . [in which] the Third District Court of Appeal decided to break from tradition and allow limited prehearing discovery in 3.850 proceedings."

(App. 30 at 8).

* * *

> "[D]iscovery has traditionally not been allowed in post-conviction proceedings."

(App. 46 at 2).

* * *

> "And the State's position is -- traditionally there has been no discovery allowed and no depositions, just no written discovery of any kind."

(App. 50 at 4).

* * *

> "The State's just concerned that CCR cannot be able to go and issue subpoenas to whomever they wish and whenever they wish because, traditionally, there has not been discovery in 3.850's."

(App. 50 at 4).

* * *

> "The facts are different between [Mr. Smith's] case and [Mr. Lewis'] case; but the overriding concern here is whether discovery should be permitted at all in 3.850 proceedings, and if so, what the procedure should be for obtaining discovery. So our position in Lawrence Lewis is that discovery should not be allowed, traditionally has not been allowed; and by denying the State's motion to quash and allowing discovery, you know, a whole series of -- actually the tradition has been broken."

(App. 50 at 17).

* * *

> "[T]he State maintains that the language and history of the rules clearly reflect that discovery should not be allowed in 3.850 proceedings."

(App. 52 at 7).

* * *

> "Traditionally, there has been no discovery in capital post-conviction proceedings. Florida Rule of Criminal Procedure 3.850

> makes no provision for discovery, and, until Davis, no other legal authority authorized it. Davis, however, has set dangerous precedent."

(Initial Brief at 10). Furthermore, in State v. Davis, the State succinctly explained its position regarding the right to discovery in postconviction:

> Any attempt to infer the right to discovery for hearings pursuant to Fla. R. Crim. P. 3.850 from Fla. R. Civ. P. 3.220 would be wrong, since 1) Rule 3.850 was promulgated years before Rule 3.220 and 2) the Supreme Court made no reference to Rule 3.850 from the year of its inception in 1967 to the present day. Clearly, if the Supreme Court intended to permit discovery in Rule 3.850 proceedings for post-conviction relief it would have expressly provided for it in the wording of civil Rule 3.220 or criminal Rule 3.850 when it was substantially amended in 1977, The Florida Bar Re: Florida Rules of Criminal Procedure, 343 So. 2d 1247 (Fla. 1977), and 1984, The Florida Bar Re: Amendment to Rules of Criminal Procedure (rule 3.850), 460 So. 2d 907 (Fla. 1984). At no time did the Court indicate in Rule 3.850 that discovery of any kind, let alone depositions, was authorized. It would be simple for the Court to insert a sentence authorizing depositions, and the fact that no such sentence has ever been in the Rule shows that depositions were not intended. See State ex rel. Evans v. Chappel, 308 So. 2d 1 (Fla. 1975).

(App. 55).[5]

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[5]State Attorney's Offices have similarly maintained that there is no right to discovery in postconviction. For example, in Grover Reed v. State of Florida, Florida Supreme Court Case No. 80,518, postconviction counsel informed the lower court that the Duval County State Attorney's Office had agreed that there was no discovery in Rule 3.850 proceedings:

> [MR. MCCLAIN] I have another case pending in Jacksonville, Leo Jones, and in that case

(continued...)

Mr. Lewis and Mr. Smith do not take issue with the State's assertion that there is no discovery in postconviction proceedings. There is no question that authorizing discovery in postconviction would "open[] Pandora's box." (State's Initial Brief at 11). In reality, the State's position centers on a series of confusing arguments which boils down to the State's unhappiness with the fact that the lower courts authorized postconviction counsel to speak with a trial judge: "The State submits [] that capital defendants in post-conviction proceedings should not be allowed the unfettered discretion to subpoena for deposition any person, <u>especially a judge</u>, who the defendant suspects <u>might</u> have information to support a claim for relief." (State's Initial Brief at 10) (emphasis added). A substantial portion of the State's brief addresses why the lower courts reneged on what the State has classified as their duty to be "especially vigilant in protecting the judiciary from potential abuse of process" (<u>Id</u>. at 15).

The State's arguments exaggerate the situation because, in fact, these cases present a unique set of factual circumstances which have never before arisen in postconviction proceedings, as

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[5](...continued)
[Assistant State Attorney] John Jolly has stipulated that there is no discovery in 3.850 proceedings. I am not entitled to the state's statements. They are not entitled to mine, and for some reason in this case now the statements that are quoted in the 3.850 are supposed to be turned over.

the lower court acknowledged (App. 23 at 15-16). Undersigned counsel have never before set a deposition for the purposes of engaging in discovery. However, the singular set of circumstances in the instant cases has never before arisen. The State's arguments obfuscate the simple issue that was presented below and ignore the reason why the unusual step of issuing a deposition subpoena was undertaken at all. After Judge Kaplan disqualified himself from presiding over Mr. Lewis' postconviction motion, postconviction counsel, believing that Judge Kaplan possessed relevant information which would provide a basis for relief, issued a deposition subpoena to Judge Kaplan. At the hearing held in circuit court on the State's motion to quash the subpoena, Mr. Lewis' counsel explained the unique circumstances underlying the issuance of the subpoena:

> And in this case, Your Honor is presented, I agree with a very highly unusual situation. This is a trial judge. <u>The reason I want to depose him, Your Honor, Judge Kaplan is also the presiding judge over other cases that the C.C.R. represent. And we wanted to avoid all appearances of impropriety and avoid ex-part[e] communications. And also to have the State present at this deposition so we could discuss with Judge Kaplan the matters related to Mr. Lewis' case</u>.

(App. 23 at 8-9) (emphasis added). Collateral counsel further explained that it was important to be able to talk with Judge Kaplan because "Judge Kaplan is the only source of information for these particular claims." (<u>Id</u>. at 14).[6] In order to avoid

[6]Incredibly, at the hearing before Judge Lebow, the state disagreed that Judge Kaplan was the only source of information (continued...)

any appearance of impropriety and to eliminate the potential for ex parte contact, postconviction counsel issued a subpoena for that specific purpose (Id.). Counsel then offered the following resolution of the issue:

> The flip side of the argument, is that we can go talk to Judge Kaplan on our own without the State present. If that is what the Attorney General is arguing, we have no objection to that. The reason why we did advise by way of deposition, as I said earlier, was to avoid any appearances of impropriety.

(Id. at 14). The State then objected to collateral counsel speaking with Judge Kaplan without the State present. (Id.). Acknowledging that "this is an extremely unusual situation," (Id. at 15-16), Judge Lebow denied the State's motion to quash.

Despite recognizing that "the defense's burden is to go forward on the 3.850 with these facts," (Id. at 15), and that Mr. Lewis alleged "that Judge Kaplan has information relevant and material to the issues that are obtainable by defense counsel," (Id. at 16), the State's actions have completely prevented Mr. Lewis' counsel from effectively investigating viable claims for postconviction relief. The State objected to counsel deposing Judge Kaplan while also objecting to counsel speaking to Judge

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[6](...continued) regarding these issues, and suggested that both the trial attorney as well as Judge Tyson would possess relevant information on the issue regarding the funding conflict of interest because Judge Tyson was the person who first revealed the conflict of interest. (App. 23 at 14-15). Of course, when CCR issued a subpoena for deposition to Judge Tyson in Mr. Smith's case, the state sought to quash that subpoena and is before this Court on Mr. Smith's case as well.

Kaplan outside its presence (which counsel may not ethically do because it would be ex parte communication). The State cannot have it both ways.

In its Initial Brief, the State argued:

> Calling his efforts "investigation," however, does not change the character or the means used to obtain the information sought. Lewis seeks to depose Judge Kaplan to discover information to pursue his claims. The State submits, however, that capital defendants in post-conviction proceedings should not be allowed the unfettered discretion to subpoena for deposition any person, especially a judge, who the defendant suspects might have information to support a claim for relief.

(Initial Brief at 10) (emphasis in original). The State simply does not understand the situation in Mr. Lewis' case. Mr. Lewis was not seeking "unfettered discretion" to engage in discovery. He was simply trying to speak to a fact witness in the only ethically-permissible manner allowed. No other witness presents the unique problem as Judge Kaplan does -- to speak with him without the State's presence would constitute ex parte contact. It would not be ethically improper for Mr. Lewis' counsel to speak with the trial attorney or any other potential witness in his case. The only exception is Judge Kaplan, who presides over other postconviction cases.

This is a question of investigation, whether the State chooses to address the issue or not. The State does not recognize the illogic of its argument.[7] Despite acknowledging

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[7]The argument that Judge Kaplan's status as a judge somehow precludes him from possessing relevant information or makes him (continued...)

that Mr. Lewis alleged "that Judge Kaplan has information relevant and material to the issues that are obtainable by defense counsel," (App. 23 at 16), and that "Lewis seeks to depose Judge Kaplan to discover information to pursue his claims," (Initial Brief at 10), the State continues to maintain that Mr. Lewis should not be permitted to speak to Judge Kaplan because Mr. Lewis' counsel "could not know how Judge Kaplan's testimony would be relevant and material until [he] had deposed him." (Initial Brief at 15). The State's position makes no sense, for it cannot explain how Mr. Lewis is supposed to know the extent to which any information known by Judge Kaplan would be relevant and material unless and until his counsel are permitted to speak with Judge Kaplan.

In circuit court, the State responded to Mr. Lewis' claim of conflict of interest regarding the funding in Broward County with two arguments. First, the State argued, and continues to argue, that the claims raised by Mr. Lewis were "conclusory in nature and wholly unsupported," (Initial Brief at 14). Despite recognizing that "Lewis seeks to depose Judge Kaplan to discover information to pursue his claims, (Initial Brief at 10), the

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[7](...continued)
immune from being a witness is contrary to law. In fact, one of the reasons Mr. Lewis sought to recuse Judge Kaplan from his postconviction proceedings was that he would be a witness at those proceedings, and Judge Kaplan granted the motion. If judges were somehow immune from being witnesses, the Rules of Judicial Administration would not provide as a ground for disqualification of a judge that "said judge is a material witness for or against one of the parties to the cause." Fla. R. Jud. Admin. 2.160 (d)(2).

State concludes that Mr. Lewis is not entitled to obtain information from a witness to further support his claims, "especially [from] a judge, who the defendant suspects might have information to support a claim for relief." (Initial Brief at 10). The State does not understand that talking to a witness who might have information is the definition of investigation. The State faults Mr. Lewis for pleading what it characterizes as conclusory and unsupported allegations, yet continues to derail counsel's suggested (and ethically proper) method of obtaining information from Judge Kaplan.[8]

The State also argued that the claim which Mr. Lewis wished to discuss with Judge Kaplan was procedurally barred because the funding issue "could have been, and should have been raised on direct appeal." (App. 5 at 2). Because of this, the State argues that Mr. Lewis should not be permitted to discuss the issue with Judge Kaplan because "Lewis could not show how Judge Kaplan's testimony was relevant and material to any nonbarred issue raised in his motion for post-conviction relief." (Initial Brief at 15) (emphasis added). The State fails to acknowledge that the claim was not raised on direct appeal, nor could it have been, because Judge Kaplan never disclosed the conflict of interest to anyone, including Mr. Lewis' trial counsel. In

[8]The state also complains of the "character and means" used to speak to Judge Kaplan, (Initial Brief at 10), yet the State has made no alternative suggestions except to cut off the right to investigation altogether. When Mr. Lewis' counsel requested the opportunity to forego the deposition and speak with Judge Kaplan outside the presence of the state, the state objected.

circuit court, Mr. Lewis specifically alleged these facts, as well as the fact that the information upon which the claim is based was newly discovered and was not "of record," thereby making the claim cognizable in postconviction:

> The State argues that this issue is procedurally barred for failure to raise it on direct appeal (State's Response to Defendant's First Supplement to Motion to Vacate at 2). The State ignores the fact that this information was newly discovered evidence of which undersigned counsel had recently learned. See First Supplemental Motion to Vacate at 2 ("Undersigned counsel has recently learned of information regarding the procedures for appointment and funding of Special Assistant Public Defenders for capital cases in the Seventeenth Judicial Circuit, which includes Broward County, Florida.
>
> Fla. R. Crim. P. 3.850 provides that information that was not previously discoverable or known to the defendant may be properly raised in a post-conviction motion. This is the case with the instant claim. This information was not previously discoverable, having come to counsel's attention in early May of 1993 when undersigned counsel received a copy of a transcript in which Judge Tyson noted the previously undisclosed conflict of interest arising in Broward County.
>
> * * *
>
> Clearly, Judge Kaplan's conflict, as explained by Judge Tyson, affected the assistance Mr. Lewis received. Corners were cut, and the saved money benefited Judge Kaplan and others in the judicial branch. At the time of Mr. Lewis' trial, Judge Kaplan had a vested (albeit unknown) interest. He negotiated lesser fees with Special Assistant Public Defenders in order to increase the available funds for his own purposes. A contrary practice would have been devastating to the judiciary's budget.

(App. 6 at 26, 28). Mr. Lewis concluded by alleging that Judge Kaplan's undisclosed conflict of interest violated Mr. Lewis' right to due process (Id. at 28).[9] Clearly, Mr. Lewis is entitled to investigate Judge Kaplan's knowledge about this situation. This Court has held that collateral counsel have a duty to do so. See Deaton v. Dugger; Agan v. State, 560 So. 2d 222 (Fla. 1990).

The fact that Judge Kaplan happens to be a judge does not immunize him from possessing facts about this situation. The State exaggerates the situation by arguing that "the mental thought processes of a trial judge should not be the subject of inquiry by a defendant" (Initial Brief at 16). Mr. Lewis did not request to inquire into the "thought processes" of Judge Kaplan, but rather wants to, and has the right to, investigate what information he possesses regarding claims which would establish a violation of Mr. Lewis' constitutional rights. The State even concedes that "there are occasions when an explanation of the reasons for a [judge's] decision may be required by the demands of due process." (Initial Brief at 16, quoting Harris v. Rivera, 454 U.S. 339, 344-45 (1981)).

The State's actions in Mr. Lewis' case have effectively eviscerated his right to investigate his case and counsel's

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[9] The conflict of interest claim applies equally to Mr. Smith, whose case is from Broward County as well. Once this Court has resolved the proceedings instituted by the State and these cases are relinquished back to circuit court, Mr. Smith will be supplementing his claims for postconviction relief to include the due process violation arising from the conflict of interest due to the funding situation in Broward County.

obligation to do so. Despite the State's attempt to distance itself from this argument, see Initial Brief at 10 ("Lewis and Smith undoubtedly will claim that the issue is not one of 'discovery,' but, rather, one of 'investigation'"), there is no question that the effect of the State's position is to vitiate Mr. Lewis' right to investigate his case. The issue is Mr. Lewis' counsel's obligation to diligently investigate and pursue collateral relief. Counsel has the obligation to pursue this area of inquiry with Judge Kaplan, for failure to do so would bar the claim in a later proceeding. For example, in Agan v. State, 560 So. 2d 222 (Fla. 1990), collateral counsel's failure to use due diligence to investigate relevant information barred later presentation of the claim arising from that information. Investigation has been recognized as an integral and essential part of an attorney's job in representing a capital defendant, see Deaton v. Dugger, and postconviction counsel have an obligation to provide effective legal representation. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Collateral counsel are simply attempting to fulfill the legal and ethical obligations they owe to Mr. Lewis, as the lower court recognized by denying the motion to quash.

Here, Mr. Lewis' attorneys are simply trying to use due diligence to investigate all claims that Mr. Lewis may have in challenging his conviction and sentence of death. If the State wishes to call investigation an effort "to 'fish' for information," (Initial Brief at 15), so be it. The State

vigorously argues that Mr. Lewis should not be entitled to talk to Judge Kaplan because Mr. Lewis only "suspects" that Judge Kaplan has information to support a claim for relief (Initial Brief at 10). However, the definition of investigation entails interviewing witnesses to determine what information they possess upon suspicion that they possess such information. The determination of whether information is relevant or material can only be made once the information has been investigated. Mr. Lewis should not be denied his right to have his case investigated just because the State cannot understand this fundamental principle. See Initial Brief at 13 ("[Mr. Lewis] should not be allowed to circumvent the process by claiming that the relevance and materiality of the witness' testimony cannot be determined until that witness has been deposed").

The only way for postconviction counsel to ethically discuss Mr. Lewis' case with Judge Kaplan is via a deposition with the State present. Judge Lebow's authorization to do so did not open the door and provide Mr. Lewis, or any other defendant, the opportunity to engage in widespread discovery with "unfettered discretion." As noted above, this is a very unusual and unique situation. Mr. Lewis does not dispute that there is no discovery in postconviction, nor did he ask Judge Lebow to authorize unfettered discovery. Counsel simply wished to depose Judge Kaplan to avoid ex parte contact for the purpose of investigating the case. By denying the State's motion to quash, Judge Lebow agreed that Judge Kaplan was a necessary and material witness and

that the only way for Mr. Lewis' counsel to ethically communicate with him regarding the facts, given his presiding over similarly situated clients, was via a deposition.

The State's argument only briefly addresses Mr. Smith's case. Regarding the discovery issues, Mr. Smith will rely on the above arguments in support of Judge Speiser's order denying the State's motion to quash the subpoena for Judge Tyson. In Mr. Smith's case, as with Mr. Lewis' case, Judge Speiser agreed that the only ethical manner for Judge Tyson to speak with Mr. Smith's counsel was via a deposition with the State present because Judge Tyson is also a presiding judge in the Seventeenth Judicial Circuit, where several CCR postconviction cases are pending. Again, as in Mr. Lewis' case, the State misconstrued Mr. Smith's request, arguing to Judge Speiser that "[t]he State's just concerned that CCR cannot be able to go and issue subpoenas to whomever they wish and whenever they wish because, traditionally, there has not been discovery in 3.850's." (App. 50 at 5). As with Mr. Lewis' counsel, Mr. Smith's postconviction counsel argued:

> Any communication we would have with Judge Tyson by going up to the office and saying hey, Judge, do you want to talk with us, certainly is ex-parte communications. And that is our biggest concern here, is that the State's position almost encourages us simply to go to Judge Tyson, go to his chambers and have a conversation without them present.
>
> The approach we have taken is much more fair to the State and is a much more straightforward approach, and that's why we took it. If we wanted to simply sneak over

> to Judge Tyson's office and get a bunch of comments in his chambers; then spring them on the State, I guess we could have done that. We chose this way because this is the fair way to do it.

(Id. at 8-9). Counsel for Mr. Smith reiterated that "we are not seeking [wholesale] []ability to take depositions; this is just in the case of Judge Tyson simply because he is a Judge." (Id. at 12). Counsel also noted that Mr. Smith's case had been held in abeyance in the Florida Supreme Court and relinquished to the circuit court at the State's request that so that the "true facts" concerning the ex parte communication could be discovered, and that the State's motion to quash the subpoena "certainly raises the question of how much the State wants the facts to really be discovered in this case" (Id. at 7). Judge Speiser agreed that deposing Judge Tyson would be the only ethical manner for Mr. Smith's attorneys to speak with him, and he denied the motion to quash for that reason. (Id. at 12). As with Mr. Lewis' case, the State's efforts have prevented Mr. Smith from investigating his case.

Mr. Lewis and Mr. Smith respectfully submit that Judge Lebow's order permitting Mr. Lewis to depose Judge Kaplan, and Judge Speiser's order permitting Mr. Smith to depose Judge Tyson, should be upheld. While Mr. Lewis and Mr. Smith agree with the State that there is no discovery in postconviction, the orders of Judges Lebow and Speiser did not authorize discovery, but rather recognized the uniqueness of the situation and permitted postconviction counsel to carry out their legal obligation to

investigate these cases in the only ethical manner possible. Any other outcome would violate Mr. Lewis' and Mr. Smith's federal and state constitutional guarantees to due process, equal protection, and the effective assistance of counsel.

CONCLUSION

Mr. Lewis and Mr. Smith respectfully request that this Court affirm the lower court's orders denying the State's motions to quash the deposition subpoenas.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 16, 1994.

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