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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	Case No. 93-3310
LAWRENCE FRANCIS LEWIS, Respondent.	)	

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PETITION FOR WRIT OF COMMON LAW CERTIORARI

The State of Florida, by and through the undersigned attorney, hereby files the instant petition for writ of common law certiorari, to review and quash the order of the Honorable Susan Lebow, Circuit Court Judge in and for the Seventeenth Judicial Circuit, Broward County, Florida, denying the State's motion to quash a deposition subpoena served on the Honorable Stanton Kaplan, Circuit Court Judge in and for the Seventeenth Judicial Circuit, Broward County, Florida.

JURISDICTION

The State maintains that the trial court departed from the essential requirements of law when it denied the State's motion to quash a deposition subpoena issued by the Office of Capital Collateral Representative (CCR) on the Honorable Stanton Kaplan, who sentenced Respondent to death, but who later recused himself from presiding over Respondent's pending 3.850 action. Pursuant to Article V, section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2), this Court has

jurisdiction to review the trial court's order, which was entered on October 11, 1993, where such order constitutes a departure from the essential requirements of law resulting in a miscarriage of justice and where Respondents have no other adequate remedy. See Greenstein v. Baxas Howell Mobley, Inc., 583 So.2d 402, 403 (Fla. 3d DCA 1991) ("Certiorari is the appropriate vehicle to review an order granting discovery."); Smith v. Bloom, 506 So.2d 1173, 1175 (Fla. 4th DCA 1987) ("Certiorari is the proper vehicle for testing a discovery order, and is particularly appropriate where disclosures are required to be made which, once made, may obviously not be recalled.").

FACTS

Respondent was tried by a jury in Broward County, Florida, and convicted on August 3, 1988, of first-degree murder and various other offenses. After a penalty phase proceeding, the Honorable Stanton Kaplan followed the jury's recommendation and sentence Respondent to death. The Florida Supreme Court affirmed Respondent's conviction and sentence of death, Lewis v. State, 572 So.2d 908 (Fla. 1990), and the United States Supreme Court denied Respondent's petition for writ of certiorari. Lewis v. Florida, 111 S.Ct. 2914 (1991).

On September 11, 1992, Respondent filed in the trial court before Judge Kaplan a motion to vacate his judgment of conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.850, raising the following claims: 1) the State has failed to comply with his public records requests, 2) he has failed to obtain defense counsel's file, 3) the HAC instruction was vague, 4) the prior violent felony aggravating factor failed

to "define the elements of the aggravating factor," 5) the trial court failed to instruct on or find age as a mitigating factor, failed to consider that Lewis was under extreme mental or emotional distress based on the turbulent relationship with his girlfriend, failed to consider that Lewis' ability to conform his conduct to the requirements of law was substantially impaired by his ingestion of alcohol preceding the murder, and failed to consider as a mitigating factor that Lewis was gainfully employed at the time of the murder, 6) the felony murder aggravating circumstance constituted an automatic aggravating factor, 7) the felony murder aggravating circumstance instruction was vague, 8) Lewis was not examined by a mental health expert prior to sentencing, 9) the trial court relied on the Assistant State Attorney to draft the sentencing order, which it then signed without conducting an independent evaluation of the evidence, 10) the penalty phase jury instructions impermissibly diminished the jury's role in the sentencing process, and 11) the cumulative errors in the trial deprived Lewis of a fair trial. (Appendix A).

One month later, on October 11, 1992, Respondent filed a motion to disqualify Judge Kaplan from presiding over the post-conviction proceeding, alleging (1) that Judge Kaplan had previously worked for Respondent's original trial counsel, Richard Kirsch, and that they were still "personal friends," which prevented Judge Kaplan from considering the merits of any forthcoming ineffective assistance of counsel claim in a fair and impartial manner, and (2) that Judge Kaplan harbored personal animosity towards Respondent, as evidenced by Judge Kaplan's

written response to the Executive Clemency Board's request for information. (Appendix B).

On December 11, 1992, Respondent filed an amended motion to vacate, adopting all of his previous claims, except claim II which he asserted was moot, and alleged three additional ones: 1) unspecified Brady violations which led to ineffective assistance of trial counsel, 2) unspecified Brady violations during the guilt phase of his first trial,[1] and 3) ineffective assistance of trial counsel at the penalty phase.[2] (Appendix C). Five months later, on May 12, 1993, Respondent filed a supplement to his motion to disqualify Judge Kaplan, claiming (1) that "Judge Kaplan made inappropriate remarks" in an episode of CBS' "48 Hours," entitled "Rough Justice," and (2) that, because monies for Special Assistant Public Defender and expert witness fees come from the same fund as monies for administrative courtroom needs, "[t]his situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County." Regarding this latter claim, Respondent asserted that "Judge Kaplan will of necessity be a witness regarding this conflict of interest issue."[3] (Appendix D).

On June 23, 1993, Judge Kaplan granted Respondent's motion to disqualify, finding the motion to be legally sufficient based upon the allegations regarding his personal relationship with

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[1] Appellant's first trial ended in a mistrial.

[2] Lewis voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation after consulting with counsel.

[3] Respondent also added this latter claim to his motion for post-conviction relief in a supplemental pleading. (Appendix E).

trial counsel.[4] (Appendix F). Thereafter, counsel for Respondent sua sponte issued a deposition subpoena to Judge Kaplan.[5] In response, the State filed in the trial court a motion to quash the subpoena. (Appendix H). A hearing on the State's motion was held on September 29, 1993, before the Honorable Susan Lebow, who had been appointed to preside over Respondent's post-conviction proceeding. (Appendix I). Judge Lebow took the State's motion under advisement and entered a written order on October 11, 1993, denying the State's motion to quash. (Appendix J). Because Judge Lebow departed from the essential requirements of law by denying the State's motion to quash, this petition follows.

RELIEF SOUGHT

Petitioner seeks the issuance of a writ of Common Law Certiorari[6] either (1) quashing the order of the trial court denying the State's motion to quash the deposition subpoena issued to Judge Kaplan, or (2) limiting the scope of the deposition to the funding issue, which is the only issue in Respondent's post-conviction motion that relates to Judge Kaplan.

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[4] The order specifically limits the finding of legal sufficiency to this particular claim. The trial court did not even acknowledge that Respondent filed a supplemental motion to disqualify raising two other grounds.

[5] The notice setting the deposition has been provided in Appendix G.

[6] In the event this Court finds certiorari to be improper, it is authorized by Article V, section 4(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.040(c) to issue any writ necessary to complete the exercise of its jurisdiction. Accordingly, Petitioner requests this Honorable Court to issue any writ it deems appropriate.

ARGUMENT

To support his motion to recuse Judge Kaplan from hearing his 3.850 motion, Respondent alleged the following four grounds: (1) a potential bias by Judge Kaplan in favor of Respondent's trial counsel on an ineffective assistance of counsel claim due to an alleged friendship and former working relationship between Judge Kaplan and trial counsel, (2) animosity towards Respondent as evidenced by Judge Kaplan's written response to the Executive Clemency Board, (3) "inappropriate remarks" in a news magazine television show, and (4) an alleged conflict of interest between the expenditure of funds for appointed counsel and expert witnesses and the expenditure of funds for capital improvements. (Appendices B & D). Finding the motion legally sufficient based on the first ground, Judge Kaplan recused himself. (Appendix F).

The only claim relating to Judge Kaplan in Respondent's motion to vacate is the latter one. Issue XI in Respondent's first supplement alleges the following:

> 3. The county fund from which Special Assistant Public Defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements. Judges receive moneys from this fund to purchase items including but not limited to computers, telephones, law books, and other necessary office equipment.
>
> 4. To resolve these conflicting uses of county funds, many Broward Circuit Judges, including Judge Kaplan, engage in the practice of negotiating lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes. Because expert witnesses are also paid from this same fund, Special Assistant Public Defenders appointed to capital cases are also expected to 'shop for the best deal' before the Court will approve an expert. The

> experience or competence of the attorney and/or expert takes a backseat to economy in the judge's determination of appointment in capital cases.
>
> 5. This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Because Mr. Lewis was tried in Broward County, was represented by a Special Assistant Public Defender, and was allowed to consult with court-appointed experts, this situation is clearly relevant to Mr. Lewis' case.

(Appendix E).[7]

In response, the State asserted that these allegations (1) were conclusory in nature and wholly unsupported, which made them legally insufficient as a claim for relief, and (2) could have been, and should have been, raised on direct appeal. Clearly, the information upon which this claim is based was available to Respondent at or before his trial. Thus, Respondent is procedurally barred from raising this claim in a motion for post-conviction relief. Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Atkins v. Dugger, 541 So.2d 1165, 1166 n.1 (Fla. 1989); Roberts v. State, 568 So.2d 1255, 1257-58 (Fla. 1990); Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990). (Appendix K).[8]

Regardless, Judge Lebow has authorized Respondent to depose Judge Kaplan regarding this funding issue. In fact, by denying the State's motion to quash, Judge Lebow has authorized

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[7] Respondent's ineffective assistance of counsel claim does not in any way relate to trial counsel's relationship with Judge Kaplan.

[8] Now that Judge Kaplan has recused himself from the post-conviction proceeding, Respondent's other complaints regarding Judge Kaplan's friendship with trial counsel and his alleged personal bias against Respondent are moot and would not constitute a basis for post-conviction relief.

Respondent to depose Judge Kaplan regarding any issue he sees fit to inquire into. Judge Lebow made no restrictions upon the sources and scope of discovery, thereby giving Respondent carte blanche to "fish" for information.[9]

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 traditionally been allowed. Recently, however, the Third District Court of Appeal decided to break from tradition and allow limited prehearing discovery in 3.850 cases. Davis v. State, 18 Fla. L. Weekly D1713 (Fla. 3d DCA Aug. 3, 1993).

While the State takes issue with the holding and rationale of Davis,[10] Judge Lebow was required to consider Davis in ruling upon the State's motion to quash. However, Judge Lebow totally ignored the procedural requirements and limitations that Davis places upon defendants who seek prehearing discover. Davis states: "On a motion which sets forth good reason, . . . the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope." Id. at 1713 (emphasis added). As argued by the State at the hearing on its motion to quash, Respondent had filed no motion for discovery,

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[9] At the hearing on the State's motion to quash, Judge Lebow even went so far as to say, "[I]f I find you have a right to take the deposition, you have the right to take the depositions of anybody that could have any information relating to this." (Appendix I at 17).

[10] The State's motion for rehearing was denied on October 19, 1993, and a motion to invoke the discretionary jurisdiction of the Florida Supreme Court has been filed.

but rather had issued a subpoena to Judge Kaplan sua sponte. (Appendix I at 6-7). When asked at the hearing what its purpose was in deposing Judge Kaplan, CCR initially claimed that it did not have to disclose its purpose,[11] but then claimed that it was trying to avoid the appearance of impropriety because Judge Kaplan was presiding over other cases involving CCR; thus, it wanted the State present when it spoke to Judge Kaplan. (Appendix I at 8-11). Ultimately, CCR admitted that it wanted to depose Judge Kaplan in order to support the otherwise unsupported allegations in its 3.850 motion. In other words, it could not know how Judge Kaplan's testimony would be relevant and material until it had deposed him. Davis clearly requires, however, that counsel seek leave from the court to engage in discovery and that counsel provide "good reason" for the discovery, which includes a showing that the subject matter of the inquiry is "relevant and material." Respondent should not have been allowed to defeat this requirement with circular reasoning.[12]

More importantly, as a matter of public policy, Judge Lebow should have been especially vigilant in protecting the judiciary from potential abuse of process. The burden for seeking and obtaining the recusal of trial judges is relatively easy since the judges may not pass upon the merits of the motions. If the

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[11] "I don't know that a showing has to be made of necessity." (Appendix I at 4).

[12] Realistically, Respondent cannot make the requisite showing because any knowledge Judge Kaplan may have about the disbursement of funds for attorneys' fees and capital improvements is not relevant and material. As noted earlier, this issue is procedurally barred as a claim for relief since it should have been, and could have been, raised on direct appeal.

judges, once recused, are then automatically available as potential sources of information for 3.850 claims, the incentive to seek their disqualification increases and the burden on the circuit courts becomes overwhelming.[13]

Post-conviction motions present an added burden to the already high circuit court caseload. Those filed in death penalty cases are particularly time-consuming, especially where, as here, the judge who presided over the trial has recused himself, leaving the replacement judge to familiarize herself with the facts from the voluminous, but cold, record. The original trial judge, once recused, should then not be subjected at the whim of the defendant to a deposition, especially one unjustified in substance and unlimited in scope.

Like the deliberations of a jury, or the work product of a prosecutor, the mental thought processes of a trial judge should not be the subject of inquiry by a defendant. See Harris v. Rivera, 454 U.S. 339, 344-45 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule." (footnotes omitted)). Judge Kaplan's decisions regarding the appointment of counsel and expert witnesses, and the fees authorized for their services (if such are even determined by the trial judge as opposed to the

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13 The incentive in collateral proceedings to seek disqualification of the original trial judge is already great, since most post-conviction motions raise a claim of ineffective assistance of counsel. Defendants generally do not want the original trial judge, who saw and heard the defendant's trial counsel in action, to consider a later ineffectiveness claim. Thus, disqualification is already becoming a common practice.

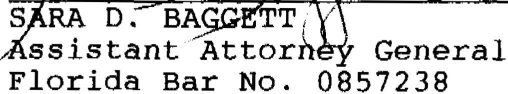
county's fiscal officer), are discretionary matters which should not have to be justified to Respondent via a deposition. Every decision that a trial court makes during the course of a case has fiscal implications, e.g., the denial of co-counsel, the denial of a continuance, the denial of expert witnesses. Taken to its extreme, the denial of any defense motion could be said to be fiscally motivated--and in some respects it is. Although it is the trial court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter," Makemson v. Martin County, 491 So.2d 1109, 1113 (Fla. 1986), the trial court still has an obligation to be fiscally responsible. It should not, however, have to detail and justify the mental processes that it used to make these decisions. Rather, such decisions are reviewed on appeal upon an abuse of discretion standard.

Given that Respondent failed to meet his burden in seeking discovery and showing good reason for deposing Judge Kaplan, and given the public policy reasons for prohibiting the unfettered ability of a defendant to subpoena over-burdened trial court judges to "fish" for information, the trial court departed from the essential requirements of law in denying the State's motion to quash the subpoena. See State v. Domenech, 533 So.2d 896, 896 (Fla. 3d DCA 1988) (granting certiorari and quashing an order which denied the State's motion to quash a deposition subpoena, where "[t]he subpoenas issued below at the behest of the defendants were directed to witnesses whose supposed testimony was affirmatively shown to bear no legal pertinence whatever to the issues in the case and thus could not be of any potential

assistance in the legitimate defense of the pending charges."). See also Combs v. State, 436 So.2d 93, 95-96 (Fla. 1983) ("In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error."). As a result, this Court should grant the State's petition for writ of certiorari in this case and quash Judge Lebow's order which denied the State's motion to quash the deposition subpoena issued by CCR to Judge Kaplan or, in the alternative, limit the scope of Respondent's inquiry of Judge Kaplan to the single issue in the 3.850 relating to Judge Kaplan.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Martin J. McClain, Chief Assistant CCR and Todd Scher, Staff Attorney, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 5th day of November, 1993.

SARA D. BAGGETT
Assistant Attorney General