ORIGINAL

IN THE SUPREME COURT

OF FLORIDA

WALTER GALE STEINHORST,	:	**Appeals No. 86,109**
		C. Circ. Case Nos. 77-708 and 77-709
Appellant,		
vs.	:	
STATE OF FLORIDA,	:	
Appellee,	:	

APPELLANT'S REPLY BRIEF

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I. INTRODUCTORY STATEMENT

The only issue before this Court is whether counsel for Walter Gale Steinhorst ("Steinhorst") exercised due diligence in not discovering a recusal order prior to September, 1991. Steinhorst had his original Rule 3.850 motion to overturn his conviction by a judge who -- unbeknownst to Steinhorst at the time -- had previously represented the estate of one of the decedents, thus creating a severe conflict of interest as found by this Court in Steinhorst v. State.[1] It is undisputed that during the two years that Judge Turner was involved in Steinhorst's case, neither the Judge nor the State ever brought this to Mr. Steinhorst's attention.[2] The judge failed to recuse himself from Steinhorst's case, even though he previously recognized his conflict as so serious to prompt his voluntary recusal in Steinhorst's co-defendant's case.[3]

Over the course of 5 years, Steinhorst's Legal Team[4] repeatedly sought from the Clerk's office to review all of the files concerning the Sandy Creek case. Each time the Clerk's office parceled the documents to the Legal Team, only producing additional documents at the persistence of the Legal Team. Each time the Legal Team was provided with different amounts of documents: during the Legal Team's initial review in 1986, the Clerks provided the Legal Team with only one box, repeatedly confirming that the box allegedly contained all documents concerning the Sandy Creek case.[5] At that time, all documents were maintained in one filing system, and were not separated according to co-

1 636 So. 2d 498 (1994).

2 ROA 1440, 1494, 1495.

3 ROA 1596.

4 The Legal Team that reviewed the files, attorneys and paralegals from the Office of the Capital Collateral Representative ("CCR"), the Volunteer Lawyers Resource Center ("VLRC"), and the law firm of Fried, Frank, Harris, Shriver & Jacobson were paralegals Christian G. Cox, Paul Harvell and Ian Haigler, and attorneys Stephen D. Alexander, Wendy Snyder and Anne Jacobs.

5 ROA 1504-1506, 1509, 1599-1600, 1602, 1604.

defendants.[6] Five years later, the Legal Team again requested to review the documents.[7] At that time, the Clerks provided the Legal Team with five **boxes** of documents and several loose files.[8] During each review, the Legal Team viewed every document provided to them, conducting "more than a cursory" review.[9]

During each review the Legal Team was given documents that were unorganized, and "a mess".[10] During each review, the Clerks reassured the Legal Team that they were given all of the documents.[11] These facts are confirmed not only by Steinhorst's witnesses, but also the State's witnesses,

Moreover, the Record shows that Steinhorst's counsel attempted to reach "every person involved in the case" -- including counsel for one co-defendant -- to learn and discuss every aspect of the case.[12] However, when contacted by one of Steinhorst's attorneys, co-defendant Hughes' counsel, Mr. Daniels, indicated that he refused to cooperate in Steinhorst counsel's investigation.[13]

Black's Law Dictionary defines "due diligence" as "a measure of care, prudence, activity, and assiduity as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances."[14] The only issue this Court must decide is whether Steinhorst, by repeatedly reviewing the Clerk's office files and

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6 **ROA 1550-1552.**

7 **ROA 1518-1519, 1528-1529.**

8 **ROA 1519-1522.**

9 **ROA 1504-1505, 1509, 1599-1600, 1602-1603.**

10 **ROA 1523, 1550.**

11 **ROA 1506, 1520-1521, 1529, 1531, 1604.**

12 **ROA 1489.**

13 **ROA 1489.**

14 **Blacks Law Dictionary 411 (5th ed. 1979).**

attempting to contact all individuals with knowledge of the facts of the case, meets this definition. If so, then the Circuit Court on remand erred in applying the appropriate standard of review, thus necessitating this Court to reverse the Circuit **Court's** Order.

XI. THE CIRCUIT COURT FAILED TO APPLY DUE DILIGENCE STANDARD

A. State's cases are easily distinguished

In its opposition brief, the State cites three cases allegedly supporting its claim that Steinhorst failed to meet the due diligence standard. None of these cases, however, define "due diligence," or set forth sufficient facts upon which this Court may analyze Steinhorst's case. Easily distinguishable, the cases cited by the State, therefore, cannot be used to determine whether Steinhorst acted with due diligence.

The State first cites to Bolender v. State.[15] In Bolender, the Court affirmed the trial court's ruling denying post-conviction relief, summarily holding that "due diligence" was not met in discovering new evidence. Bolender, however, fails ***to*** discuss any facts surrounding the newly discovered evidence. It **is,** therefore, impossible to determine whether the facts in the instant case are the same or similar to those leading to the Court's denial of relief in Bolender.

The State also cites to .[16] Like Steinhorst, in Johnson, the defendant asserted that he was entitled to post-conviction relief under **Fla.** R. Crim. Proc. 3.850. The defendant in Johnson, however, based his 3,850 motion on a claim of ineffective assistance of counsel, asserting that counsel's failure to provide certain expert and character testimony constitutes newly discovered evidence. Rejecting this argument, the Court held that the evidence was always in existence, and that it could have been discovered through the exercise of due diligence. However, neither Johnson nor his attorney even attempted to discover this

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15 ***658 So.*** 2d 82 (Fla. 1995), cert. denied, 116 S. Ct. 12, 132 L. Ed. 2d 896 (1995).

16 536 ***So.*** 2d 1009 **(Fla. 1988).**

evidence prior to trial. Other jurisdictions have similarly held that a defendant cannot base a claim of newly discovered evidence on ineffective assistance of counsel.[17]

Finally, the State cites to Walker v. State.[18] The issue in Walker was whether the defendant was entitled to an evidentiary hearing, not whether due diligence standard was met; the Court did not address whether the defendant acted with due diligence. Instead, the case was remanded for the lower court to conduct an evidentiary hearing to determine whether the due diligence standard was met.

Courts have denied post-conviction relief where a defendant chooses not to use evidence in his possession at trial,[19] where a defendant chooses not to interview witnesses with knowledge of relevant facts,[20] where a witness retracts trial testimony,[21] and where a defendant voluntarily chooses not to review documents.[22] They have granted relief where, as here, requested records are not provided for the defendant's review.[23]

B. Due Diligence standard was met.

Like other jurisdictions, Florida courts have long recognized due diligence as "the diligence of a 'prudent person'."[24] Despite all of Steinhorst's efforts, the recusal order was

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17 See e.g., United States v. Hanoum, 33 F.3d 1128 (9th Cir. 1994); United States v. Garcia, 19 F.3d 1123 (6th Cir. 1994); United States v. Lema, 909 F.2d 561 (1st Cir. 1990).

18 661 So. 2d 945 (Fla. 1995).

19 Dean v. Duckworth, 748 F.2d 367 (7th Cir. 1994), cert. denied, 469 U.S. 1214 (1985).

20 Francois v. State, 407 So. 2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982).

21 Smith v. State, 400 So. 2d 956, 958 (Fla. 1981).

22 Zeigler v. State, 632 So. 2d 48, 50 (Fla. 1993), cert. denied, 115 S. Ct. 104, 130 L. Ed. 2d 52 (1994).

23 Ventura v. State, 673 So. 2d 479 (Fla. 1996), modified on other grounds, 21 Fla. L. Weekly S 190 (Fla. 1996).

24 Harduvel v. General Dynamics, 801 F. Supp. 597, 605 (D.C. Fla. 1992). See also, Huntington National Bank v. Johnson, 840 S.W. 2d 916, 918 (Tenn. 1991) ((following Blacks Law Dictionary definition for due diligence); Ford v. Engleman, 118 Va. 89, 86 S.E. 852 (Va. 1915) (defining reasonable diligence as "diligence as an ordinary person would exercise under similar circumstances").

not discovered until 1991. On remand from this Court, the Circuit **Court** attributed Steinhorst's failure to discover the recusal order to Steinhorst's failure to act with due diligence. The Order states that "at no time did defense counsel seek to talk directly by letter, phone or personally to" Hughes' counsel -- a fact in apposite with the Record -- and that the Court clerks "did not attempt to conceal or hide any information" from Steinhorst's counsel -- a fact that is irrelevant, since the ultimate result was the same.

The Circuit Court, in denying Steinhorst's 3.850 motion, referred to three specific factors indicative of Steinhorst's alleged failure to act with due diligence. First, the Court stated that "it is important that ***at no time*** did defense counsel seek to talk directly by letter, phone or personally to the defense counsel who handled the Hughes case as to what had happened in that case."[25] (Emphasis added,) This statement, however, completely contradicts the Record. Mr. Alexander, counsel for Steinhorst, testified that since he was first involved in the case in **1982,** the Legal Team attempted to contact everyone involved in the Sandy Creek case, including Mr. Daniels, Hughes' counsel.[26] At Mr. Alexander's direction, an attorney did contact Mr. Daniels.[27] Mr. Daniels, however, indicated that he did not wish to cooperate in Steinhorst's investigation.[28] Obviously, Steinhorst's Legal Team did, in fact, seek to talk to Mr. Hughes' counsel. Mr. Daniels refused to cooperate. Steinhorst should not be prejudiced because of Mr. Daniel's refusal to cooperate. Despite Mr. Daniels' refusal, Steinhorst met the due diligence standard.[29]

The Circuit Court also referred to the fact "that defense counsel was never denied access to the court records" **and** that there was "no showing that anyone associated with the

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25 **ROA 1441.**

26 **ROA 1489.**

27 **ROA 1489.**

28 **ROA 1489.**

29 McCallum v. State, **559 So. 2d 233, 234 (Fla. 1990).**

Clerk's office attempted to conceal or hide any information from defense counsel or staff."[30] This fact, however, is irrelevant. Whether intentional or inadvertent, the end result was that Steinhorst was denied access to publicly available records, including the recusal order.

In a case similar to the instant case, Ventura v. State,[31] the defendant was denied access to publicly available documents, The Court held that information contained within those documents was newly discovered evidence. The Court did not address whether the State acted intentionally in denying the defendant access to the records. When addressing whether a defendant is denied access to publicly available records, under Ventura, intent is irrelevant. Rather, the sole issue is that the defendant did not have access to the files.

Likewise, whether the Clerk's office intentionally attempted to hide or conceal the recusal order from Steinhorst is irrelevant. Under Ventura, the mere fact that the Clerk's office failed to provide Steinhorst with the recusal order when the Legal Team requested all documents concerning the Sandy Creek case makes it newly discovered evidence.

Finally, the Circuit **Court** and the State alleges that Steinhorst could have re-reviewed the files prior to the evidentiary hearing in September, **1987.** Steinhorst's Legal Team, however, reviewed the files previously represented as "complete" less than one year earlier. It **is** not logical to expect an attorney to continuously re-review documents previously represented as complete. The extent of an attorney's duty **is** "to *make* a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary"[32]; it is not to continuously re-review documents during **all** stages of a proceeding, particularly when the defendant receives representations that he has been provided all relevant documents, and after reviewing these documents, believed that the records presented did not advance the case.

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30 **ROA 1441.**

31 673 *So.* 2d **479.**

32 Strickland v. Washingon, **466** U.S. **668,691 (1984) (in context** of **ineffective assistance** of **counsel).**

Steinhorst's counsel reasonably relied on the Clerk's representation that it had been given all documents pertaining to the Sandy Creek case.[33] A prudent person would not expect to find additional documents in files previously represented as complete.[34] Counsel's decision to not re-review the files in 1987 should be given extreme deference.[35]

> **[A]** fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. **A** court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.[36]

Although Steinhorst's counsel did not re-review the files immediately prior to the evidentiary hearing in **1987,** that fact alone is not indicative of a failure to exercise due diligence throughout the case. Rather, the Court must look to all of the circumstances in assessing Steinhorst's counsel's conduct, Counsel acted reasonably by relying on the clerk's representation that all files were given for the Legal Team's review.

Also, the fact that Mr. Alexander did not personally review the files is simply not true. Mr. Alexander sought to conduct an extensive and thorough review **of** all records. To achieve a complete and thorough understanding of the case, Mr. Alexander personally:

(1) reviewed files held at the Florida Supreme Court, the Federal Court, the Bay county court;

(2) reviewed files held at the State Attorney General's office;

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33 Serio v. Badger Mutual Ins. *Co.*, 266 F.2d 418 (5th Cir), cert. denied, 361 U.S. 832 (1959) (in context of opposition representing that the documents were previously destroyed); United States v. Tierney, 718 F. Supp. 748 (D.C. Mo. 1989), aff'd, 947 F.2d 854 (1991) (opposition representing that documents were no longer in existence).

34 Id.

35 Strickland, 466 U.S. at 691.

36 Id. at 669.

(3) filed a Freedom of Information Act with the FBI to review the FBI's information concerning a related investigation

(4) reviewed records obtained from filing a request under Florida state law, with various government and law enforcement agencies; and

(5) attempted, to no avail, to obtain files from the State Attorney's office.[37]

Even if Mr. Alexander did not personally review all of these files, he may properly delegate certain duties to other attorneys, paralegals, and staff members.[38] As the State is certainly aware, delegating tasks to other members of a Legal Team is a common and accepted procedure. Mr. Alexander properly delegated reviewing the Clerk's office files to trained members of the Legal Team.

Finally, the State, recognizing the Circuit Court's error in its statement that "defense counsel sought no relief from the Court [in 1986] to make sure that all records were available to it or to correct any perceived problems of access to court records during the course of their review," attempts to dismiss this statement as merely an "observation." A Court order describes the basis of the decision set forth in the Order. The State's position that the Court was merely making an observation is wholly without merit,

III. STATE'S RECITATION OF THE RECORD IS INCOMPLETE AND THUS MISLEADING

In its Opposition, the State merely plucks certain facts from the Record, thus resulting in an incomplete review of all relevant facts. Although the State claims that its opposition sets forth "[c]ontrary facts that support the [trial court's] order," it interestingly fails to provide the Court with any new or additional facts from the Record. Instead, the State generally uses the same cites as those referred to in Appellant's Opening Brief, selectively

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37 ROA 1468-1470.

38 ABA Model Code of Professional Responsibility EC 3-6; ABA Model Rules of Professional Conduct, Rule 5.3.

picking and choosing cites which create a distorted review of the evidence and project an incomplete and false light on the Record. To gain an accurate review of the record, the Court must look to the record as a whole, not just to a few discrete cites.

A. Testimony from the State and Steinhorst witnesses concerning the condition of the files is consistent

By stating that Judge Sirmons "obviously found the state's witnesses to be more credible than Steinhorst's,"[39] the State implies that only Steinhorst's witnesses testified that the files were "a mess." The State completely disregards the fact that its own witnesses testified to this same fact. In fact, one State witness testified that the files were in such disarray, that she and her supervisor decided *to* Completely re-organize the files.[40] Prior *to* that reorganization, documents were merely thrown into one of several boxes.[41] This is the State's testimony, not Steinhorst's.

The State also attempts to muddy the record by discounting the importance of the Clerk's file's organization, the State: claims that "'chronological' might be a stretch given the number of the documents and the number of people who went through the files."[42] The term "chronological" means to "arrange in or according to the order of time."[43] The files are a public record. It is the Clerk's office's responsibility to ensure that documents are filed and maintained in chronological order, irrespective of how many documents comprise the file, or how many people go through the files. Moreover, it is the Clerk's office's responsibility to ensure that the files are complete. The fact that the documents were not maintained in chronological order, but were merely thrown into a box, evidences a lack of care and

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39 Opposition, p. 15.

40 ROA 1551-1552.

41 ROA 1550.

42 Opposition, p. 14.

43 Websters Dictionary 239 (9th ed. 1987).

attention to the files, thereby suggesting that the Clerk's office failed to keep the file together. This would increase the likelihood of the Clerk's office misplacing or losing documents, a problem the Clerk's office admits occurred in the past.[44]

B. The State misrepresents the record concerning the Legal Team's attempts to contact Hughes' counsel

Moreover, the State alleges that Mr. Alexander's conclusion that Mr. Daniels did not want to cooperate was "unfounded."[45] The Record, however, reads that Mr. Alexander "attempted to reach him and people on my - that working for me attempted to reach him and I believe at the time I was told that he didn't want to cooperate."[46] Mr. Alexander's conclusion was based on a conversation between a member of the Legal Team and Mr. Daniels -- it was not, as the State suggests, unfounded.[47]

The State also misstates the Record, claiming that Mr. Alexander testified that he "thought [Ann] Jacobs spoke with Hughes' counsel and told him that Hughes' counsel would not cooperate."[48] Mr. Alexander did not testify that Ann Jacobs was the Legal Team member assigned to initially contact Mr. Daniels. Thus, the fact that Ms. Jacobs was not assigned to the Legal Team until 1990 is irrelevant. The Record shows that Mr. Alexander sought through his staff to contact every attorney involved in the case starting as early as 1983.[49] Ms. Jacobs did not testify about her contacts with Mr. Daniels after she discovered

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44 **ROA** 1559. Moreover, the Statr: incorrectly claims that Steinhorst ignored Ms. Tharpe's and Ms. Baker's testimony that "prior to **1988,** all Sandy Creek pleadings were put in one **box."** Opposition, p. 14. Perhaps the State merely overlooked Steinhorst's recitation of relevant facts, specifically pages 7-9, 19-20, which directly addresses Tharpe's and Baker's testimony.

45 Opposition, p. 3

46 **ROA 1489.**

47 It is worth noting that the State put forth no evidence concerning Mr. Daniels. He was not called by the State to testify. Nor did the State put in any evidence from his files.

48 Opposition, p. **13.**

49 ROA **1489.**

the recusal order. Indeed, Assistant State Attorney Alton Paulk did not even ask her about Mr. Daniels.[50] Ms. Jacobs did eventually speak with Mr. Daniels in 1991, after she had discovered the Recusal Order.

C. The Circuit Court and State's conclusion that the order was merely overlooked is not logical

The State further claims that the recusal order was merely overlooked during Steinhorst's review in 1986 it wasn't entitled "recusal order" and the Legal Team paralegal did not read every word of every document given to her.[51] The State, however, overlooks Ms. Cox's testimony and supporting affidavits showing that although she didn't read "every word," she examined every page of every document given to her, doing more than a "cursory" reading.[52] In fact, the Record shows that she examined every page given to her.[53] Ms. Cox was trained to notice documents such as a recusal order, and testified that she would have realized its importance if she had seen it.[54] Ms. Cox, however, did not see the recusal order.[55]

In assuming that the order was given to Ms. Cox and that it was merely overlooked, the State disregards the fact that during her review in 1986, Ms. Cox was given only one box of documents when even the State's witness concede there were multiple boxes of documents located in more than one place. Moreover, only one week after Ms. Cox reviewed the Sandy Creek files, another Legal Team member, Paul Harvell, further reviewed the Clerk's files. He also was given only one box of documents. Like Ms. Cox, Mr. Harvell was repeatedly

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50 ROA 1533-1534.

51 Opposition, p. 10.

52 ROA 1504-1505, 1600.

53 ROA 1504, 1506, 1509, 1599-1600, 1602.

54 ROA 1507-1508, 1602-1603.

55 ROA 1507-1508, 1602-1603.

assured that he was given all of the files.[56] During his review, he also did not see the recusal order.

However, when Ms. Jacobs reviewed the files in 1991, she was given five boxes of documents plus numerous loose files, with additional files brought out later in the day. The files were provided to Ms. Jacobs piecemeal, with the clerk continuously "discovering" additional documents. In fact, only because of Ms. Jacobs' insistence, the Clerk found another batch of documents in the basement containing the recusal order.[57]

In 1986, the files of all co-defendants consisted of only "one box." Five years later, after the documents had been reorganized to separate out the co-defendants, only because of Jacobs' persistence the Clerks produced over five boxes of documents. The State alleges that in 1986, the paralegals were given all of the documents. But the State fails to explain why 5 years later, after the **files** of the inactive co-defendants had been removed, the records grew to **5** boxes. Logically, in **1986,** the Clerk's office failed to provide Mr. Alexander and Ms. Snyder in 1983, and later Ms. Cox and Mr. Harvell in 1986, with all documents pertaining to the Sandy Creek case.

D. Clerk's office did not maintain separate docket sheet on Hughes prior to 1988

Finally, the State incorrectly concludes that "although [Ms.] Cox copied the docket sheets for several of the Sandy Creek defendants, she did not copy the docket sheets for Hughes."[58] The Record shows that Ms. **Cox** requested the docket sheet for the Steinhorst and the later-filed Capo/John Doe cases.[59] But prior to 1988, any documents concerning the

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56 **ROA 1604.**

57 As the State's owns witnesses testified, the Sandy Creek files were maintained in different places in the courthouse and only some of the clerks had access to all of the storage areas. ROA 1531, 1578-**1581, 1584-1590, 1604.**

58 Opposition at 11.

59 ROA 1601.

Sandy Creek co-defendants would have been listed on one docket sheet because the documents were maintained in one file, The State fails to explain, because it cannot, why there would have been separate docket sheets for Steinhorst and for Hughes. At that time there were not separate files. In the words of the State's witness, Gloria Tharpe, a clerk assigned to Judge Turner's division:

> Q. Now, in 1987, when you got the Steinhorst file, if you would, explain to the Court how they were maintained and how objects were filed on those.
>
> **A.** In '87?
>
> Q. Yes. In **'87,** in September of **'87.**
>
> **A.** Everything was put in the **box.** I mean if we filed something we would just put it in the box. I don't think it was in any real file folder or anything. It was - it was a confusing file at that time.
>
> Q. Okay. This **is** in **1986, or** in September **'87.**
>
> **A.** Right.
>
> Q. Okay. In that file how - the defendants, were they separated out?
>
> **A.** No.[60]

Moreover, the State failed to produce a Hughes "docket" sheet. Indeed, at the pertinent time they did not have "docket or minute sheets" they just "wrote on the outside of the files."[61] When Ms, Cox photocopied the "Steinhorst" docket sheet, it would have included documents pertaining to Hughes also. The recusal order was not, however, listed on the docket sheet.

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60 **ROA 1549-1550.**

61 **ROA 1564, 1566.**

IV. COURT MAY PROPERLY DEEM EVIDENCE AS „NEWLY DISCOVERED" IN THE INTERESTS OF JUSTICE;

The due diligence requirement is not inflexible, and may be construed in order to achieve the ends of justice.[62] Mr,.Steinhorst has been denied his right to a fair evidentiary hearing on his Rule 3.850 motion before an impartial judge as required by this Court in Steinhorst v. State.[63] It would be a grave miscarriage of justice to conclude that, after having reviewed the files on at least three separate occasions, and having been repeatedly assured the were given everything, Mr. Steinhorst's Legal Team did not exercise due diligence, when the State concedes the files were a mess and had to be reorganized. Moreover, it would be unconscionable to require counsel to find something it did not even know existed -- Judge Turner's prior conflict and recusal -- when both Judge Turner and the State knew about it but remained silent.

V. CONCLUSION

For all of the reasons set forth in Appellant's Initial brief and in this Rely Brief, Mr. Steinhorst respectfully requests that this Court vacate the Circuit Court's June 16, 1995 order, and remand this case with instructions to vacate the 3.850 judgment

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62 McCallum v. State, 559 So. 2d 233.

63 636 So. 2d 498 (Fla. 1994).

entered by Judge Turner **and** conduct **a new evidentiary hearing on Steinhorst'sRule 3.850 petition.**

DATED: July **23,1996**

Respectfully submitted,

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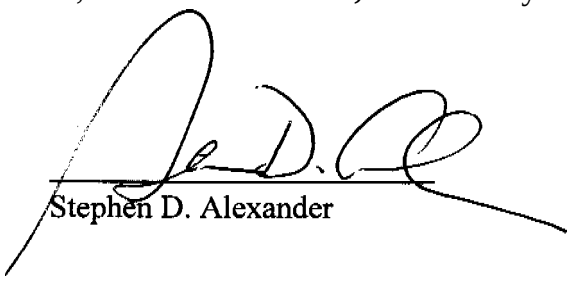
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a **copy** of the foregoing Appellant's Reply Brief has been furnished by U.S. Mail to Alton **O.** Paulk, Esq., **Office** of the State Attorney, P.O. **Box** 1040, Panama City, Florida 32402-1040, and Robert **A.** Butterworth, Attorney General, Department **of** Legal Affairs, The Capitol, Tallahassee, Florida **32399-1050, this** 23rd day of July, 1996.



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