IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,551

PAUL WILLIAM SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial after evidentiary of Mr. Scott's motions for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ____." The record on appeal from the Rule 3.850 proceedings, excluding hearing transcripts, shall be referred to as "PC-R. ____". The transcripts from the Rule 3.850 proceedings shall be referred to as "PC-TR. ____". The supplemental record on appeal from the Rule 3.850 proceedings shall be referred to as "Supp. PC-R. ____). All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Scott has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument are more than appropriate in this case, given the seriousness of the claims and the issues at stake.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On November 17, 1994, after hearing oral argument regarding the issues raised in Mr. Scott's 3.850 motion, this Court entered a stay of execution. On March 16, 1995, this Court issued an opinion remanding Mr. Scott's case to the Circuit Court for an evidentiary hearing, specifically on Mr. Scott's claim that either the State failed to disclose or the defense failed to discover the following: "(1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and (3) a medical examiner's photograph that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle. " Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). This Court also directed the Circuit Court to address public records claims raised by Mr. Scott. Id. at 1132 n. 3. Rehearing was denied on July 20, 1995.

On remand Mr. Scott's case went to the Honorable Edward A. Garrison, the judge who had been assigned to Division "W" of the Circuit Court of Palm Beach County when Judge Lupo who presided over Mr. Scott's case in 1994 transferred to the General Trial Division. However, on August 29, 1995, Judge Garrison entered an Order of Recusal (PC-R2. 1084), and Mr. Scott's case was reassigned to Division "T" (PC-R2. 1084).[1]

'It is unclear from the record whether Mr. Scott's case was assigned to Division "T" or Division "U. " In an order, dated September 22, 1995, Judge Carlisle states that Mr. Scott's case had been assigned to Division "T." However, the style of the order indicates that Judge Carlisle sits in Division "U" (PC-R2 1091).

On September 13, 1995, Mr. Scott filed a Motion to Transfer Case To Original Post-Conviction Judge, stating that judicial economy would be best effected were Mr. Scott's case transferred back to Judge Mary Lupo, the circuit judge who had heard Mr. Scott's motion for postconviction relief in November of 1994 (1088- 1090). On September 22, 1995, Judge Carlisle of Division "U" denied Mr. Scott's motion to transfer (PC-R2. 1091-1092). Copies of this order, which clearly indicated that Mr. Scott's case had been reassigned to Division "T," were sent to Celia Terenzio of the Attorney General's Office and to Ken Selvig of the West Palm Beach State Attorney's Office (PC-R;!. 1092).

On October 2, 1995, the Honorable Roger B. Colton, circuit judge of Division "T," entered an Order of Recusal (PC-R2.1093), and on October 5, 1996, Mr. Scott's case was reassigned to the Honorable Marvin U. Mounts in Division "S" (PC-R2. 1093). As before, copies of this order were sent to Celia Terenzio and Ken Selvig, and the order recognized Martin J. McClain as sole counsel for Mr. Scott (PC-R2. 1093).

On October 10, 1995, State Attorney Ken Selvig filed a Notice of Intent to Interview Jurors, indicating that the purpose of said interviews was to "reconstruct the record to determine the count by which the jury voted to recommend the death penalty. " (PC-R2. 1094). Copies of this notice were sent to the judge for Division "W" (long since recused) and to Judith Dougherty (an attorney no longer employed by the Office of the Capital Collateral Representative)[2] (PC-R2. 1094).[3] The notice was sent by regular mail and did

[2]Ms. Dougherty had been an attorney with CCR in 1994 who worked on Mr. Scott's case as second chair to Mr. McClain. She resigned her position at CCR effective December 15, 1994.

not reach the Office of the Capital Collateral Representative until October 13, 1995. Affidavits filed with the circuit court by the state months later would reveal that the state had conducted at least one of these jury interviews on October 10, 1995, the day the notice was signed by Mr. Selvig which was three days prior to the time Mr. Scott was served with the notice (PC-R2. 13351336).

On October 17, 1995, undersigned counsel filed an Objection To Interview Of Jurors By The State in Division "S" based on the state's failure to allege or state any reason for its belief that the verdict was subject to legal challenge pursuant to the mandate of Rule 4-3.5 of the Florida Rules of Professional Conduct (PC-R2. 1095-1096). Mr. Scott requested that, pursuant to Rule 4-3.5, the state refrain from interviewing jurors until it had provided appropriate grounds for doing so and until a hearing had been held (PC-R2. 1096).

On November 1, 1995, The Honorable Marvin Mounts issued an order requesting that both Mr. Scott and the State submit a "chronology of the essential events since the conviction and to recommend matters that need to be considered at the next hearing. " (PC-R2. 1103-1104). Judge Mounts also asked both parties to respond as to "why an original file was microfilmed and apparently discarded when it was still active and to how it should be maintained now, including the several notes that have been stuck or attached to pleadings recently, " (PC-R2. 1103). The order ended with the following statement: "This document concludes with the complex rhetorical question: Does the State as the advocate or clerk as

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[3]Undersigned counsel draws this Court's attention to the upper right hand corner of the copy of the Notice of Intent to Interview Jurors contained in the record on appeal (PC-R2 1094). The copy of the notice served upon Judith Dougherty indicated that it had been filed in Division "W." It appears that the notice as filed has been tampered with,

record keeper and caseload equalizer have any interest anent the recusal incidence in this case?" (PC-R2. 1103). This order recognized Martin J. McClain as sole counsel for Mr. Scott (PC-R2. 1104)

On November 14, 1995, the State filed a Response To Order Of November 1, 1995 (PC-R2. 1105-1109). This response stated the evidentiary hearing, which the State requested take place prior to December 15, 1995, should address the question of whether the state violated Bradv v. Maryland, 373 U.S. 83 (1963) by failing to disclose statements of Dexter Coffin and Robert Dixon and by failing to disclose the existence of a crime scene photograph of a circle of blood to the defense (PC-R;!. 1107-1108). The State's response also maintained that the issue of the jury vote to recommend death would be a relevant issue at the hearing (PC-R2. 1108). This response recognized Martin J. McClain as sole counsel for Mr. Scott (PC-R2. 1109).

Also on November 14, 1995, undersigned counsel, Martin J. McClain, filed a response to the November 1, 1995 order (PC-R2. 1110-113 1). Undersigned counsel attached a copy of this Court's July 20, 1995 opinion to his response, and indicated that in addition to those questions related to Brady v. Maryland, this Court had ordered that any public records claims raised by Mr. Scott should be addressed (PC-R2. 1110). Mr. Scott also requested that he be allowed to conduct an investigation of any inappropriate manipulation of the case assignment process which may have occurred prior to any further activity in Mr. Scott's case (PC-R2. 1111). Additionally, undersigned counsel notified Judge Mounts that he had been ordered by this Court to give top priority to Jerry White, a client scheduled for execution on

December 1, 1995, and that he was therefore requesting additional time to conduct this investigation and to update his response (PC-R2. 1111).

On November 17, 1995, undersigned counsel learned through Robert Hesse, Judge Mounts' judicial assistant, that pursuant to the state's request, an evidentiary hearing would be scheduled for December 14, 1995 .[4] On November 17, 1995, undersigned counsel, Martin J. McClain, sent a letter to Judge Mounts, copied to the state, which outlined the reasons for his inability to prepare for a hearing on December 14, 1995. Specifically, Mr. McClain informed Judge Mounts that he was currently litigating Jerry White's case under warrant, and that he had been directed to turn his full attention toward the representation of Mr. White by this Court. The letter also informed Judge Mounts that the state had ignored issues which needed to resolved in its November 14, 1995 response, and that it had underestimated the length of time needed for the evidentiary hearing.' After Judge Mounts had received the letter, Robert Hesse informed Mary K. Anderson Mills that the December 14, 1995 hearing would be continued only if the State were to agree.

Accordingly, undersigned counsel, through Mary K. Anderson Mills, contacted Ken Selvig and requested that he agree to a continuance of the hearing, Mr. Selvig agreed to the

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[4]Mary Anderson Mills, an assistant CCR, actually spoke to Mr. Hesse because of Mr. McClain's unavailability. Mr. McClain was, at that time, litigating Jerry White's case under warrant in Orlando. Mr. McClain was lead counsel on that case. See White v. Singletary, 663 So. 2d 1324 (Fla. 1995). Mr. White was executed on December 4, 1995.

[5]Mr. Scott filed a motion to supplement the record with this letter, which did not appear in the original record filed with this Court. In its Supplemental Record, the Palm Beach County Circuit Clerk's Office notes that it did not receive the letter in question. Mr. Scott is therefore filing a copy of Mr. McClain's letter with this brief. See Appellant's Supplement. A motion to Supplement the Record with this letter has also been filed with this Court.

continuance, but only if the hearing were to be rescheduled in January. Mary K. Anderson Mills again contacted Mr. Hesse regarding the state's position, but was informed that there would be no need to file a motion for continuance, as the hearing had never been set. A notice of agreed order was filed and the evidentiary hearing was thereafter set by the court for January 23, 1996 (PC-R2. 1132-1134).

On December 18, 1995, Mr. Scott mailed for filing an Amended Response To Order Of November 1, 1995, And To The State's Response Dated November 13, 1995.[6] This motion repeated Mr. Scott's request that an investigation be conducted or that a hearing be conducted regarding the condition and destruction of the files in Mr. Scott's case (PC-R2. 1142-1146). On December 19, 1995, Mr. Scott filed a Motion to Disqualify State Attorney Ken Selvig from further representation of the State pursuant to Rule 4-3.7 of the Florida Rules of Professional Conduct and the "witness-advocate" rule. State v. Christopher, 623 So. 2d 1228, 1229 (1993)(PC-R2. 1138-1141). Mr. Scott also filed a Motion to Permit Discovery pursuant to Lewis v. State, 656 So. 2d 1248 (Fla. 1995), requesting that he be allowed to take Mr. Selvig's deposition (PC-R2. 1135-1137). On December 22, 1995, the State filed a Response which opposed Mr. Scott's Motion to Disqualify Ken Selvig and to Permit Discovery on the grounds that it was legally insufficient (PC-R2. 1147-115 1). The State described Mr. Scott's motion as "a futile attempt to delay justice and deprive the state of representation by the most qualified person to handle this case, " (PC-R2. 1150). The

[6] Inexplicably, this motion was not file-stamped by the clerk's office until December 27, 1996.

State noted that "Mr. Selvig has been the lead prosecutor in this case for the past seventeen years. Scott's veiled attempts to disrupt that continuity must fail." (PC-R2. 1150).

On December 27, 1995, a hearing was held regarding Mr. Scott's motions to disqualify Ken Selvig and to permit discovery and the state's response to those motions (PC-TR. 1-44).[7] Also heard was argument regarding the state's notice of intent to interview jurors. During the hearing, Mr. Selvig informed Judge Mounts that his sole purpose for conducting these interviews was to dispute the factual finding by this Court that the jury vote for death was seven to five (PC-TR. 30). Assistant State Attorney Selvig admitted that he had already interviewed "a number of jurors. " (PC-TR. 31). Mr. Selvig concealed from the Court and opposing counsel the fact that they had conducted at least one of these interviews on October 10, 1995, the day they had filed the notice and three days before undersigned counsel received it.[8] Judge Mounts thereafter made the following statements regarding the jury interviews:

> . . .it's always been my practice, at least in old Division S whenever the need in other cases has arisen to interview any jurors, I have, oh, I think consistently denied the opportunity of the defense or the State to do it in camera and required that it be done in open court and on the record.
>
> And when I saw your notice to interview jurors I assumed apparently wrongly, incorrectly rather that we would, if it ever got to the stage were they were to be interviewed and after hearing from the defense interview them in due process venue with a Court and court reporter and clerk., .

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[7]As the state had chosen to serve its response on Mr. Scott by regular mail, Mr. Scott's counsel did not receive and did not have the opportunity to read the response until the day of hearing.

[8]Although State Attorney Selvig indicated that he had "consulted with the Florida Bar ethics attorneys, " it seems doubtful that such advice would have been given him (PC-TR. 30).

(PC-TR. 31-32).

On January 5, 1996, the Court signed an order that the state had proposed on December 28, 1996, which denied Mr. Scott's Motion to Disqualify Ken Selvig and Motion to Permit Discovery (PC-R2. 1152-A). Mr. Scott subsequently filed a petition for writ of prohibition from this ruling to this Court. The writ was subsequently denied by this Court on January 22, 1996 (PC-R2. 1248).

In preparing for the January 23, 1996 hearing, it came to the attention of undersigned counsel that two of Mr. Scott's material witnesses, Dexter Coffin and Robert Dixon, were outside the jurisdiction of this Court and would be unavailable for the January 23, 1996 hearing, as Mr. Dixon was on parole in the State of California and Mr. Coffin was incarcerated in the State of Virginia. On January 10, 1996, immediately upon making this determination, a motion to take the depositions of Dexter Coffin and Robert Dixon in order to perpetuate their testimony was filed. This was pursuant to Rule 3.190(j), Fla. R. Crim. P.[9] (PC-R2. 1161-1163). On January 11, 1996, undersigned counsel was informed by Judge

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'Rule 3.190(j) provides in pertinent part:

> the defendant or the state may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witnesses' testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents, or tangible objects, not privileged be produced at the same time and place. If the application is made within 10 days before the trial date, the court may deny the application.

Mounts' judicial assistant that Judge Mounts had no time to hear the motion in advance of January 23, 1996. Accordingly, a motion to continue was filed because of Judge Mounts' inability to find time to hear the pending motion. Judge Mounts then found time to hear the motions on January 18, 1996.

At the hearing on Mr. Scott's motion for continuance and motion to take depositions, the State opposed these motions, claiming that Dexter Coffin and Robert Dixon did not have relevant testimony to give. Specifically,

> THE COURT: You say that is a condition precedent?
>
> MR. SELVIG: Absolutely.

According to Mr. Selvig, undersigned counsel could not present the testimony of either Coffin or Dixon unless he proved without resorting to their testimony that Mr. Selvig had failed to disclose their pretrial statements to Mr Scott's trial counsel (PC-TR. 55). Thereupon, Judge Mounts denied Mr. Scott's motion to take depositions to perpetuate testimony (PC-TR. 63). The Court also denied Mr. Scott's motion for continuance (PC-TR. 63). Judge Mounts left Mr. Scott with two working days prior to the evidentiary hearing, making it impossible for undersigned counsel to obtain the testimony of Dexter Coffin or Robert Dixon, who were both beyond the territorial jurisdiction of the circuit court.

During the January 18, 1996 hearing, Ken Selvig made the following admission regarding statements made by Dexter Coffin, which were the substance of the Brady claim in Mr. Scott's case:

> The substance of the statement was never disclosed because we in the prosecutor's office at that point in time gave no credence to Mr. Coffin's statements, had he made one. "

(PC-TR. 57).

Also during the January 18, 1996 hearing, Judge Mounts informed Mary Anderson, whom undersigned counsel had assigned as second chair to cover the hearing, that he, Judge Mounts, was well-acquainted with defense witness Dexter Coffin, and specifically directed Mr. Scott's counsel to investigate this matter (PC-TR. 47-48). Based on Judge Mounts' directive, undersigned counsel attempted to conduct an investigation into the matter of Judge Mounts' familiarity with Dexter Coffin in the two business days remaining prior to the January 23, 1996 hearing,

Through investigation, it became immediately apparent to undersigned counsel that Judge Mounts had been directly involved with Dexter Coffin and officials such as Captain Jack Donnelly at the Palm Beach County Jail during the very time period that Richard Kondian made the statements to Dexter Coffin which are the subject of Mr. Scott's evidentiary hearing. An inspection of Mr. Coffin's criminal files indicated that he had been sentenced by and indeed corresponded with, Judge Mounts during this time period. However, further investigation was impossible due to the fact that Mr. Coffin's criminal files had been destroyed with the exception of the index forms. Therefore, the only individual who could have provided information regarding this matter was Judge Mounts himself.

Because of this newly discovered information, which created a fear in Mr. Scott's mind that he would not receive a full and fair hearing from Judge Mounts, undersigned counsel filed motions to disqualify Judge Mounts, and an accompanying motion to depose Judge Mounts regarding his involvement with Dexter Coffin (PC-R2. 1174-1197; 1198-1209; 1244-1247). On January 23, 1996, argument was heard on these motions, and on an amended motion to disqualify Judge Mounts which contained updated information

undersigned counsel had been able to obtain after the motion to disqualify had been filed. (PC-TR. 70-106). Undersigned counsel, Martin J. McClain, appeared at this hearing as lead counsel, and conducted all aspects of the hearing and case. At that time, undersigned counsel set forth in detail the information he had obtained regarding Judge Mounts' involvement with Dexter Coffin, including additional information he had received regarding a Roger Beach, an individual who had threatened Judge Mounts and whom Dexter Coffin informed against (PC-TR. 99). Undersigned counsel also informed Judge Mounts that Attorney David Roth had given him new information relevant to the disqualification motion earlier that morning (PC-TR, 75-76). Undersigned counsel sought an opportunity to reduce the new information to writing. Judge Mounts refuse to disqualify himself and refused to grant undersigned counsel the continuance he requested to conduct a further investigation into the matter. Judge Mounts refused to allow even a brief recess as specifically mandated in Rogers v. State, 630 So. 2d 5 13 (Fla. 1993), despite undersigned counsel's specific reference to Rogers (PC-TR. 75, 106). [10]

The evidentiary hearing was thereafter commenced. Judge Mounts had denied Mr. Scott's previously filed Motion to Disqualify Ken Selvig and to take his deposition, based on his role as a witness in Mr. Scott's case. In the same vein, Judge Mounts refused to follow the rule regarding sequestration of witnesses and refused to exclude Ken Selvig from the Courtroom during the testimony of other witnesses (PC-TR. 127-128). Thus, undersigned counsel was forced to call Ken Selvig as his first witness (PC-TR. 136).

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[10]Undersigned counsel continued to investigate this matter to the best of his ability. On January 26, 1996, undersigned counsel filed a second amended motion to disqualify Judge Mounts with additional information he had obtained.

During the course of the hearing, Judge Mounts excluded all evidence which the State claimed was either not admissible or "beyond the scope" of the evidentiary hearing (PC-TR. 165, 167, 203, 262, 264, 266, 268, 269, 270, 271, 272, 273).

At 6:00 p.m., at the end of the day on January 23, 1996, Judge Mounts recognized that additional time needed to be allotted for the hearing (PC-TR. 275). Undersigned counsel was still in the midst of direct examination of Mr. Selvig. At that time, in response to Judge Mounts' inquiries, undersigned counsel stated that he intended to call five witnesses in addition to Ken Selvig, whom he was not finished questioning (PC-TR. 275-276). Undersigned counsel specifically mentioned that it was his intention to attempt to obtain the presence of Robert Dixon and Dexter Coffin for the hearing (PC-TR, 275-276). Additionally, undersigned counsel informed this Court, in the presence of the State, that he was aware of several dates in the future on which he would be unable to attend hearing in Mr. Scott's case due to previously scheduled hearings in other cases. Specifically, undersigned counsel cited February 15, 1996 as one of the dates he could not attend a hearing in Mr. Scott's case (PC-TR. 281).[11] Mr. McClain had received notice dated December 20, 1995, of a hearing on February 16, 1996, at 9:00 a.m. in Salisbury, Maryland, in the case of Rickey Roberts, and to reach Salisbury, Maryland, by February 16th at 9:00 a.m., Mr. McClain was scheduled to leave on February 15th. After Mr. McClain indicated he had a commitment on February 15th, Judge Mounts requested that the State "undertake to obtain the two days" to complete the hearing. The record makes clear

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"Undersigned counsel was tired after a full day in court and without a calendar. He attributed the February 15th hearing to Raleigh Porter instead of Rickey Roberts. Raleigh Porter's hearing was in fact set for February 22, 1996.

that undersigned counsel was to be contacted and included in deciding when the hearing would be scheduled (PC-TR. 281).

On January 25, 1996, the Governor of Florida signed a warrant setting Rickey Roberts' execution for February 25, 1996.[12] On January 26, 1996, CCR received a notice of hearing from Ken Selvig, notifying undersigned counsel that a hearing had been set for February 14 and 15, 1996 (Supp. PC-R2. 15). The service on the notice indicated that this hearing was set on January 24, 1996 (Supp. PC-R2. 15). Neither undersigned counsel nor anyone in his office was contacted regarding the selection of this hearing date. The hearing date was selected on an ex parte setting of resumption of the evidentiary hearing on the very day counsel indicated he was not available.

Undersigned counsel had been the lead counsel on Mr. Scott's case since 1991, a fact well-documented by the record. See Scott v. State, 657 So. 2d at 1129. In an effort to diligently apprise Judge Mounts and the State of his inability to attend the February 14 and 15, 1996 hearing, undersigned counsel filed a Motion for Continuance or in the Alternative to Allow CCR to Withdraw on January 31, 1996 (PC-R2. 1256-1260). In this motion he informed the Court that he not only had a previously scheduled hearing which would prevent him from attending the currently scheduled evidentiary hearing set in Mr. Scott's case, but that a warrant had been signed in Rickey Robert's case, the very case with a hearing set for February 16th in Salisbury, Maryland (PC-R2. 1256-1257). In fact, due to the warrant, the February 16th proceedings were going to be longer and of more significance requiring Mr. McClain to travel to Maryland on February 14th in order to interview witnesses and be

[12]Undersigned counsel had been Mr. Roberts' counsel since 1989.

prepared to present evidence on February 16th if the Maryland courts granted Mr. McClain's request to do just that. Accordingly, undersigned counsel requested that Judge Mounts reschedule Mr. Scott's evidentiary hearing to a date subsequent to the Roberts' warrant period (PC-R2. 1259). Included with this motion was a request for hearing. A copy of this motion was faxed to Judge Mounts on January 3 1, 1996. However, undersigned counsel heard nothing from Judge Mounts regarding the hearing he had requested until the second week in February. Meanwhile, Mr. McClain had scheduled to travel to California on February 9th to take the deposition of Robert Dixon on February 10th. On February 5, 1996, undersigned counsel was informed that Judge Mounts would take up the motion for continuance on February 9, 1996 at 4:00 p.m. Accordingly, Mr. McClain arranged to have Ms. Anderson cover the deposition armed with a cellular phone and a list of all questions to be asked.[13] However, undersigned counsel was later informed on February 6th by Judge Mounts' Judicial Assistant, Robert Hesse, that because of a personal matter Judge Mounts would not hear the motion until February 12, 1996 at 11:00 p.m., two days prior to the February 14, 1996, hearing date, Robert Hesse specifically averred that Judge Mounts had no prior time available to hear this motion for continuance (See Letter to Judge Marvin U. Mounts, Jr., dated February 6, 1996).[14]

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[13]Undersigned counsel filed a notice of taking Mr. Dixon's deposition on January 31, 1996, which was served on both Ken Selvig and Celia Terenzio (PC-R2. 1261-62). A subsequent letter to Mr. Selvig and Ms, Terenzio offered to arrange an appearance by telephone for the February 10, 1996 deposition. Neither appeared for the deposition.

[14]Mr. Scott filed a motion to supplement the record with this letter, which did not appear in the original record filed with this Court. In its Supplemental Record, the Palm Beach County Circuit Court Clerk's Office notes that it did not receive the letter in question. Mr. Scott is therefore filing a copy of Mr. McClain's letter with this brief. See Appellant's Supplement.

After receiving Mr. Scott's motion for continuance, Celia Terenzio telephoned the Office of the Capital Collateral Representative and spoke to Mary Anderson Mills. During that conversation, Ms. Mills informed Ms. Terenzio that Mr. McClain had mistakenly referred to the Raleigh Porter hearing as the hearing set on February 15, 1996, and that it had in fact been the Rickey Roberts hearing in Maryland to which Mr. McClain had intended to refer.

A telephonic hearing regarding undersigned counsel's request for continuance or permission to withdraw and the Third Amended Motion To Disqualify Judge Mounts (based on Judge Mounts' actions in setting the hearing ex parte) was held on February 12, 1996 (PC-TR. 285-323). The State opposed both motions (PC-TR. 293, 305-307, 310-311). Relying on the transcript of the January 23, 1996, evidentiary hearing, the State argued that "there was never any indication in the record that counsel for Mr. Scott should be asked what was convenient for him. " (PC-TR. 290-291). Furthermore, the state maintained that Mary Anderson Mills should be required to represent Mr. Scott in Mr. McClain's absence (PC-TR. 306-307).

The State read only portions of the transcript into the record (PC-TR. 398-401). Although undersigned counsel had requested a copy of the January 23, 1996, transcript in writing subsequent to the hearing, he was not provided with a copy until after the hearing on February 14, 1996 (PC-TR. 312, 398-401). The State, however, who conceded at the February 14, 1996, hearing that they had not been required to make a written request for the

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A motion to Supplement the Record with this letter has also been filed with this Court.

transcript, was given a copy of the January 23, 1996, hearing transcript prior to the February 12, 1996, hearing (PC-TR. 401, 290-291).

At the hearing, undersigned counsel set forth in detail the reasons for his inability to attend the February 14 and 15 hearing. Undersigned counsel informed Judge Mounts, as he had informed Judge Mounts and the State on January 23, 1996, that he would not be available to conduct an evidentiary hearing on those dates due to his commitment in another case (PC-TR. 299-301). Undersigned counsel further explained to Judge Mounts that although the hearing set in Maryland was a pre-evidentiary hearing to the main evidentiary hearing set on March 22, 1996, because of the pending warrant Mr. McClain was seeking to convert the February 16th hearing into an evidentiary hearing and had to be prepared to present all of the necessary evidence. Because an execution warrant had been signed for Rickey Roberts by the Governor, at the Attorney General's urging, for February 23, 1996, undersigned counsel had been compelled to take measures to expedite the Maryland evidentiary hearing (PC-TR. 300). Undersigned counsel explained that as lead attorney on Mr. Roberts' case, his presence in Maryland during the time scheduled for the Scott evidentiary hearing had become essential as the case was very complex and involved the presentation of testimony by numerous witnesses (PC-TR. 300). Undersigned counsel advised Judge Mounts that the Attorney General had argued to the Florida Supreme Court that a warrant case must take top priority and that any other case was merely a "cat in a tree," (PC-TR, 301). In accordance with this position, undersigned counsel informed Judge Mounts that the Florida Supreme Court had recently continued an oral argument set in Terre11 Johnson because of undersigned counsel's role as lead attorney in Rickey Roberts'

case (PC-TR. 304). And in fact, the federal court hearing in the Raleigh Porter case continued the February 22nd evidentiary hearing because of the Roberts' warrant. Judge Mounts thereafter denied the motion for continuance or to withdraw (PC-TR. 3 11).

Also taken up at the February 12, 1996, hearing was the State's Motion to Preclude Testimony of Witnesses and Mr. Scott's response to that motion (PC-TR. 311-318). [15] Ken Selvig represented the State at this hearing, urging the court to preclude the testimony of all defense witnesses who would provide testimony regarding the "materiality" prong of Brady v. Maryland, 373 U.S. 83 (1963), as Ken Selvig propounded that the record rebutted Mr. Scott's Brady claims (PC-TR. 315). Named as witnesses whose testimony should be excluded were Dr. Cuevas and Dale Nute (PC-TR. 313). Mr. Scott opposed this motion, noting the impropriety of Judge Mounts basing his determination of the issues in Mr. Scott's case solely upon the testimony of Ken Selvig, whose bias toward these issues was clear (PC-TR. 314-316). Judge Mounts thereafter granted the State's motion to preclude defense witness testimony in its entirety (PC-TR. 318).

On February 14, 1996, Judge Mounts reconvened the evidentiary hearing in Mr. Scott's case (PC-TR. 324-402). Undersigned counsel Martin J. McClain was unable to attend the hearing, due to his litigation of the Roberts case in Maryland. However, because of Judge Mounts' refusal to continue the hearing, Mr. McClain felt compelled to send Mary K. Anderson Mills to appear on behalf of Mr. Scott.

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[15] Mr. Scott's response to the State's Motion to Preclude Testimony of Witnesses was sent overnight federal express to the Clerk of Palm Beach County, to all counsel of record and to Judge Mounts on February 9, 1996. The motion was received by the clerk on February 10, 1996. However, the record contains two copies of the motion, one file-stamped on February 12, 1996 and one file-stamped February 14, 1996.

At the beginning of the hearing, it was discovered that Mr. Scott had not been transported to West Palm Beach from Union Correctional Institution (PC-TR. 326). Ms. Anderson Mills objected to Mr. Scott not being present and asserted that he was not waiving his rights in this regard (PC-TR. 331). Ms. Anderson Mills also made Judge Mounts and opposing counsel aware that, due to Judge Mounts' failure to transport Mr. Scott to the hearing, counsel had not been able to speak with him about the issues at hand (PC-TR. 334).

Although Judge Mounts expressed some initial concern with Mr. Scott's absence, and in fact delayed the hearing for an hour to allow counsel to research this issue, Judge Mounts ordered that the hearing proceed in Mr. Scott's absence, upon the state's assurances that his presence was not required and that they knew that the issue would be reviewed by an appellate court (PC-TR. 330). Thereafter, the hearing went forward in the absence of Mr. Scott and Mr. McClain. Ms. Anderson Mills was not prepared to present any evidence without either Mr. Scott or Mr. McClain present. The State's evidence consisted solely of the testimony of Ken Selvig (PC-TR. 357-365).

At the conclusion of the State's case and after the evidence was closed, Judge Mounts entertained argument by Ken Selvig that Mr. Scott's 3.850 motion should be denied based on his testimony and the record (PC-TR. 371-388). Ken Selvig referred Judge Mounts to a memorandum he had served on undersigned counsel minutes prior to the hearing, which he claimed supported his position (PC-TR. 371). Judge Mounts ignored Ms. Anderson Mills' assertion that she was not waiving notice to the afore-mentioned memo and subsequent request for additional time to prepare a response to Ken Selvig's memorandum (PC-TR. 394). Subsequently, Judge Mounts requested that Ken Selvig provide him with the materials

from the record that the State deemed appropriate for him to review in making his determination (PC-TR. 393). Judge Mounts requested that the State submit a written finding of fact for his review (PC-TR. 393). No such requests were made of Mr. Scott's counsel.

On February 20, 1996, Mr. Scott filed a Fifth Motion to Disqualify Judge Mounts, citing as grounds Judge Mounts' actions at the February 14, 1996, hearing (PC-R2.1352-1371). On March 2, 1996, Robert Hesse, Judicial Assistant to Judge Mounts, contacted Mary Anderson Mills and asked whether undersigned counsel intended to submit proposed findings of fact. As Judge Mounts had given no previous indication that he wished Mr. Scott to submit such proposed findings, undersigned counsel submitted a motion for clarification requesting an order from Judge Mounts regarding this matter (PC-R2. 1378-79). Judge Mounts never ruled on this motion.

On March 11, 1996, undersigned counsel filed a Motion For Reconsideration Of Denial Of Mr. Scott's Motion For Continuance And Response To State's Letter Regarding Materials To Be Reviewed By The Court (PC-R2. 1380-1422). Mr. Scott requested that Judge Mounts strike the February 14, 1996, proceedings from the record and reopen the evidence to allow Mr. Scott to fully present his claims. Attached to this motion was a copy of the deposition of Robert Dixon, which had been taken on February 10, 1996, a transcript of which had not previously been available (PC-R2. 1487-1508).

On March 26, 1996, the State filed a Response to Defendant's Motion For Reconsideration And Amended Motion For Reconsideration (PC-R2. 1512-1538). That motion addressed what it referred to as "Scott's repeated misrepresentations to this Court

regarding the true nature of the February 16th hearing in the case of **Rickey** Roberts." Mr. Scott filed a reply to the state's motion on April 2, 1996 (PC-R2. 1539-1833).

On April 5, 1996, undersigned counsel received a letter, written by Judge Mounts' Judicial Assistant, Robert Hesse, on April 4, 1996. The letter began as follows:

> You have invited me to review and respond, at my option, to the several references to statements attributed to me in the course of this case.

(PC-R2. 1834). The letter did not address any specific allegations, as Mr. Hesse stated it was not proper for him to agree or disagree with anything claimed by the attorneys. After receiving the aforementioned letter, Mr. Scott filed a Sixth Motion to Disqualify Judge Mounts, based on the Judge Mounts' extra-judicial investigation into issues involving Mr. Scott's case. Mr. Scott also filed a Motion to Permit Discovery requesting that undersigned counsel be allowed to depose Judge Mounts and Robert Hesse regarding the extent of this investigation.

On April 23, 1996, Judge Mounts issued an order, which stated the following regarding the **Brady** issues in Mr. Scott's case:

> It is clear and without doubt that the defense had notice of all three. The State's Memorandum of February 14th is correct and incorporated herein. There is no evidence, by affidavit or otherwise, that Dixon or Coffin ever made a written or recorded statement during the time frame prior to the trial.
>
> This record demonstrates that there is no concealment, no failure to disclose.

(PC-R2. 1851).

On April 29, 1996, the state submitted a proposed order which vacated the Court's April 23, 1996 order, denied all pending defense motions, and then reinstated the April 23,

1996, order (PC-R2. 1932-1933). Mr. Scott was not served with a copy of this motion until May 2, 1996.

On April 30, 1996, Judge Mounts filed a Notice and Order forbidding all parties from contacting Janet S. O'Keefe, a juror in Mr. Scott's case, without prior leave of court (PC-R2. 193 1). The order stated that Judge Mounts had discussed Mr. Scott's case with Timothy Sullivan, the Bailiff of Division "S," on April 19, 1996, and that Mr. Sullivan had informed him that a representative of CCR had approached Ms. O'Keefe in 1994 without notice. Mr Scott filed a Seventh Motion To Disqualify Judge Mounts and an accompanying motion for discovery based on these actions (PC-R2. 1958-1971).

On May 10, 1996, Mr. Scott filed a timely Motion for Rehearing from the April 23, 1996, order (PC-R2. 1934-1954). On May 13, 1996, Mr. Scott received a copy of the proposed order submitted by the state on April 29, 1996. Judge Mounts had signed the State's proposed order on May 1, 1996, a day before undersigned counsel became aware that the proposed order had been submitted (PC-R2. 1932-1933).

On May 20, 1996, Mr. Scott filed a Notice of Filing Motion For Rehearing, informing the court that because the April 23, 1996, order had been vacated, he intended to file a subsequent motion for rehearing within 15 days of the receipt of the May 1, 1996, order which was May 13th (PC-R2. 1955-1957).

On May 24, 1996, Mr. Scott filed a timely motion for rehearing from the May 1, 1996 order (PC-R2. 1975-2002). On June 19, 1996, Judge Mounts denied Mr. Scott's motion for rehearing (PC-R2. 2003). Mr. Scott filed a timely notice of appeal from this order on July 16, 1996. This appeal follows (PC-R2. 2004-2014).

SUMMARY OF ARGUMENTS

1. The refusal to disqualify Ken Selvig as the assigned prosecutor representing the State violated the witness-advocate rule. Mr. Selvig participated below as both witness and advocate. He blurred those two roles. When he was called as a witness, he immediately reminded the court of his desire to make an opening statement. After his opening, he took the witness stand. When recess was called while he was on the witness stand, he arranged through ex parte communication, the resumption of the hearing for a time neither Mr. Scott's lead counsel nor Mr. Scott were available or present. He returned to the witness stand, gave evidence for the State, and then gave a closing argument. Mr. Selvig's behavior is a living example why a lawyer should not be both a witness and an advocate in one proceeding. As a result, the hearing violated Mr. Scott's due process rights and, was not full and fair. A new evidentiary hearing must be ordered.

2. Judge Mounts violated well established law when he refused to disqualify himself, Judge Mounts disclosed to Mr. Scott's counsel that he knew non-record facts about Dexter Coffin that counsel might want to familiarize himself with. Judge Mounts, in fact, had corresponded with Dexter Coffin during the time period that Mr. Coffin obtained a confession from Mr. Scott's co-defendant. Dexter Coffin also reported that Roger Beach, during that time period, was planning to kill Judge Mounts. These facts warranted disqualification.

Judge Mounts refused to grant a continuance under Rogers v. State, 630 So. 2d 513 (Fla. 1993), when one was requested to comply with the writing requirement. This itself required disqualification.

Judge Mounts engaged in ex parte communication with the State in setting the resumption of the evidentiary hearing for a time when undersigned counsel was not available. He also engaged in ex parte communications in signing orders submitted by the State before they were even served on opposing counsel.

Judge Mounts conducted extra-judicial investigations and considered non-record material. He completely disregarded the principles of due process.

Judge Mounts' conduct placed Mr. Scott in fear of not being heard by an impartial tribunal. The motion to disqualify should have been required. A reversal is required.

3. Due process was violated when the resumption of the evidentiary hearing was scheduled for a time undersigned counsel had previously indicated he was not available, Mr. Selvig's claim that he was not required to schedule the resumption of the hearing at a time convenient for undersigned counsel constitutes proof of a due process violation. Mr. Scott was deprived of notice and a fair opportunity to be heard when his evidentiary hearing resumed at a trial his lead attorney of five years was not available and when he, Mr. Scott himself, was not present. A reversal is required.

4. Due process was violated by conducting the evidentiary hearing on whether the State failed to disclose or defense counsel failed to discover exculpatory evidence, without the presence of Mr. Scott.

5. Due process and Rule 3.190(j) were violated when Judge Mounts refused to allow depositions of out-of-state witnesses, Dexter Coffin and Robert Dixon. These witnesses were not available. Depositions should have been conducted upon request so that

Mr. Scott could prove their unavailability and present their testimony. The ruling by Judge Mounts requires a reversal.

6. Due process was violated when Mr. Selvig successfully argued that this Court's opinion not withstanding, Mr. Scott was not entitled to present the evidence he **had** argued to this Court warranted an evidentiary hearing. The exclusion of this evidence requires a reversal.

ARGUMENT I

MR. SCOTT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY THE PARTICIPATION OF ASSISTANT STATE ATTORNEY, KEN SELVIG, AS COUNSEL FOR THE STATE BECAUSE MR. SELVIG WAS A NECESSARY AND MATERIAL WITNESS WHO HAD A PERSONAL STAKE IN THE OUTCOME AND ALLOWED THAT PERSONAL STAKE TO CLOUD HIS JUDGMENT AND VIOLATE THE RULES OF PROFESSIONAL CONDUCT TO MR. SCOTT'S PREJUDICE.

This Court remanded Mr. Scott's case for an evidentiary hearing to determine whether a constitutionally adequate adversarial testing occurred at Mr. Scott's trial when the jury did not hear certain exculpatory evidence. As the prosecutor who obtained the conviction and death sentence against Mr. Scott, Ken Selvig of the Palm Beach County State Attorney's Office was a fundamental witness in the resolution of this issue at Mr. Scott's evidentiary hearing. Mr. Selvig's role as prosecutor at Mr. Scott's jury trial made him not only a necessary and material witness but also gave Mr. Selvig a strong interest in the outcome of the litigation. For this reason, Mr. Selvig had every incentive to protect himself. As a result, Mr. Selvig abandoned his "responsibility [as] a minister of justice". Comment to Rule 4-3.8, Fla. R. Professional Conduct. Mr. Selvig was determined to exonerate

himself from any alleged misconduct and protect his reputation. Mr. Selvig had a personal stake in the outcome. Under these circumstances he should have been disqualified from participating as counsel of record for the State. Judge Mounts' actions in allowing Ken Selvig to act as a prosecutor and witness in Mr. Scott's case extended to Mr. Selvig the opportunity to manipulate the proceedings in order to deny Mr. Scott a full and fair hearing. The record of Mr. Selvig's conduct in this case reveals that from the beginning, Mr. Selvig consistently acted to do just that.

A. MR. SELVIG AS A WITNESS

The Florida Rules of Professional Responsibility envisioned the impermissible conflict created when a lawyer plays the dual role of advocate and witness at trial. Rule 4-3.7 of Rules of Professional Conduct, clearly states:

> (a) **When a Lawyer May Testify.** A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of the legal services rendered in the case; or,
>
> (4) disqualification would work a substantial hardship on the client.

Rule 4-3.7 (emphasis added).

In Mr. Scott's case, Mr. Selvig's testimony did not relate to an uncontested issue; it did not relate solely to a matter of formality; it did not relate to the nature and value of legal services; nor would disqualification have worked a substantial hardship upon the State.

The Eleventh Circuit Court of Appeals has explained that "a prosecutor must not act as both prosecutor and witness," United States v. Hosford, 782 F.2d 936, 938 (11th Cir 1986). The Eleventh Circuit explained:

> The policy concerns that preclude a prosecutor from also appearing as a witness were well stated by the United States Court of Appeals for the Seventh Circuit:
>
> > First, the rule eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government. Second, there is fear that the prestige or prominence of a government prosecutor's office will artificially enhance his credibility as a witness. Third, the performance of dual roles by a prosecutor might create confusion on the part of the trier of fact as to whether the prosecutor is speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier according testimonial credit to the prosecutor's closing argument. Fourth, the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that "justice must satisfy the appearance of justice. " This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government. (footnote omitted).
>
> United States v. Johnston, 690 F.2d 638, 643 (7th Cir. 1982).

Hosford, 782 F.2d at 938-39.

Florida state courts have recognized the conflict inherent in a situation where, as in Mr. Scott's case, a lawyer plays the dual role of prosecutor and witness. In State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), it was stated:

> We recognize that the functions of a witness and a prosecuting attorney must be kept separate and distinct and that "the practice of acting as both a prosecutor and a witness is not to be approved and should be indulged in only under exceptional circumstances." Shargaa v. State, 102 So.2d 809, 813 (1958), cert. denied 358 U.S. 873, 79 S.Ct. 114, 3 L.Ed. 2d 104 (1958). See also Clause11 v. State, 455 So.2d at 1051 n.1

Id., at 1229. In Christopher, disqualification was not required only because there was no indication that the prosecutor would in fact be called as a witness.

There have been a number of cases which have held that the disqualification required by this rule does not require disqualification of the entire state attorney's office. In State v. Clausell, 474 So. 2d 1189 (Fla, 1985), this Court found that, where the Assistant State Attorneys who would be witnesses were not the assigned attorneys representing the State in the matter, disqualification of the entire office was not warranted absent actual prejudice. The opinion implicitly recognizes that the "advocate-witness" rule precluded a prosecutor who was a witness in a case from also acting as prosecutor. Similarly, in Meggs v. McClure, 538 So. 2d 518 (1st DCA 1989), the individual who was the witness was not acting as the prosecutor in the case. This Court refused to order disqualification of the entire office absent actual prejudice.

Citing to Rule 4-3.7 of the Florida Rules of Professional Conduct and to the "witness-advocate" rule set forth in State v. Christopher, 623 So. 2d 1228 (1993), Mr. Scott filed a motion to disqualify Mr. Selvig from the further prosecution of Mr. Scott's case on December 19, 1995, asserting that Mr. Selvig would cause irreparable prejudice to his case were Mr. Selvig also allowed to further engage in the prosecution of Mr. Scott's case. (Supp. PC-R. 1138-1141).

In addition to the Motion to Disqualify, Mr. Scott filed a Motion To Permit Discovery pursuant to this Court's decision in State v. Lewis, 656 So. 2d 1248 (Fla. 1994)(PC-R. 1135-36). The motion requested permission to depose Ken Selvig, as he was a relevant and material witness, and such deposition was necessary for an adequate investigation and presentation of Mr. Scott's issues at the evidentiary hearing (PC-R. 1136).

The State, through Ken Selvig, vigorously opposed Mr. Scott's motions to disqualify and depose Ken Selvig, (PC-R. 1147-1151), claiming that these motions were not only "nothing more than a veiled attempt to disqualify the original trial attorney from further participation in [Mr. Scott's] case," (PC-R. 1149), but were also "a futile attempt to delay justice and deprive the state of representation by the most qualified person to handle this case."[16] (PC-R. 1150). The state asserted that Mr. Scott's motion to disqualify Ken Selvig should be denied, as it failed to show either that Mr. Selvig would actually be called as a witness, or that he would "possess any information that would be helpful to the defense." (PC-R. 1150). The state also argued that Rule 4-3.7 did not apply to Mr. Selvig, as that rule only prescribed testimony by a lawyer in his own client's case (PC-R. 1149-1150).[17]

After hearing on December 27, 1997, the trial court orally denied Mr. Scott's motions to disqualify and to depose Ken Selvig, and thereafter entered a written order to this

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[16]Ironically, this quote fittingly describes Mr. Selvig's action in setting the resumption of the evidentiary hearing for a day that undersigned counsel had indicated he was not available. Mr. Selvig, who was on the witness stand, arranged the hearing to resume without the presence of the attorney examining him.

[17]"This position is certainly not supported by case law, and no doubt the wealth of contra authority was not cited by Mr. Selvig.

effect. (Transcript of 12-27-95 Motion Hearing, at 43; PC-R. 1152A). Ken Selvig continued to represent the State in Mr. Scott's case during all subsequent proceedings.

At the proceedings on January 23, 1996, Mr. Selvig was the only representative from the State Attorney's Office present for Mr. Scott's case. He opposed Mr. Scott's motion to exclude witnesses. He got Judge Mounts to exempt him, Ken Selvig, from the sequestration of witnesses. Because of potential prejudice arising from Mr. Selvig's ability to sit and listen to other witnesses and shade his own testimony accordingly, undersigned counsel called Mr. Selvig as his first witness.[18] Whereupon, Mr. Selvig reminded the court that he first wished to give an opening statement for the State. At that time, Mr. Selvig gave an opening statement, After giving his opening, Mr. Selvig then took the witness stand, and was still on the stand hours later when Judge Mounts stopped the proceedings. At the beginning of the hearing, counsel for Mr. Scott had reiterated his objection to Ken Selvig's dual role of advocate and witness (PC-TR. 112). However, the State continued to oppose Mr. Selvig's disqualification, and the court refused to order it.

In fact, Mr. Selvig was the only witness called on Mr. Scott's behalf on January 23, and Mr. Scott's counsel was not finished with his direct examination of Mr. Selvig when the trial court announced its intention to end the proceedings for that day. During the hearing, Mr. Selvig was questioned extensively regarding his conduct relating to the disclosure of exculpatory evidence.

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[18]Of course this would still not have insulated Mr. Scott from the prejudice of having one witness, Ken Selvig, cross-examining other witnesses.

At the February 14, 1996, resumption of the evidentiary hearing that Mr. Selvig scheduled on an ex parte basis knowing full well that undersigned counsel was not available, Mr. Selvig retook the witness stand. Since neither undersigned counsel was present nor Mr Scott, Mary Anderson Mills, Assistant CCR, was not prepared to go forward. Thereupon, Ms. Terenzio, Assistant Attorney General, conducted questioning of Mr. Selvig on behalf of the State. At the conclusion of his testimony, there was no other evidence to be presented by the State. Mr. Selvig then gave a closing argument asserting his own credibility, and argued that 3.850 relief should be denied on the basis of his own testimony. Clearly, Mr. Selvig was both an advocate and a witness in violation of the Rules of Professional Conduct. Mr. Selvig's personal interest in the proceedings deprived Mr. Scott due process and a fair hearing.

B. MR. SELVIG'S EX PARTE SCHEDULING OF HEARING

This Court has denounced ex parte communications in the course of 3.850 proceedings. Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992):

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect of the appearance of the impartiality of the tribunal The impartiality of the trial judge must be beyond question.

Justice Harding wrote a concurring opinion in which he expressed his view that ex parte communication was forbidden in scheduling matters as well: "care should be given that all parties have equal opportunity to participate in the setting of [a] hearing. " Rose, 601 So. 2d at 1184.

At the close of the January 23, 1996, hearing, Judge Mounts inquired regarding setting a date for the continuation of the hearing. Undersigned counsel informed Judge Mounts and the State that he was taking a week's vacation starting the next day, January 24th, and that he had a previously scheduled hearing set on or around February 15, 1996. In response to undersigned counsel's statement, Judge Mounts indicated:

> THE COURT; All right, 1'11 leave that up to you. I don't -- I don't want to leave cases like this undisposed of. I don't want to be an advocate for moving it, you know, but I would like -- I think it's helpful to have your objections to the calling of these witnesses in advance so we don't spin around and sputter and so forth on the date of the hearing.
> So get two full days and I'll set that as soon as we can.

Transcript of January 23, 1996 hearing at 217.

With full knowledge of Mr. McClain's obligation to attend another hearing on February 15, 1996, Ken Selvig through ex parte contact with Judge Mounts' judicial assistant immediately reset Mr. Scott's evidentiary hearing for February 14 and 15, 1996. On January 24, 1996, without contacting undersigned counsel or anyone at CCR, Mr. Selvig issued a notice of hearing. Mr. Scott's counsel was never contacted by the state prior to the setting date. Mr. Selvig has justified the ex parte setting saying: "there was never any indication in the record that counsel for Mr. Scott should be asked what was convenient for him. " Transcript of February 12, 1996, hearing at 291 .

Upon receiving notice of the February 14 and 15, 1996 setting, counsel for Mr. Scott filed a Motion For Continuance Or in the Alternative to Allow CCR to Withdraw (PC-R. 156-1260). In that motion, and in a hearing which was held regarding this motion on February 12, 1996, counsel for Mr. Scott explained in great detail the reasons for his

inability to attend the hearing. Mr. McClain informed the court that he not only had a previously scheduled hearing for February 15, 1996,[19] which would prevent him from attending the currently scheduled evidentiary hearing set in Mr. Scott's case, but that a warrant had been signed in Rickey Robert's case, the very case with a hearing set for February 16th in Salisbury , Maryland. In fact due to the warrant, the nature of the February 16th proceedings was altered. The proceedings would have to be converted into an evidentiary hearing. The February 16th hearing had been scheduled as a status in advance of a March evidentiary hearing. Given the execution date, the evidentiary hearing needed to be expedited. Thus it was necessary for Mr. McClain to travel to Maryland on February 14th in order to interview witnesses and be prepared to present evidence at a full blown evidentiary hearing on February 16th if the Maryland courts granted Mr. McClain's request to do just that. Accordingly, undersigned counsel requested that this Court reschedule Mr. Scott's evidentiary hearing to a date subsequent to the Roberts' warrant period,

Ken Selvig, who had been in the middle of his testimony on direct examination when Mr. Scott's hearing concluded on January 23, 1996, took the amazing position that "there was never any indication in the record that counsel for Mr. Scott should be asked what was convenient for him, " regarding the setting for the continuation of the hearing. (Transcript of February 12, 1996 hearing, at 291). Apparently, this Court's opinion in Rose was of no

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[19]In fact the hearing was scheduled for 9:00 a.m. in Salisbury, Maryland. In order to be present in time for the hearing, undersigned counsel's departure had been scheduled for February 15, 1996. Undersigned counsel had mistakenly referred to this hearing during the January 23rd proceedings as being in Raleigh Porter's case, when in fact it was Rickey Roberts' case. Mr. Porter's hearing was scheduled for February 22, 1996.

moment to Mr. Selvig. Obviously, Mr. Selvig's role as a witness clouded his judgment in his role as an advocate.

Mr. Selvig's actions in setting the hearing on a date he knew Mr. McClain to be unavailable, on refusing to reset the hearing on a date Mr. McClain could attend, and on insisting that Mr. McClain's unprepared and unqualified co-counsel go forward clearly demonstrates Mr. Selvig's agenda, His position against his own disqualification was that the State would lose the best attorney for the job, but forcing undersigned counsel off the case through the ex parte scheduling the hearing for the one day that undersigned counsel indicated he was unavailable was perfectly acceptable to Mr. Selvig, Guided by his personal and significant interest in the outcome of the litigation, Mr. Selvig's intent was to prevent Mr. Scott from receiving representation by counsel who had the necessary skill and knowledge of his case. The fact that Mr. Selvig had been on the stand and was being questioned by Mr. McClain at the close of the proceedings on January 23, 1996, makes his actions particularly inappropriate.

Mr. Scott's counsel was deprived of the opportunity to cross-examine Mr. Selvig or to present evidence to impeach his testimony from the January 23, 1997, hearing. Mr. Selvig testified to facts that were not true and then manipulated the process to deny Mr. Scott the opportunity to challenge those facts. Had undersigned counsel been able to prepare for and attend the resumption of the hearing, he would have presented evidence that the state had, contrary to Ken Selvig's testimony, relied upon Dexter Coffin's testimony at the Herman trial for over ten years, even in the face of Mr. Coffin's repudiation of his testimony at the Herman trial.

Counsel would have also called the proper records custodians to establish that over one hundred items of physical evidence have not been made available to any of Mr. Scott's postconviction counsel. These items were listed in the 3.850 motion and in the brief filed in the Florida Supreme Court. The law enforcement agencies claim that this evidence was turned over to the State Attorney's Office, and the State Attorney's Office denied having these items, and refused to look for them. Counsel would have called George Barrs, Mr. Scott's trial attorney, to testify in accord with his affidavit and to testify regarding Mr. Selvig's ongoing efforts to get Mr. Barrs to alter his testimony. Counsel would have also called Jon Moyle to present evidence of Mr. Selvig's conversations with him revealing his bias and personal interest in the outcome of the hearing.

Mr. Selvig also worked diligently to ensure that the court would never hear the testimony of Dexter Coffin and Robert Dixon. By scheduling the hearing when he did, he insured that undersigned counsel would not be able to obtain the presence of these out-of-state witnesses. Mr. Selvig consistently opposed all efforts on Mr. Scott's counsel's part to take the depositions of Mr. Coffin and Mr. Dixon, both of whom were out of state and unavailable. Again, Mr. Selvig's role as a witness caused him to try to make sure that other witnesses contradicting his testimony were not heard.

Mr. Selvig's continued representation of the State in Mr. Scott's case resulted in a blatant denial of Mr. Scott's rights to due process and equal protection. Mr. Selvig has a strong personal interest in protecting his professional reputation and ensuring the Mr. Scott's conviction and sentence of death are maintained. Mr. Selvig's role as prosecutor in Mr. Scott's case has placed him in a position to deny Mr. Scott his rights to due process and a

full and fair hearing. The record reveals that Mr. Selvig took full advantage of this opportunity. The harm which resulted to Mr. Scott's case was significant and would not have occurred were Mr. Selvig to have been properly disqualified,

C. MR. SELVIG'S JUROR INTERVIEWS

Rule 4-3 .5, Rules of Professional Conduct provides in pertinent part:

> (d) Communication with Jurors. A lawyer shall not:
>
> (4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview.

On October 10, 1995, Ken Selvig filed a Notice of Intent to Interview Jurors. The Notice went to the wrong judge. It was served by mail on undersigned counsel who did not receive it until October 13, 1995, And in any event, Mr. Selvig had already conducted the juror interviews. Subsequently, Mr. Selvig filed an affidavit from a juror dated October 10, 1995 (PC-R2. 1336). Mr. Selvig's conduct was in violation of Rule 4-3.5(d).

Undersigned counsel did file an objection to the notice and set a hearing on his objection. At that hearing on December 27, 1995, Judge Mounts ordered the parties to not interview jurors without express permission. In violation of that order, Mr. Selvig obtained a second juror affidavit on January 23, 1996 (PC-R2. at 1335).

Mr. Selvig's only justification for his action was this Court's reliance, in its opinion remanding, upon an affidavit obtained in the course of clemency proceedings on behalf of clemency counsel, Jon Moyle, That affidavit had been provided to the Governor without objection during clemency proceedings. Since it was accepted without objection during the clemency process, undersigned counsel presented it with the 3.850 filed in November of 1994. Again there was no objection to it in 1994 in the 3.850 proceedings before Judge Lupo. Nor was there any objection to it before this Court during the appeal. Certainly, procedural bars apply to the State as well as to capital defendants. Cannadv v. State, 620 So. 2d 165 (Fla. 1993). Any complaint that the State might have to this Court's consideration of the affidavit obtained for clemency purposes is procedurally barred. Moreover, it hardly justifies Mr. Selvig's action in disregarding the rule and his subsequent decision to disregard a specific court ruling.

Mr. Selvig's behavior readily demonstrates why he should have been disqualified from the proceedings below. His agenda as an interested witness overrode his professionalism as an advocate.

D. MR. SELVIG'S ATTACK ON THIS COURT

Mr. Selvig's lack of objectivity can also be seen in his closing argument before Judge Mounts. Again this closing argument occurred after he had testified as the only witness due to his scheduling the resumption of the hearing for a date undersigned was not available. Mr. Selvig's argument was simply that this Court, in remanding for an evidentiary hearing, had not reviewed the record, According to Mr. Selvig, had this Court simply reviewed the record it would have discovered undersigned counsel's "supposed" blatant misrepresentations:

> Had an examination been made of the record of the case, simply the cold record, those allegations would have not made and the fact that they were made is a blatant misrepresentation of the truth to the Supreme Court and this Court.

Transcript of February 14, 1996, hearing at 49.

This argument from the man who scheduled the hearing to occur without undersigned counsel and without the presence of Mr. Scott, who had flaunted the witness-advocate rule, who had flaunted Rule 4-3.5(d), who openly violated the order precluding contact with jurors, and who engaged in ex parte communication. Mr. Selvig's actions were designed to deprive Mr. Scott of a fair hearing. Unfortunately, he succeeded in that endeavor.

E. CONCLUSION

Judge Mounts erred in denying Mr. Scott's motion to disqualify Mr. Selvig. Mr. Scott was prejudiced by Mr. Selvig's conduct as both a witness and an advocate.

This case must be remanded to the trial court for an evidentiary hearing, with instructions that Mr. Selvig be disqualified from any further involvement or prosecution of Mr. Scott's case.

ARGUMENT II

JUDGE MOUNTS ERRONEOUSLY FAILED TO DISQUALIFY HIMSELF.

Mr. Scott was entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); including the fair determination of the issues by a neutral, detached judge. The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially."

Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id. This principal applies in Rule 3.850 proceedings wherein a capital defendant is challenging his conviction and sentence of death. Rogers v. State, 630 So. 2d 513 (Fla. 1993); Suarez v. Dugger, 527 So, 2d 191 (Fla. 1988).

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned, " including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(l)(a) & (b), Rule 2.140(d)(1) & (2).

Florida courts have repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. " Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988) (emphasis added). See Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); Diaeronimo v. Reasbeck, 528 So. 2d 556 (Fla. 4th DCA 1988); Ryon v. Reasbeck, 525 So. 2d 1025 (Fla, 4th DCA 1988); Fruhe v. Reasbeck, 525 So. 2d 471 (Fla. 4th DCA 1988); Lake v. Edwards, 501 So. 2d 759 (Fla. 5th DCA 1987); Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th DCA 1986); ATS Melbourne, Inc. v. Jackson, 473 So, 2d 280 (Fla. 5th DCA 1985); Gieseke v. Moriarty, 471 So. 2d 80 (Fla. 4th DCA 1985);

Management Corn. v. Grossman, 396 So. 2d 1169 (Fla. 3rd DCA 1981). See also Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

To establish a basis for relief a movant:

> need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a auestion of how the judge feels: it is a auestion of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The auestion of disqualification focuses on those matters from which a litigant may reasonably auestion a iudge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston, 441 So. 2d at 1086 (emphasis added); Rogers v. State, 630 So. 2d at 515 (quoting Livingston). The Fourth District Court of Appeals recently emphasized that, in a capital case like Mr. Scott's, judges "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d at 293.

The United States Supreme Court has also recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it

> preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951)(Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests. " Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, " but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Haves, 418 U.S. 488, 501 (1974).

The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner

> where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 18 1 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
>
> * * * *
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

Moreover, this Court has held that

> "all motions for disqualification of a trial judge must be in writing and otherwise in conformity with this Court's rules of procedure. The writing requirement cannot be waived and a presiding judge must afford a petitioning party a reasonable opportunity to file its motion. Where a party discovers mid-trial or mid-hearing that a motion for disqualification is required, he or she may request a brief recess - which must be granted - in order to prepare the appropriate documents. "

Rogers v. State, 630 So. 2d at 516.

In Mr. Scott's case, there was far more than the "appearance of impropriety" on the part of the tribunal. The record of the proceedings in this case reveal that Judge Mounts' prejudice toward Mr. Scott's key witnesses, his *ex parte* communication with the State, his participation in extra-judicial investigations, and his consideration of matters outside the record rendered his impartiality non-existent. Moreover, new matters arose during the

morning of January 23, 1996. Counsel requested an opportunity to reduce the new facts to writing pursuant to Rogers, but Judge Mounts denied the request. This itself required disqualification.

A. BIAS AND PREJUDGMENT OF ISSUES AND WITNESSES

At a hearing which took place on January 18, 1996, Judge Mounts admitted that he had personal knowledge and familiarity with Dexter Coffin, a witness whom Mr. Scott intended to call pursuant to the Florida Supreme Court's explicit directive:

> THE COURT: Now, let me share with you, there is the important role of disclosure in cases, I think civil and criminal, and I don't know that this really requires disclosure but it may be of some interest to you.
>
> One of the persons you name in one of those motions is -
>
> MR. ANDERSON: Sir, I believe one of the persons is Dexter Coffin.
>
> THE COURT: Right. Mr. Coffin was a defendant in my division many, many years ago, I think. He was also a person of some, I guess notoriety may be too strong a word, but he was involved in a number of criminal matters in this jurisdiction,
>
> I recall finally his case before me and was defended by one of the most able attorneys that I have ever encountered and who I became close friends with and who is now deceased, so I have had his case and he was involved in other cases in this community,
>
> So there are people who know him and you need to acquaint yourself with that.

(PC-TR. 1226-1227). These volunteered statements placed Mr. Scott on notice to investigate Judge Mounts' "disclosure." Undersigned counsel undertook such an investigation

immediately. However, the disclosure did not occur until five days before the scheduled evidentiary hearing. Based upon undersigned counsel's investigation, a motion to disqualify was filed.

Mr. Scott filed a Motion To Disqualify Judge Mounts on January 19, 1996, pursuant to the mandates of Canon 3E, Fla. Code Jud. Conduct, Rule 2.160, Fla. R. Jud. Admin., and principles of Due Process and Equal Protection. Specifically, Canon 3(E)(1)(a), indicates that a "judge shall disqualify himself. . . where. . . the judge has. . . personal knowledge of disputed evidentiary facts. " (PC-R2. 1174-1197). The January 19th motion was based upon Judge Mounts' disclosure.

On January 22, 1996, Mr. Scott amended his motion to disqualify Judge Mounts after discovering, through additional investigation of Dexter Coffin's criminal court files, that Judge Mounts had presided over Dexter Coffin's criminal proceedings while he was incarcerated at the Palm Beach County Jail in 1979. This coincided with the time period that Paul Scott and Richard Kondian were awaiting trial for the murder of James Alessi and with the time Richard Kondian made statements to Dexter Coffin which were the subject of Mr. Scott's evidentiary hearing (PC-R2. 1199, 1204). Mr. Coffin's court files also revealed that during this time period, Judge Mounts had been in receipt of letters from a Captain Donnelly, who had used Dexter Coffin as an informant to obtain information against Richard Kondian by placing them together in the so-called "Captain's cell. " (PC-R2. 1200, 1204). Judge Mounts had also received correspondence from Dexter Coffin. Therefore, the very real possibility exists that Judge Mounts may have had direct knowledge of the exculpatory statements made by Mr. Kondian.

No further information could be gleaned from Mr. Coffin's court files, however, as only the docket sheets remained after the substance of the file had been destroyed (PC-R2. 1200, 1203-1209). Therefore, as Captain Donnelly was deceased, Judge Mounts was the only person who could have provided information regarding his personal involvement with Dexter Coffin. Counsel for Mr. Scott reiterated these facts to Judge Mounts at the beginning of the January 23, 1997, evidentiary hearing (PC-TR. 72-78; 82-89; 96106).

Additionally, on the morning of January 23rd, Mr. Scott's counsel informed Judge Mounts that he had talked to Attorney David Roth immediately prior to the hearing since Mr. Roth had stopped by the courtroom. Mr. Roth had information relevant to Judge Mounts' involvement with Dexter Coffin.

Mr. Roth had been Dexter Coffin's attorney in 1978 and 1979. Mr. Roth indicated that he had specific dealings with Judge Mounts regarding Dexter Coffin. Mr. Roth indicated that undersigned counsel needed to check out the Roger Beach case. Pursuant to this Court's ruling in Rogers v. State, 630 So. 2d 513 (1993), Mr. Scott's counsel requested that a recess be granted in order to conduct further questions of Mr. Roth or to call Mr. Roth to the stand in order to elicit information relevant to Mr. Scott's Motion to Disqualify (PC-TR. 77). However, Judge Mounts refused to follow the procedure set forth in Rogers, refused to disqualify himself (PC-TR. 106).

Follow-up investigation occurred subsequent to the January 23, 1996, hearing. It revealed that Judge Mounts had had direct and significant contact with Captain Donnelly regarding Donnelly's use of informants to obtain convictions for the Palm Beach County State Attorney's Office. One of these informants was Dexter Coffin. Further inquiry

revealed that Dexter Coffin was directly involved in providing information to Captain Donnelly regarding Roger Beach, a man who had threatened to kill Judge Mounts, and that in May of 1979 correspondence occurred between Captain Donnelly and Judge Mounts regarding Dexter Coffin. Thus, Dexter Coffin gave evidence to the State that Roger Beach had threatened to kill Judge Mounts, The record shows direct correspondence between Dexter Coffin and Judge Mounts, although the correspondence has itself been destroyed and Captain Donnelly is deceased. Dexter Coffin's statements regarding Roger Beach were subsequently found insufficient. Short of talking to Judge Mounts, counsel had no means of learning the content of the communications. It should also be noted that May of 1979 was after Captain Donnelly had been advised by Mr. Coffin of Mr. Kondian's alleged confession.

Further investigation revealed that Judge Mounts had taken a personal interest in the sentencing consideration Dexter Coffin had received after testifying in the Mark Herman case, another case in which he had acted as an informant. See Defendant's Second Amended Motion To Disaualifv Judge, January 26, 1996. This Court made statements to the media regarding the public pressure he felt to impose a harsh sentence on Dexter Coffin when he presided over his case. See Defendant's Sixth Motion to Disqualify Judge, April 18, 1996.

Judge Mounts was clearly privy to non-record evidence and information. Judge Mounts felt compelled to make this disclosure. Yet, despite his personal relationship with Dexter Coffin and his recognition that he knew information that counsel "need[ed] to acquaint yourself with, " Judge Mounts refused to disqualify himself. He even refused to comply with the clear language of Rogers and grant counsel an opportunity to submit a

written motion to disqualify. Judge Mounts erred. The motion to disqualify should have been granted.

B. EX-PARTE COMMUNICATION WITH THE STATE

Judge Mounts has also engaged in ex-parte contact with the State. Despite judicial statements directing the State to contact Mr. Scott's counsel regarding possible hearing dates for the continuation of Mr. Scott's evidentiary hearing at the close of the January 23, 1996, hearing, Judge Mounts allowed the State to set the remainder of the evidentiary hearing in Mr. Scott's case for a day on which undersigned counsel had specifically informed both the State and Judge Mounts that he was not available (PC-TR. 281). Judge Mounts refused to continue the remainder of Mr. Scott's evidentiary hearing, despite numerous assertions by undersigned counsel that he was under warrant and would not be able to attend the hearing (PC-TR, 285-323). Despite these compelling factors mandating disqualification, Judge Mounts refused to disqualify himself.

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. " Fla. Bar Code Jud. Conduct, Canon 3 A(4) (emphasis supplied). The trier of fact cannot have ex parte communications with a party. For that reason alone, recusal is required. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); McKenzie v. Rislev, 915 F.2d 1396 (9th Cir. 1990).

Judge Mounts engaged in additional ex parte communication with the State subsequent to the February 14, 1997, hearing. On May 13, 1996, Mr. Scott received a copy of a proposed order submitted by the State to Judge Mounts on April 29, 1996. Judge Mounts

had signed the State's proposed order on May 1, 1996, a day before undersigned counsel became aware of the proposed order's existence (PC-R:!. 1932-1933). The subject of this proposed order, which vacated Judge Mounts' April 23, 1996 order denying Mr. Scott's postconviction claims, denied Mr. Scott's pending Sixth Motion to Disqualify Judge Mounts and Motion to Permit Discovery, and then reinstated the denial of Mr. Scott's postconviction claims, was not the product of any "on the record" directive from Judge Mounts (PC-R2. 1932-1933). Mr. Scott was not even aware of the Order's existence until after it had been signed by Judge Mounts, and therefore was not provided with the opportunity to respond. The inescapable conclusion is that the Order was the product of ex parte communication between Ken Selvig and Judge Mounts.

The current situation is identical to the issue recently addressed by this Court in Rose v. State, 601 So. 2d 1181 (Fla. 1992). As observed in Rose, it is improper for the State to prepare an order for the court's signature without the defense being given an opportunity to object. As this Court stated: "Under these facts we must assume that the trial court, in an ex parte communication, had requested the State to prepare the proposed order." Rose at 320.

Because of these improper ex parte communications with the State, disqualification of Judge Mounts was mandated. This case should be remanded to the Circuit Court for new postconviction proceedings before a new trial judge.

C. EXTRA-JUDICIAL INVESTIGATIONS AND CONSIDERATION OF MATTERS OUTSIDE THE RECORD

Instead of disqualifying himself, Judge Mounts improperly engaged in extra-judicial investigations of the issues. These investigations included discussions with his Judicial

Assistant, Robert Hesse, regarding his involvement in improper actions complained of in Mr. Scott's motions to disqualify. On April 4, 1996, Robert Hesse wrote a letter to Judge Mounts which contained the following statement:

> You have invited me to review and respond, at my option, to the several references to statements attributed to me in the course of this case.

(PC-R2. 1845). This letter proceeds to address several of the issues raised in Mr. Scott's motions. This letter is the only indication Mr. Scott has of the obvious extra-judicial investigation Judge Mounts was conducting into Mr. Scott's case. All investigation of this matter occurred off the record and without Mr. Scott's knowledge or opportunity to respond. Mr. Scott's requests that he be permitted to conduct discovery of the nature of this investigation were denied by Judge Mounts (PC-R2. 1932-1933). Also denied was Mr. Scott's Motion to Disqualify Judge Mounts based on these occurrences (PC-R2. 1932-1933).[20] Mr. Scott can therefore only guess as to the nature and extent of Judge Mount's investigation of this matter.

Additionally, undersigned counsel received an order dated April 30, 1996, from this Court which indicated that Judge Mounts had been conducting an extra-judicial investigation of Janet S. O'Keefe, a juror in Mr. Scott's case, through her husband, a bailiff in this Court's division. (PC-R2. 1931). The order stated:

> On Friday, April 19, 1996, Mr. Timothy Sullivan, the Bailiff of this Division ("S"), brought to my attention the fact that his wife was a juror in the trial of this defendant in this case. She was

[20]These motions were denied as the result of ex parte communication with the State, when Judge Mounts signed a proposed order submitted by the State before Mr. Scott had been served with the order.

> apparently visited without notice by a representative of CCR, Mr. Michael R. Chavis sometime in February-March, 1994. She declined to be interviewed.

(PC-R2. 1931). The order subsequently directed that there be no further communication with Ms. Sullivan without leave of court (PC-R2. 1931).

Once again, Judge Mounts had obviously been engaging in extra-judicial investigation of Mr. Scott's case, Mr. Scott was never given the opportunity to investigate this matter and it was not the subject of any hearing. Mr. Scott's Seventh Motion to Disqualify, based on this occurrence and corresponding motion to permit discovery were never addressed or even ruled on by Judge Mounts (PC-1958-1971; 1972-1974).

Mr. Scott can only speculate about the motivation for this order, entered more than two years after the alleged contact took place. However, its existence raises serious questions on Mr. Scott's part regarding the prosecuting attorney's involvement in this matter, considering Mr. Selvig's improper conduct regarding juror interviews and inappropriate attempts to make the jury affidavits a matter of record after the hearing had been continued. Mr. Selvig filed a notice of intent to interview jurors in October of 1995 to which undersigned counsel objected. At a hearing in December of 1995, the matter was addressed on the record and this Court declined to enter an order, although the Court stated that no further communication with jurors should take place off the record (PC-TR. 31-32). Contrary to this Court's December 27, 1995, directives, however, the State continued to interview jurors (PC-R2. 1335). Despite the fact that the jury vote had not been an issue remanded for consideration and had not been raised at the evidentiary hearing, the State improperly made jurors the subject of its Memorandum in Opposition to Mr. Scott's Motion

for Postconviction Relief. (PC-R2. 1330-1331, 1335-1336). Thereafter, Judge Mounts incorporated the State's Memorandum, containing these affidavits, in his orders denying Mr. Scott's postconviction claims. (PC-R2. 1849-1930, 1932-1933). The May 1, 1996, order was signed as the result of ex parte communication by the State (PC-R2. 1932-1933). Ironically, the April 30, 1996, order regarding Janet O'Keefe was signed only one day prior to this order (PC-R2. 193 1).

It is clear that, at the very least, Judge Mounts was conducting extra-judicial investigation into matters which concern the issues in Mr. Scott's case. This investigation has occurred off the record, outside the scope of any hearing, and without prior notice to Mr. Scott or his counsel, Such conduct was found to be subject to discipline by the Florida Judicial Qualifications Commission. Inquiry Re Perry, 586 So. 2d 1054 (Fla. 1991).

Additionally, by incorporating the juror affidavits filed by the State after the evidentiary hearing into his orders denying Mr. Scott's postconviction claims, Judge Mounts improperly considered matters outside the record and showed his clear and unswerving deference to the State.[21] By signing the May 1, 1996, proposed order incorporating the State's Memorandum in Opposition to Mr. Scott's Postconviction Motion, Judge Mounts condoned procedures which not only directly contradict his own prior rulings and statements regarding this matter, but which also sanction the blatantly unethical and deceitful practices employed by the State regarding the interviewing of jurors in this case.

[21]However, this is not a concession that an evidentiary hearing conducted in the absence of Mr. Scott's lead counsel and in the absence of Mr. Scott constituted a proper record for Judge Mounts to rely upon.

Conspicuously absent from Judge Mounts' order forbidding contact with Juror O'Keefe is any mention of the State's conduct in interviewing Jurors Alho and Federico, despite Judge Mounts' undisputed knowledge, at least since February 14, 1996, that they had been interviewed by the State. Judge Mounts' failure to address the fact that Mr. Scott's undersigned counsel objected to the State's conduct and to address the State's conduct reflects bias.

D. CONCLUSION

These incidents are certainly "sufficient to warrant fear on [Mr. Scott]'s part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 190, 191, 192 (Fla. 1988); Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Rogers v. State, 630 So. 2d at 516. A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U. S . 133 (1955). Absent a fair and impartial tribunal, there is no full and fair hearing. Even the appearance of partiality or prejudgment is sufficient to warrant disqualification. This case should be remanded to the circuit court for new post-conviction proceedings before a new trial judge.

ARGUMENT III

MR. SCOTT WAS DENIED DUE PROCESS, AND A FULL AND FAIR HEARING ON HIS MOTION TO VACATE THE CIRCUIT COURT AND THE STATE VIOLATED MR. SCOTT'S RIGHT TO DUE PROCESS AND A FULL AND FAIR HEARING BY DEPRIVING MR. SCOTT OF COMPETENT AND EFFECTIVE COUNSEL WHEN THEY SET MR. SCOTT'S EVIDENTIARY HEARING AT A TIME WHEN THEY KNEW MR. SCOTT'S COUNSEL COULD NOT ATTEND AND HIS WITNESSES COULD NOT BE PRESENT.

On July 20, 1995, this Court reversed and remanded Mr. Scott's case for an evidentiary hearing on Claim I and Claim II, as well as on Mr. Scott's Chapter 119 claim, In words it undoubtedly felt could not be misunderstood, this Court specifically directed the Circuit Court to hear evidence of the following items in consideration of Mr. Scott's claims that the state violated the principles of Brady v. Marvland, 373 U.S. 83 (1963): (1) a statement by Dexter Coffin in which Coffin contends he told police officials that Richard Kondian, Scott's co-defendant, had admitted he killed the victim; (2) a statement by Robert Dixon, in which Dixon contends he told police officials the Kondian was angry with Scott for running out on him at the murder scene; (3) a photograph of a bloody ring which suggests that Kondian struck the fatal blow with a champagne bottle; (4) Public Records claims. Scott v. State, 657 So. 2d 1129 (Fla. 1995).

Certainly, this Court remanded Mr. Scott's case intending that he receive a full and fair evidentiary hearing on the above-stated matters, and that during this hearing Mr. Scott receive the assistance of competent and effective counsel. Nevertheless, to this day no such hearing has occurred . The record of the proceedings in Mr. Scott's case is fraught with error, caused in part by the prosecuting attorney's persistent efforts to prevent Mr. Scott's

evidence from being presented because of his personal interest in preventing a full airing of his actions before and during Mr. Scott's trial, and in part by Judge Mounts' failure to disqualify himself. These factors, combined with the exclusion of Mr. Scott's evidence and other improper actions and rulings, have worked to deny to Mr. Scott his right to the full and fair hearing of his claims.

Postconviction proceedings in Florida are governed by the principles of due process no less than trial or sentencing proceedings. See, e.g., Huff v. State, 622 So. 2d 982 (Fla. 1993); Teffeteller v. Duaaer, 676 So. 2d 369, 371 (Fla. 1996); Johnson v. Singletary, 647 So. 2d 106, 111 n.3 (Fla. 1994).

In Skull v. State, 569 So. 2d 1251 (Fla. 1990), this Court recognized the particular importance of affording due process in a death case:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Id. at 1252. In Skull, this Court had remanded the case to the circuit court for a new sentencing hearing. The trial court in Skull scheduled this hearing two days after the mandate had arrived, which fell during the Christmas holidays. Id. Trial counsel's motions for continuance for time to prepare for the hearing were denied by the trial court and the

sentencing went forward. This Court vacated Mr. Skull's sentence, finding that "haste has no place in a proceeding in which a person may be sentenced to death. " Id.

The predicament in which the trial attorney found herself in the Skull case is analogous to that in which Mr. Scott's counsel found himself during the proceedings in Mr. Scott's case, From the beginning, the State has worked diligently to prevent the full and fair litigation of the issues in Mr. Scott's case through the use of litigation tactics and maneuvers designed to prevent Mr. Scott's counsel from presenting his claims. These actions were condoned without question by the trial judge, who compounded these errors by his own actions and improper rulings. The record of the State and trial court's actions in this case speaks for itself.

On November 1, 1995, the trial court filed an order which stated the following:

> Please respond as requested and feel free to make any additional contribution which might help to advance the cause and narrow the issues. I ask the attorneys to submit a chronology of the essential events since the conviction and to recommend matters that need to be considered at the next hearing, the length of that hearing and the date.

On November 14, 1995, the State filed a pleading with the trial court in which it requested that the court set Mr. Scott's evidentiary hearing on or before December 15, 1995, and estimated that the hearing would take approximately three hours. Mr. Scott's counsel also responded to the trial court's request for information on November 14, 1995. In that response, undersigned counsel explained that he was handling a warrant case with an execution date of December 1, 1995 (PC-R2. 11 10- 1109). Mr. McClain also explained that he was the only attorney at CCR with the requisite knowledge and experience with Mr Scott's case to provide him with adequate representation at an evidentiary hearing.

On December 17, 1995, defense counsel learned through Robert Hesse, Judge Mounts' judicial assistant, that pursuant to the State's request, an evidentiary hearing would be scheduled for December 14, 1995. Mary Anderson Mills, an assistant CCR, actually spoke with Mr. Hesse because of Mr. McClain's unavailability. At that time, Mr. McClain was also lead counsel on a case under an active death warrant, and was unable to prepare adequately for Mr. Scott's hearing. See White v. Singletary, 663 So. 2d 1324 (Fla. 1995) (Martin McClain was lead counsel for Jerry White who was executed on December 4, 1995).

On November 17, 1995, undersigned counsel sent a letter to the circuit court outlining the reasons for his inability to prepare for a December 14, 1995, evidentiary hearing.[22] In that letter, Mr. McClain indicated that the State had underestimated the length of the hearing and ignored other issues that were to be resolved,

The afore-mentioned letter was ignored by the circuit court. Robert Hesse informed Mary Anderson, since Mr. McClain was in Orlando litigating Mr. White's case, that the December 14, 1995, hearing would only be continued if the State were to agree to such a continuance. Upon contacting Mr. Selvig regarding his position on the continuance, Mary Anderson was informed that the State would agree to the continuance only on the condition that the hearing be reset for sometime in January, Undersigned counsel had little choice, with Mr. White's execution pending, but to accept the State's conditions and agree to a January hearing date. Interestingly, upon contacting Bob Hesse regarding the State's position

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[22]Mr. Scott filed a motion to supplement the record with this letter, which did not appear in the original record filed with this Court. In its Supplemental Record, the Palm Beach County Circuit Court Clerk's Office notes that it did not receive the letter in question. Mr. Scott is therefore filing a copy of Mr. McClain's letter with this brief. See Appellant's Supplement. A motion to Supplement the Record with this letter has also been filed with this Court.

on the hearing date, counsel was informed that there was no need for counsel to file a motion for continuance of the hearing as the hearing had never been set. This was in clear contradiction to the information previously given to Ms. Anderson.

Mr. McClain was not able to turn his attention to the preparation of Mr. Scott's case until the completion of his work on behalf of Mr. White. In preparing for the hearing, Mr. McClain directed his investigator to locate Dexter Coffin and Robert Dixon, both specifically mentioned by this Court in its opinion remanding Mr. Scott's case for evidentiary hearing. It was not until the beginning of January of 1996 that counsel's investigator located Dexter Coffin and Robert Dixon. At that time, it was learned that both witnesses were outside the territorial jurisdiction of the Court, as Dexter Coffin was then incarcerated in the State of Virginia, and Robert Dixon was then on parole in the State of California, with the condition that he not leave the State (PC-R. 1999-2001)

Immediately after locating these witnesses, Mr. Scott's counsel attempted on January 11, 1996, to apprise the Court of this situation and to take steps to ensure that the testimony of these unavailable witnesses would be preserved and presented at the hearing pursuant to Rule 3.190(j) of the Florida Rules of Criminal Procedure (PC-R. 1153-1155). An immediate hearing on these motions was requested in order to obtain a ruling which would enable counsel to prepare for the introduction of the testimony of witnesses Coffin and Dixon. It is common practice in Florida capital post-conviction proceedings for depositions of out-of-state witnesses to be admitted in lieu of live testimony. In fact, as long as the request is made more than ten days before the trial date, the request must be granted. See Rule 3.190(j); Argument V, infra.

However, counsel was informed by Judge Mounts' judicial assistant that no hearing time was available prior January 23, 1996, to hear the motion (PC-R. 1162). Because of the untenable situation created by Judge Mounts' refusal to rule regarding the depositions prior to January 23, 1996, Mr. Scott's counsel requested that a continuance of the hearing be granted (PC-R. 1161-1163). Judge Mounts then found hearing time on January 18, 1996. Mr. Selvig opposed Mr. Scott's motions to take depositions to perpetuate testimony on the ground that he wanted Mr. Dixon and Mr. Coffin present in Florida so that he could then charge them with perjury (PC-TR. 54). Mr. Selvig, with no evidence to back up his claim, also insisted that the presence of Mr. Dixon and Mr. Coffin in Florida could be obtained (PC-TR. 54). Judge Mounts denied Mr. Scott's request to depose Mr. Dixon and Mr. Coffin.

On January 23, 1996, a partial evidentiary hearing was conducted before Judge Mounts. Because Judge Mounts had refused to rule on Mr. Scott's motion to take the depositions of Dexter Coffin and Robert Dixon until January 18, 1997, and had refused to grant Mr. Scott's motion to continue Mr. Scott's evidentiary hearing in order to attempt to secure out-of-state subpoenas, Mr. McClain was unable to prepare or present their testimony at the January 23, 1996, hearing.

At the end of the day, Judge Mounts recognized that more time would need to be calendared for the hearing, as it would not be concluded on January 23, 1996 (PC-TR. 275). At that time, Mr. McClain, Mr. Scott's counsel, indicated that he was aware that there were dates in the near future on which he would be unavailable to conduct the remainder of the hearing, as he had previously scheduled hearings on those dates, One of the conflict dates

specifically mentioned by Mr. McClain was February 15, 1996. Judge Mounts made the following responses to Mr. McClain's statements:

> THE COURT: Well, out of an abundance of caution, let's schedule two days and just get it committed in and reserved.

(PC-TR. 278).

> THE COURT: All right, I'll leave that up to you. I don't -- I don't want to leave cases like this undisposed of.. . .So get two full days and I'll set that as soon as we can.

(PC-TR. 281). It is obvious that Judge Mounts intended for Mr. McClain to have input into the date selected for the hearing.

On January 26, 1996, Mr. McClain received notice that the State had set the remainder of the evidentiary hearing on February 14 and 15, 1996. No one from the State or Judge Mounts' office had ever contacted Mr. McClain regarding these dates.

The Office of the Capital Collateral Representative (CCR) is required by law to provide effective legal representation to all death row inmates in post-conviction proceedings. See Snaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Undersigned counsel was the only attorney at CCR with the requisite knowledge and experience with Mr. Scott's case to provide him with adequate representation at an evidentiary hearing. He had been Mr. Scott's lead counsel since March of 1991. The proceedings of Mr. Scott's case stretch over the length of approximately seventeen (17) years. Consequently, the records and pleadings in Mr. Scott's case are voluminous. Additionally, the legal issues involved in Mr. Scott's case are far more complex than those involved in an original post-conviction proceeding. Undersigned counsel's second chair, Mary K. Anderson Mills, had attended her first evidentiary hearing on January 1, 1996, in

the case of Porter v. State. She had attended this hearing as a third chair, and did not participate in the hearing other than to observe and assist lead counsel in the case. Ms. Anderson Mills' inexperience, coupled with her unfamiliarity with the issues in Mr. Scott's case, made it impossible for her to render the effective assistance required by Spaziano and Spalding.

Because of this, Ms. Anderson-Mills' representation of Mr. Scott at the evidentiary hearing would have been in direct contravention of the Rules of Professional Conduct, promulgated by the Florida Bar and approved by this Court, and therefore subject to discipline. Rule 4-1.1 of the Rules of Professional Conduct clearly states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The comments to that rule clarify that in making the determination of requisite knowledge and skill, "relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." See comments Rule 4-1.1 of Rules of Professional Conduct.

Because of his responsibilities in the pending Roberts warrant case, Mr. McClain was not able to attend the Paul Scott evidentiary hearing on February 14 or 15. In an effort to diligently apprise the circuit court and the State of his inability to attend the February 14 and 15, 1996 hearing, undersigned counsel filed a Motion for Continuance or in the

Alternative to Allow CCR to Withdraw on January 31, 1996. In this motion he informed the court that he not only had a previously scheduled hearing which would prevent him from attending the currently scheduled evidentiary hearing set in Mr. Scott's case, but that a warrant had been signed in Rickey Robert's case, the very case with a hearing set for February 16th in Salisbury, Maryland. In fact, due to the warrant, the February 16th proceedings were going to be longer and of more significance requiring Mr. McClain to travel to Maryland on February 14th in order to interview witnesses and prepare to present evidence at a full-blown evidentiary hearing on February 16th if the Maryland courts granted Mr. McClain's request to do just that. Accordingly, undersigned counsel requested that Judge Mounts reschedule Mr. Scott's evidentiary hearing to a date subsequent to the Roberts' warrant period. Included with this motion was a request for hearing.

A copy of this motion was faxed to the circuit court on January 31, 1996. However, undersigned counsel heard nothing from the circuit court regarding the hearing he had requested until the second week in February. Meanwhile, Mr. McClain had scheduled to travel to California on February 9th to take the deposition of Robert Dixon on February 10th in order to proffer Mr. Dixon's unavailability and his testimony. On February 5, 1996, undersigned counsel was informed that the circuit court would take up the motion for continuance on February 9, 1996 at 4: 00 p.m. Accordingly, Mr. McClain arranged to have Ms. Anderson cover the deposition armed with a cellular phone and a list of all questions to be asked. However, undersigned counsel was later informed on February 6th by Judge Mounts' Judicial Assistant, Robert Hesse, that because of a personal matter the court would not hear the motion until February 12, 1996 at 11:00 p.m., two days prior to the February

14, 1996 hearing date, Robert Hesse specifically averred that the court had no prior time available to hear this motion for continuance.[23]

A telephonic hearing regarding undersigned counsel's request for continuance or permission to withdraw and a Third Amended Motion To Disqualify Judge Mounts was held on February 12, 1996. During the hearing, Mr. Selvig, who had not filed a response,[24] opposed the Motion For Continuance and Judge Mounts refused to continue the hearing. Relying on the transcript of the January 23, 1996, evidentiary hearing, Mr. Selvig argued that "there was never any indication in the record that counsel for Mr. Scott should be asked what was convenient for him. "[25] (PC-TR. 291). Conveniently, Mr. Selvig read only portions of the transcript into the record (PC-TR. 291). Although undersigned counsel had requested a copy of the January 23, 1996, transcript in writing subsequent to the hearing, he was not provided with a copy until after the hearing on February 14, 1996. The State, however, who conceded in the February 14, 1996, hearing that they had not even been

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[23]Mr. Scott filed a motion to supplement the record with this letter, which did not appear in the original record filed with this Court. In its Supplemental Record, the Palm Beach County Circuit Court Clerk's Office notes that it did not receive the letter in question. Mr. Scott is therefore filing a copy of Mr. McClain's letter with this brief. See Appellant's Supplement. A motion to Supplement the Record with this letter has also been filed with this Court.

[24]While the State never bothered to extend the courtesy of a phone call to Mr. McClain regarding the selection of a hearing date, it is obvious from the record of the Motion for Continuance hearing that they spent a great deal of time investigating Mr. McClain's conflicts in an effort to dispute them. This occurred despite the fact that they could have easily obtained Mr. McClain's conflicts from him by making a simple phone call. The State's surreptitious investigation of this matter has resulted in the relation of incorrect information to the Court.

[25]This comment by Mr. Selvig, who is both a witness and an advocate in these proceedings over Mr. Scott's objection, reflects a complete failure to understand due process and explains the failure to disclose exculpatory evidence.

required to make a written request for the transcript, was given a copy of the January 23, 1996, hearing transcript prior to the February 12, 1996, hearing (PC-TR. 290) . Because undersigned counsel was denied access to this transcript, he was unable to provide the full colloquy between Judge Mounts, Mr. Selvig and undersigned counsel regarding the setting of the new hearing date, giving Mr. Selvig the opportunity to present a misleading picture of that colloquy.

Undersigned counsel set forth in detail the reasons for his inability to attend the February 14 and 15 hearing. Undersigned counsel informed Judge Mounts, as he had informed Judge Mounts and Mr. Selvig on January 23, 1996, that he would not be available to conduct an evidentiary hearing on those dates due to his involvement with a hearing in Salisbury, Maryland, regarding Rickey Roberts (PC-TR. 293-296). Undersigned counsel further explained to Judge Mounts that the hearing set in Maryland was a pre-evidentiary hearing to the main evidentiary hearing set on March 22, 1996, although Mr. McClain was asking to convert the February 16th hearing into an evidentiary hearing and had to be prepared to present all of the necessary evidence. Because an execution warrant had been signed for Rickey Roberts by the Governor, at the Attorney General's urging, for February 23, 1996, undersigned counsel had been compelled to take measures to expedite the Maryland evidentiary hearing.

Undersigned counsel explained that as lead attorney on Mr. Roberts' case, his presence in Maryland during the time scheduled for the Scott evidentiary hearing had become essential as the case was very complex and involved the presentation of testimony by numerous witnesses. Id. at 15-16. Undersigned counsel advised the circuit court that the

Attorney General had argued to this Court that a warrant case must take top priority and that any other case was merely a "cat in a tree." Id. at 16-17. In accordance with this position, undersigned counsel informed the court that this Court had recently continued an oral argument set in Terre11 Johnson because of undersigned counsel's role as lead attorney in Rickey Roberts' case. After receiving the notice of setting, Mr. McClain made every effort to notify Judge Mounts that he would not be available to represent Mr. Scott at an evidentiary hearing set on February 14 and 15, and that no other CCR attorney had the requisite skill, knowledge and familiarity with the facts of Mr. Scott's case to provide effective representation to him on those dates.

Mr. Selvig, who was both a witness and an advocate, insisted that the hearing go forward, asserting that Ms. Anderson Mills should be required to conduct the hearing in Mr. McClain's place (PC-TR, 306). According to Mr. Selvig, the evidentiary hearing was properly set without consideration to Mr. McClain's schedule. Mr. Selvig was adamant that only his schedule and this Court's schedule were relevant considerations.

On February 14, 1996, Judge Mounts conducted the remainder of the evidentiary hearing in Mr. Scott's case despite the fact that neither Mr. McClain nor Paul Scott were present.[26] The situation caused by Mr. McClain's inability to attend the hearing was exacerbated by the trial court's failure to ensure Mr. Scott's presence (PC-TR. 326-338). Ms. Anderson Mills informed the court that neither Mr. Scott nor Mr. McClain were available for consultation and that Mr. Scott was not waiving his presence at the hearing.

[26]In setting the hearing, Mr. Selvig neglected to arrange for Mr, Scott's presence. He then argued that Mr. Scott's presence was not necessary. See Argument IV, infra.

However, Mr. Selvig assured Judge Mounts that Mr. Scott's presence was not required at the hearing, despite the fact that Mr. Selvig had no case law to support this position (PC-TR. 338). Judge Mounts asked Mr. Selvig if he was willing to conduct the hearing without Mr. Scott knowing that the appellate court would review this issue (PC-TR. 350-351). Based on the State's assertions that it was, Judge Mounts announced that he would conduct the hearing in Mr. Scott's absence (PC-TR. 351).

Ms. Anderson Mills also repeatedly informed the Court that she was not competent or prepared to represent Mr. Scott, and that she could not go forward (PC-TR. 338, 339, 341, 342, 344, 345, 347, 348, 354, 355, 365,367,368,370, 395). Nevertheless, the state insisted that Ms. Anderson Mills was qualified to represent Mr. Scott, asserting that "Miss Anderson's self-imposed that she's not qualified is from no action by the State telling her that she's not qualified to handle this case. " (PC-TR. 349).

Thereafter, the hearing went forward in the absence of Mr. Scott and in the absence Mr. McClain. Because he was not represented by prepared or effective counsel, Mr. Scott received the equivalent of no representation during this hearing.

The state and trial court's actions in setting the February 14, 1996, hearing on a date they knew Mr. McClain could not be present coupled with their insistence that the hearing go forward at all costs, resulted in a denial of Mr. Scott's rights to due process and effective assistance of counsel. Particularly distressing is the ease with which these errors could have been corrected by either the State or the trial court. All the State need have done was to make a single, simple phone call to opposing counsel to obtain a mutually agreeable hearing date for the continuation of the evidentiary hearing, allowing Mr. McClain to be present and

prepared and able to present his witnesses. In the alternative, the State should have agreed to continue the February 14, 1996, hearing date to a date when Mr. McClain could be present, However, the State and trial court failed to engage in these reasonable practices. As a result, Mr. Scott's case must be remanded for a new evidentiary hearing.

ARGUMENT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ENSURE MR. SCOTT'S PRESENCE DURING CRITICAL STAGES OF HIS POSTCONVICTION HEARING, AND AS A RESULT MR. SCOTT'S RIGHTS TO DUE; PROCESS WERE VIOLATED.

Mr. Scott's Constitutional rights to due process and a full and fair hearing were violated when the trial court ordered that the February 14, 1996, evidentiary hearing proceed in Mr. Scott's absence.

In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), the Eleventh Circuit declared the right of a criminal defendant to be present "extends to all hearings which are in essential part of the trial--i.e., to all proceedings at which the defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" 685 F.2d at 1256 (quoting Snyder v. Massachusetts, 54 S. Ct. 330, 332 (1934)). Although the Proffitt court was not specifically addressing the issue of a defendant's presence at an evidentiary hearing, the language used certainly applies to that situation, as the Court emphasized that it was the purpose of the hearing and not its timing which was the determinative issue in whether the defendant's presence is required, Id. at 1257. This Court has recently recognized the right of a defendant to be present at an evidentiary hearing regarding his postconviction claims. In Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996),

this Court ruled that while it is within the trial court's discretion to conduct post-conviction relief hearings without the defendant being present, the trial court's discretion must be exercised "with regard to the prisoner's right to due process." Id., at 371 (citing Clark v. State, 491 So. 2d 545, 546 (Fla. 1986)). For this Court did not delineate any specific standard or test for a trial court to follow in deciding whether a defendant's presence was required under due process, this Court found that the trial court erred in excluding Mr. Teffeteller from portions of an evidentiary hearing held on his 3,850 motion.

Like the Court's decisions in Teffeteller and Proffit, the decisions of Florida courts dealing with the right of a defendant to be present during an evidentiary hearing appear to focus on the purpose of the hearing, whether the hearing concerns facts within the defendant's personal knowledge, and whether a defendant's presence would assist in his own defense.

For this reason, courts have consistently determined that a defendant's presence is required at a hearing in which issues of ineffective assistance of counsel are presented. In Smith v. State, 489 So. 2d 197 (Fla. 1st DCA 1986), the District Court found that a defendant must be present at an evidentiary hearing in which his trial attorney testifies about communications between the attorney and the defendant. Likewise, in Harrell v. State, 458 So. 2d 901 (Fla. 2d DCA 1984), the District Court found that a defendant "must be afforded an opportunity to be present at [an evidentiary] hearing to testify and cross-examine his former counsel concerning his allegations that trial counsel was ineffective. " Id. at 902. See also Alfonso v. State, 319 So. 2d 49 (Fla. 2d DCA 1975); Ebv v. State, 306 So. 2d 602

(Fla. 2d DCA 1975); Ulvano v. State, 479 So. 2d 809 (Fla. 3d DCA 1985); Plute v. State, 528 So. 2d 1308 (Fla. 2d DCA 1988).

Contrasting these decisions are those determining that a defendant's presence is not required when the purpose of the hearing is to determine a wholly legal issue with facts outside the realm of the defendant's knowledge. For instance, in State v. Revnolds, 238 So. 2d 598 (Fla. 1970), this Court determined that a defendant's presence is not required if there is no prejudice to the defendant and the defendant is not personally involved in the factual dispute to be resolved. However, this Court recognized that only competent counsel may serve as a substitute for the defendant's presence. When a defendant is not represented by counsel, this Court has held that his presence is required at an evidentiary hearing regarding issues of ineffective assistance of counsel, Clark v. State, 491 So. 2d 545 (Fla. 1986).

In Mr. Scott's case, Mr. Scott wanted the testimony of George Barrs presented. He wanted the testimony of Dexter Coffin presented. He wanted the testimony of Robert Dixon presented. Mr. Scott has personal knowledge of whether George Barrs had ever advised him that Dexter Coffin or Robert Dixon had made statements exculpatory as to Mr. Scott. In responding to Mr. Selvig's testimony that exculpatory evidence was disclosed, Mr. Scott's presence was necessary because the issue was, if Mr. Selvig's testimony was true (a doubtful proposition to be sure) then Mr. Barrs was ineffective in not investigating and presenting the exculpatory evidence. Mr. Scott's presence was critical not only in presenting relevant evidence, but also in deciding how to proceed. Yet, Mr, Selvig, the State's witness-advocate, manipulated the process to exclude Mr. Scott and his counsel of five years, Mr. McClain.

It is clear that the situation in Mr. Scott's case is like that of the defendants in Teffeteller, Proffit, Harrell, Smith, Alphonso, Eby, Ulvano and Plute, and that his presence was therefore required at the evidentiary hearing. This Court remanded Mr. Scott's case to the Circuit Court for an evidentiary hearing regarding Mr. Scott's claim that either the State failed to disclose or the defense failed to discover the following: "(1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and (3) a medical examiner's photograph that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle." Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995).

The issues to be determined at this evidentiary hearing were directly related to facts which were within Mr. Scott's personal knowledge, as they pertained to exculpatory evidence which existed at the time of Mr. Scott's jury trial, but not presented to the jury, either because the state failed to disclose it or because defense counsel failed to discover it. Consequently, it was necessary to have Mr. Scott present in order for Mr. Scott to testify, assist in cross-examination and to assist in his own defense,

Judge Mounts had already determined that due process mandated Mr. Scott's presence at the evidentiary hearing. On January 10, 1996, undersigned counsel filed a motion to transport Mr. Scott to the evidentiary hearing, scheduled for January 23, 1997. The motion stated that Mr. Scott's presence was necessary in order to ensure his right to due process, a full and fair hearing, and effective assistance of counsel. (Supp PC. 13-14).

Accordingly, on January 12, 1996, Judge Mounts entered an order directing the Department of Corrections to transfer Mr. Scott to the Palm Beach County Jail, where he was to remain until the completion of the evidentiary hearing.[27] The order specifically stated that "[t]he presence of Paul William Scott is necessary at an evidentiary hearing presently being conducted by the Court in this proceeding. " (PC-R. 1156).

Mr. Scott was in fact transported to and was present during the portion of the evidentiary hearing which took place on January 23, 1996. However, after it became apparent that the hearing would take longer than one day, Judge Mounts ordered that the remainder of the hearing should be set at a future date. Sometime thereafter, Mr. Scott was transported back to Union Correctional Institution.

On January 24, 1996, Ken Selvig set the remainder of the evidentiary hearing in Mr. Scott's case for February 14, 1996. Mr. Selvig did this, despite specific knowledge that undersigned counsel had another previously scheduled hearing in Maryland on February 14, 1996, which would prevent him from attending Mr. Scott's hearing. See Argument III, supra. Despite repeated and diligent efforts on the part of undersigned counsel to reset the hearing, the trial court refused to continue it.

On February 14, 1996, Judge Mounts reconvened the evidentiary hearing in Mr. Scott's case. Undersigned counsel Martin J. McClain was unable to attend the hearing, due to his litigation of the Maryland case. However, because of Judge Mounts' refusal to

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[27]The order contained a typographical error, indicating that Mr. Scott was not to be transported back to the Union Correctional Institution until September 23, 1996, when in fact the order should have read "January 23, 1996. "

continue the hearing, Mr. McClain felt compelled to send Mary K. Anderson Mills to appear on behalf of Mr. Scott.

At the beginning of the hearing, it was discovered that Mr. Scott had not been transported to West Palm Beach from Union Correctional Institution. Ms. Anderson Mills objected to Mr. Scott not being present and asserted that he was not waiving his rights in this regard. Ms. Anderson Mills also made the court and opposing counsel aware that, due to the court's failure to transport Mr. Scott to the hearing, counsel had not been able to speak with him about the issues in his case, or to inform him that he was not being represented by competent counsel at the hearing. However, the trial court ordered that the hearing proceed in Mr. Scott's absence. Surely, Mr. Scott's presence could have been no less necessary during the continuation of his evidentiary hearing on February 14, 1996.

This exclusion of Mr. Scott from the February 14, 1996 evidentiary hearing was especially egregious in light of the fact that he was not represented by competent counsel. This Court recognized that only competent counsel may serve as a substitute for the defendant's presence, When a defendant is not represented by counsel, his presence is required at an evidentiary hearing regarding issues of ineffective assistance of counsel are being determined. Clark v. State, 491 So. 2d 545 (Fla. 1986).

Failure to ensure Mr. Scott's presence at his evidentiary hearing constituted a violation of Mr. Scott's rights to due process and right to a full and fair hearing. Mr. Scott's case must be remanded for an evidentiary hearing where he has the opportunity to be present and assist in his own defense.

ARGUMENT V

JUDGE MOUNTS ABUSED HIS DISCRETION WHEN HE DENIED MR. SCOTT'S REQUEST UNDER RULE 3.190(j) TO DEPOSE DEXTER COFFIN AND ROBERT DIXON.

On November 14, 1995, the State, through Ken Selvig, filed a pleading with the trial court in which he requested that the Court set Mr. Scott's evidentiary hearing on or before December 15, 1995 . On November 17, 1995, Mr. Scott's counsel was informed that the trial Court had indeed set the hearing on December 15, 1995. At that time, Mr. McClain, the lead counsel in Mr, Scott's case, was also lead counsel on a case under an active death warrant, and was unable to prepare adequately for Mr. Scott's hearing. See White v. Singletary, 663 So. 2d 1324 (Fla, 1995) (Martin McClain was lead counsel for Jerry White who was executed on December 4, 1995).

Despite Mr. Scott's counsel's attempts to inform Judge Mounts of these conflicts, he was informed through Judge Mounts' judicial assistant that the December 14, 1995, hearing would only be continued if the State were to agree to such a continuance. Upon contacting Mr. Selvig regarding his position on the continuance and informing him of the situation, Mr. Scott's counsel was informed that the State would agree on the condition that the hearing be reset for sometime in January. Undersigned counsel had little choice, with Mr. White's execution pending, but to accept the State's conditions and agree to a January hearing date.

Thereafter, Mr. Scott's counsel made every effort to prepare for the presentation of their case, Obviously, Dexter Coffin and Robert Dixon were material and necessary witnesses to the determination of Mr. Scott's Brady issues as both would have provided testimony regarding statements made to law enforcement officials in connection with Mr.

Scott's case which were exculpatory but never provided to Mr. Scott's counsel. However, the locations of Dexter Coffin and Robert Dixon were not immediately available to counsel or his investigator.

It was not until January of 1996 that counsel's investigator located Dexter Coffin and Robert Dixon. At that time, it was learned that both witnesses were outside the territorial jurisdiction of the Court, as Dexter Coffin was then incarcerated in the State of Virginia, and Robert Dixon was then on parole in the State of California, with the condition that he not leave the State. See Affidavit of Jeffrey Walsh (PC-R. 1999-2001).

Immediately after locating these witnesses, Mr. Scott's counsel attempted on January 11, 1996, to apprise the Court of this situation and to take steps to ensure that the testimony of these unavailable witnesses would be preserved and presented at the hearing pursuant to Rule 3.190(j) of the Florida Rules of Criminal Procedure (PC-R. 1153-1155).

A hearing was, in fact, held regarding the afore-mentioned motions on January 18, 1996. Ken Selvig, representing the State, opposed both motions on the ground that he wanted Mr. Dixon and Mr. Coffin present in Florida so that he could then charge them with perjury. Mr. Selvig also asserted that a "condition precedent" existed before the testimony of these two witnesses, whom this Court mentioned specifically in its opinion remanding Mr. Scott's case for an evidentiary hearing, would be relevant (PC-TR. 1234-35). That "condition, " according to Mr. Selvig, was evidence that the witnesses had given statements which were withheld (PC-TR. 1234-35). Mr. Selvig thereafter proceeded to explain his rationale for failing to disclose exculpatory evidence to Mr. Scott's trial counsel and to assure the Court that he had acted properly (PC-TR. 1236).

Pursuant to Rule 3.190(j) of the Florida Rules of Criminal Procedure, Mr. Scott moved to take the depositions of three unavailable witnesses. At the hearing on January 18, 1996, Judge Mounts denied this motion without explanation. However, Judge Mounts had no discretion to deny Mr. Scott's motion,

Rule 3.190(j) provides that in a criminal case, either party may apply for an order to take depositions to perpetuate testimony. The Rule provides that the application must indicate that a prospective witness resides beyond the jurisdiction of the court or may be unable to attend a trial or hearing, that the witness's testimony is material, and that the deposition is necessary to prevent a failure of justice. If these requirements are met, the court has no discretion to deny the motion: "The court **shall** order a commission to be issued to take the deposition of the witnesses to be used in the trial." (emphasis added)

Where the language of a statute is clear and unambiguous, courts may not resort to rules of statutory construction; rather, the statute must be given its plain and ordinary meaning. Steinbrecher v. Better Construction Co., 587 So. 2d 492 (Fla. 1st DCA 1991). Florida precedent firmly establishes that the plain meaning of "shall" indicates a mandatory intent. Manatee County v. Train, 583 F.2d 179 (5th Cir. 1978); Drury v. Harding, 461 So. 2d 104 (Fla. 1984); State v. Goodson, 403 So. 2d 1337 (Fla. 1981); S.R. v.State, 346 So. 2d 1018 (Fla. 1977); Neal v. Bryant, 149 So. 2d 529 (Fla. 1962).

In the absence of a convincing argument to the contrary, courts are required to interpret "shall" as mandatory rather than permissive. Manatee County, 583 F.2d at 182. Contrary intent can be found in the wording of a statute, its purposes, or its legislative history. Id.; State v. Goodson, 403 So. 2d at 1338. In Manatee County, the court noted that

the specific language of the statute in question (the Federal Water Pollution Control Act) supported its interpretation of "shall" as mandatory; Congress had used "may" and "shall" within the same statute, revealing its awareness of the difference and its intent to use "shall" to connote its normal meaning: "The fact that . . . Congress distinguished 'shall' from 'may' shows that . . . Congress used 'shall' in its everyday sense, as imposing a mandatory duty." Id. In Goodson, this Court similarly looked at the context in which the words "may" and "shall" are used to determine whether the legislature intended courts to use the normal meanings of those words. The law in question, that governing a court's classification of youthful offenders, provided both eligibility and disqualification requirements. The statutory language indicates that if a defendant meets the eligibility requirements, the court "may" classify the person as a youthful offender. In contrast, if a defendant meets the eligibility criteria and is not disqualified by the statutory requirements, the court "shall" classify the person as a youthful offender. This Court concluded that "in this context the word 'shall' is clearly meant to be mandatory." Id. at 1339 (citing Barnhill v. State, 393 So. 2d 557 (Fla. 4th DCA 1980); Killian v. State, 387 So. 2d 385 (Fla. 2d DCA 1980)).

In writing Rule 3.190(j), the drafters similarly used both the permissive "may" and the mandatory "shall" indicating their awareness of the difference and their intent that courts use the normal meaning of "shall." The Rule provides that if the statutory requirements are met, "[t] he court shall order . . . the deposition" but that "[i]f the application is made within ten days before the trial date, the court may deny the application." The legislature clearly gave the circuit courts discretion to deny motions under Rule 3.190(j) only when the

application is made within ten days of trial. In all other situations, when the statutory requirements are met, the court must grant the motion.

Florida courts have allowed a permissive interpretation of "shall" in only limited circumstances, none of which apply here. In Walker v. Bentley, 660 So. 2d 3 13 (Fla. 2d DCA 1995), the court interpreted a statute limiting the court's right to enforce domestic violence injunctions. The court found that interpreting "shall" as mandatory in that case would render the statute unconstitutional as a violation of the separation of powers, The court noted that the case required a balancing of two basic principles of statutory interpretation: the presumption that the legislature intended to enact a constitutional statute and the court's duty to give effect to clear legislative intent as expressed in statutory language. The court concluded that "when the legislature used the word 'shall' in prescribing the action of a court in a field of operation where the legislature has no authority to act, the word is to be interpreted as permissive or directory, rather than mandatory. " Id. at 320-21. The court interpreted "shall" to be permissive only to save the statute in question from being rendered unconstitutional. The narrow holding of Walker has no effect here where the legislature was clearly acting within its authority in passing Rule 3.190.

In Neal v. Brvant, 149 So. 2d 529 (Fla. 1962), this Court considered a rule requiring the Board of Education to conduct an investigation before revoking a teaching certificate and held that "shall" must be interpreted according to its ordinary meaning and the investigation provisions are therefore mandatory. This Court had earlier recognized a narrow exception to the mandatory meaning of "shall" which did not apply in Neal:

> When a particular provision of a statute relates to some immaterial matter, where compliance is a matter of convenience

> rather than substance, or where the directions of a statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.

Id. at 532 (quoting Reid v, Southern Development Co., 42 So. 206 (Fla. 1949)). Clearly, the Rule at issue here does not fall within this exception. The purpose of the Rule is to allow the presentation of material testimony in a criminal trial or hearing when that testimony would otherwise be unavailable due to the witness's residence outside the jurisdiction. The Rule protects the fundamental right of criminal defendants to present evidence in their defense and cannot be described as concerned with "the proper, orderly, and prompt conduct of business. "

In further support of Mr. Scott's argument are cases in which courts have interpreted "may" as mandatory based on the purpose of the statute in question. In Allied Fidelity Ins. Co. v. State, 415 So. 2d 109, 111 (Fla. 3d DCA 1982), the court held that "the permissive 'may' will be deemed to be obligatory '[w]here the statute directs the doing of a thing for the sake of justice." (quoting Mitchell v. Duncan, 7 Fla. 13 (1857)). In Comcoa, Inc. v. Coe, 587 So. 2d 474 (Fla. 3d DCA 1991), the petitioner sought a writ of mandamus in circuit court directing the county court judge to issue a writ a replevin without notice. The circuit court denied the petition on the ground that issuance of the writ was a discretionary act, but the district court of appeal held that the legislature's use of "may" can sometimes be mandatory if there is no basis on which the court could properly exercise its discretion. The court found that the statute fell within that category of cases in which mandatory construction was necessary to protect the petitioner's rights:

> an imperative obligation is sometimes regarded as imposed by a statutory provision notwithstanding that it is couched in permissive, directory, or enabling language. Thus where a statute says a thing that is for the public benefit "may" be done by a public official, the courts may construe it to mean that it must be done. Permissive words in a statute respecting courts or officers are said to be imperatives in those cases where the individuals affected have a right that the power conferred be exercised.

Id. at 477 (quoting 49 Fla.Jur.2d Statutes §18 (1984)).

Judge Mounts' ruling violated the rule and deprived Mr. Scott of any means of obtaining the evidence to support his claim. Mr. Scott was deprived of due process, compulsory process, and a full and fair hearing. The matter must be reversed and remanded.

ARGUMENT VI

JUDGE MOUNTS IMPROPERLY OVERRULED THIS COURT WHEN, IN DISREGARD OF THE OPINION REMANDING FOR AN EVIDENTIARY HEARING, HE EXCLUDED AND REFUSED TO LET MR. SCOTT PRESENT THE EVIDENCE OF WHICH THIS COURT HAD HELD AN EVIDENTIARY HEARING WAS REQUIRED.

Once he had made sure that Mr, Scott would not receive adequate representation at his evidentiary hearing, Mr. Selvig set out to urge the trial court to exclude all evidence and testimony which Mr. Scott intended to present in support of his claims. On January 3 1, 1996, the state filed a Motion To Preclude Testimony of any of Mr. Scott's witnesses, including Dr. Cuevas and Dale Nute, whose testimony had been proffered to this Court when this Court ruled that an evidentiary hearing was required. The state claimed that the testimony of these witnesses was now irrelevant, as Ken Selvig had testified that he had in fact disclosed the material in question. By excluding this evidence, Mr. Selvig ensured that

no testimony contrary to his assertion that all evidence had been provided to Mr. Scott' defense counsel would be heard by the court assessing Mr. Scott's claims.

In his motion, Mr. Selvig urges Judge Mounts to preclude the testimony of all defense witnesses who, according to witness-advocate Mr. Selvig, would provide testimony regarding the "materiality" prong of Bradv v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), based on the State's assertion that "the record is indisputable that the picture of the bloody circle was made known to Scott before trial. " See Motion to Preclude Testimony of Witnesses, at page 2. Mr. Selvig's argument completely ignored Mr. Scott's contention that if Mr. Barrs had been apprised of the existence of the photograph, then he was ineffective in failing to understand its significance and present it.

This Court remanded Mr, Scott's case for an evidentiary hearing to determine whether Brady violations occurred during the course of Mr. Scott's trial. This Court referred to the following matters which were to be the subject of the Brady inquiry: (1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; (3) a medical examiner's photograph that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle.

This Court did not intend for the Brady inquiry to be narrowly restricted to whether the photograph of the bloody circle was made available to defense counsel, as the State's motion suggests. The photograph of the bloody circle was but one piece of the puzzle that

made up Mr. Scott's case, and was, therefore, intricately connected to the other pieces of the puzzle. The testimony of Dr. Cuevas and Dale Nute would have been instrumental in putting those pieces together, as this Court's opinion ordering the evidentiary hearing recognized. Their testimony not only was directly relevant to the issue of whether the bloody ring photograph was made available to the defense, but also would have corroborated Mr. Scott's arguments as to the other issues which this Court ordered to be considered on remand. Judge Mounts should have viewed the entire puzzle before making his decision regarding the **Brady** issues. That Mr. Selvig did not want Judge Mounts to know the rest of the story is disturbing.

Even more disturbing was Mr. Selvig's insistence to Judge Mounts that he should rely exclusively on the incomplete testimony of Mr. Selvig, himself, in making its determination as to whether the photograph of the bloody ring was given to defense counsel. Mr. Selvig asserted that because Ken Selvig has testified that he disclosed the photograph in question to the defense, "the record is indisputable that the picture of the bloody circle was made known to Scott before trial. " See Motion to Preclude Testimony of Witnesses, at page 2.

Clearly, this Court did not feel the issue of the bloody circle photograph and its disclosure to defense counsel was "undisputable," as it remanded this case for an evidentiary hearing. Certainly, this Court did not intend for Judge Mounts to base his decision on the issue of the disclosure of the circle of blood solely on the testimony of Mr. Selvig, the individual who has the most to lose by a determination that he failed to disclose this

evidence.[28] The determination by Judge Mounts based on Ken Selvig's testimony alone was a mockery of justice and deprived Mr. Scott of his rights to a full and fair hearing. The State's position to the contrary is simply absurd, and violates this Court's order remanding the case for a full evidentiary hearing on Mr. Scott's allegations.

In Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994), the defendant appealed the denial of his motion for a new trial, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had confessed to the crime for which Mr. Johnson was convicted and sentenced to death, In 3.850 proceedings, the trial court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court reversed, ruling that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits violated his due process rights. The Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n. 3.

Justice Over-ton in his concurring opinion noted that Mr. Johnson must be given an opportunity to present evidence corroborating the affidavits; he explained: "This is especially true given that the trial court allowed the State to present evidence that the

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[28]By Mr. Selvig's own logic, it would also be unnecessary for this Court to listen to testimony by George Barrs, Mr. Scott's defense attorney, regardless of his assertions regarding the nondisclosure to him of the photo of the bloody ring.

affidavits were unreliable but did not afford Johnson the same evidentiary hearing opportunity. " Id. at 111. Justice Kogan, also concurring, agreed that "[s]ince the trial court effectively had commenced an evidentiary hearing, it was obligated to grant Johnson's request to present testimony of his own in rebuttal," Id. at 112.

This Court's decision in Johnson confirms that accepting evidence from one party while denying a reciprocal opportunity to the other denies that party's due process right to a fair hearing. That is what occurred here.

Judge Mounts could not properly make a determination of the admissibility or relevance of defense witnesses based on conjecture by Mr. Selvig regarding their testimony. By its own words, Mr. Selvig "can only speculate" as to the testimony of defense witnesses. Mr. Selvig's argument was that if the witnesses' testimony did not match his then it was wrong and should not be considered. Any decision based on these assertions by Mr. Selvig was improper.

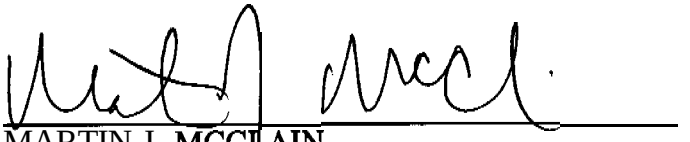
Mr. Selvig's motion was further evidence of the enormous conflict created when the individual representing the State in a post-conviction hearing is also a substantive witness in a key issue for determination. Judge Mounts entertained and granted a motion from a key and extremely biased witness in Mr. Scott's case, excluding all other witnesses from its consideration of a central issue. This situation emphasizes the inappropriateness of the failure to disqualify Ken Selvig from further representation of the State in this case.

Judge Mounts' exclusion of Mr. Scott's evidence violated this Court's opinion remanding for an evidentiary hearing. It also violated due process and deprived Mr. Scott of a full and fair hearing.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Scott respectfully urges the Court to reverse the lower court's order and remand Mr. Scott's case to the circuit court with direction that Mr. Scott receive a full and fair evidentiary hearing, and vacate his unconstitutional convictions and sentences. Mr. Scott respectfully requests that this Court order that the Honorable Marvin U. Mounts, and Ken Selvig, Assistant State Attorney be disqualified from any further prosecution of Mr. Scott's case.

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 June 2, 1997.



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