IN THE SUPREME COURT OF FLORIDA

RALEIGH PORTER,

Appellant,

vs. CASE NO. 90,101

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 12, 1996, this Honorable Court entered its order granting a joint motion to reopen the case for the lower court to conduct a hearing to determine whether sentencing judge Richard M. Stanley was biased against appellant Porter at the time of his trial and sentencing (Vol. I, R 1). This action followed a determination by the Eleventh Circuit Court of Appeals in the last round of post-conviction litigation that Mr. Porter was entitled to an evidentiary hearing in the federal district court to determine whether Porter had sufficient cause to excuse the procedural default in Porter's not having raised the judicial bias issue in previous collateral proceedings. Porter v. Singletary, 49 F.3d 1483, 1489-90 (11th Cir. 1995). The Court concluded that if Porter satisfied the cause requirement that it would be preferable for the state court to conduct an evidentiary hearing on the merits of the claim. Porter, *supra*. Thereafter, an evidentiary hearing was conducted in the federal district court (Vol. II, R 149-322) and the federal court concluded that Porter had satisfied the requirement that cause existed for not presenting the claim earlier.

An evidentiary hearing was conducted on January 17, 1997, with the Honorable Isaac Anderson, Jr. presiding (Vol. IV, R 1-174). The state stipulated that Jerry Beck contacted Judge Reese about

his information and asked what he should do about it prior to contacting CCR (Vol. IV, pp. 7-8).

Porter's first witness, Jerry Beck, the former Clerk of Circuit Court, Glades County, who was defeated for re-election in 1996, testified that he contacted the Office of the Capital Collateral Representative in the spring of 1995 (Vol. IV, pp. 11-12). He called the CCR office because he had recalled a conversation with Judge Stanley before or during the trial of Raleigh Porter. He invited Judge Stanley, whom he did not know, to have a cup of coffee and asked him why the Porter trial had been transferred to Glades County and Stanley allegedly responded that Glades County had a lot of good honest people, a jury could be selected who would listen to the case, consider the evidence and then he would send him to the chair (Vol. IV, pp. 13-15). Judge Stanley said they would convict the son of a bitch (Vol. IV, p. 16). Beck claimed that he recalled the conversation when investigators from the State Attorney's office were in the office looking for a case file on Porter and asked him about the file (Vol. IV, p. 17). Beck subsequently signed a statement and affidavit and amended affidavit in March of 1995 (Vol. IV, p. 19). Beck claimed that he didn't know if the information was relevant but he didn't think he should keep him mouth shut (Vol. IV, p. 21). The witness explained that there are certain things in anyone's

life that leaves a lasting impression in your memory and this event was one. He discussed his concerns with chief deputy Dick Blackwell (Vol. IV, p. 22).

On cross-examination, the witness asserted that he did not know whether or not Porter had already been executed (Vol. IV, p. 25). He only knew through the hearsay reports of his staff that it was State Attorney investigators who came to the office (Vol. IV, p. 26). Beck admitted previously stating that State Attorney's personnel told him Porter was to die within twenty-four hours, but they did not tell him directly, they told his staff (Vol. IV, p. 29). Prior testimony he gave in a federal hearing that the State Attorney's office related to him that Porter was to die in twenty-four hours or so was in error (Vol. IV, pp. 30-31); he had not discussed it with State Attorney personnel. Beck claimed that his conversation with Judge Stanley occurred in the back portion of the clerk's office, early in the trial before the second day of trial (Vol. IV, p. 32). Beck could not remember what else was said in the conversation (Vol. IV, p. 34). He didn't recall the changes in terminology in the two affidavits he provided to CCR (Vol. IV, p. 37). He did not know who Mr. Porter's trial defense attorneys were, he didn't recall the rest of the conversation with Judge Stanley, he didn't recall if he was present every day of the trial, he didn't recall when in the conversation Judge Stanley's quote

took place, he didn't recall how long the conversation lasted, he didn't recall if it was the first or second day of trial, he didn't recall the jury recommendation, he didn't recall the date he called CCR, he didn't recall the changes made in his affidavit, he didn't recall who he reported to at the State Attorney's office, he didn't recall who represented Porter at trial or whether Porter testified but claimed to recall the remark of Judge Stanley (Vol. IV, pp. 38-39).

Beck claimed that he had no problems with State Attorney Joseph D'Alessandro; the only problem he had with D'Alessandro was in the death of Beck's son (Vol. IV, pp. 40-41). Then he acknowledged that he did not know whether D'Alessandro was personally involved in the decision regarding the death of his son (Vol. IV, pp. 41-42). He didn't know who signed the document declining to prosecute the man who hit his son and he could not recall whether he had posted a document on the wall for a lengthy period of time that D'Alessandro did not prosecute. The incident with his son occurred after the trial and sentencing of Raleigh Porter (Vol. IV, p. 42). Beck claimed that he had problems living with himself for seventeen years after the trial but Porter "was out of my mind" (Vol. IV, p. 43). He never thought about it (Vol. IV, p. 44). He did not have trouble sleeping at night because he

had not provided this information to the proper authorities back in 1978 (Vol. IV, p. 48).

Dick Blackwell, former Chief Deputy Clerk of Court for Glades County, testified that in March of 1995 Beck told him of the statement he recalled having with Judge Stanley (Vol. IV, p. 65).

James Greenhill was called to testify and on voir dire examination by the prosecutor admitted that he had no firsthand knowledge of Judge Stanley's mind in 1978 or 1981 and had no information or evidence on whether he had bias in 1978 or 1981 (Vol. IV, p. 77). Greenhill, a staff writer for the Fort Myers News-Press, identified Exhibit 4, an article he wrote (Vol. IV, pp. 79-80). He claimed that certain quoted matters attributed to Judge Stanley were made by the Judge (Vol. IV, pp. 82-83). Greenhill did not record his entire conversation, it was not a tape-recorded conversation (Vol. IV, p. 86). He would write down only select phrases or statements in the interview (Vol. IV, p. 87).

The state called Judge Richard Stanley, who had retired in 1985 (Vol. IV, p. 94), was a circuit judge in the Twentieth Judicial Circuit in 1978 and presided over the trial of State v. Raleigh Porter (Vol. IV, p. 95). He stated that he did not recall any conversation with clerk Jerry Beck (Vol. IV, p. 96). Stanley related that the Porter case was tried in Glades County because there had been a tremendous amount of publicity in Charlotte

County, including Porter's having escaped from custody and the death of a policeman while checking stopped cars (Vol. IV, p. 96). Judge Stanley did not remember Jerry Beck and recalled no incident drinking coffee with anyone in the back area of the clerk's office (Vol. IV, p. 97). Judge Stanley explained that his routine was to go to Moore Haven from Punta Gorda with his secretary, Nancy Raulerson, and go into the courthouse together. He added that some of the things attributed to him in newspapers he did not say and would not say (Vol. IV, pp. 97-98). He did not intend to say that he knew prior to the jury recommendation that he would absolutely sentence Porter to death, that he had been a judge long enough to know "that I'm going to go to the end of the trial before I make any decision" (Vol. IV, pp. 98-99). He was receptive during sentencing phase to hear anything that might have been offered in mitigation, he would have listened to any mitigating circumstances with an open mind (Vol. IV, p. 99). He weighed both the aggravating and mitigating circumstances presented. If the mitigating had outweighed the aggravating he would have sentenced to life imprisonment (Vol. IV, p. 100). Prior to the conclusion of the guilt phase he never told anyone what he was going to do (Vol. IV, p. 100). Judge Stanley explained that you await the penalty phase before you make a final decision (Vol. IV, p. 102). The reason he imposed death on Mr. Porter was that the aggravators

greatly outweighed the mitigators. Judge Stanley insisted that he would not have made the statement Beck accredited to him, reported in the newspaper (Vol. IV, p. 122). He didn't make any statement to Jerry Beck before the end of the trial that he was going to send Porter to the chair (Vol. IV, pp. 124, 127). Stanley did not make any statement to Beck before the end of trial that he was going to send Porter to the chair (Vol. IV, p. 125). He had previously followed a jury life recommendation (Vol. IV, p. 131).

Judge Stanley maintained that he sentenced Porter to death after the jury made its recommendation and not until then. He did not make up him mind until after the recommendation (Vol. IV, p. 133). Judge Stanley did not affix the date on the sentencing document. The order reflecting a November 30 date was incorrect, perhaps affixed by the clerk. Judge Stanley signed the judgment but did not have written signed statement in front of him when pronouncing sentence (Vol. IV, p. 135). He recalled signing the resentencing order of August 3, 1981 (Vol. IV, p. 136).

Nancy Raulerson, secretary to Judge Stanley, testified that she rode with Judge Stanley to Glades County for the Porter trial everyday except Thursday of trial week (Vol. IV, p. 144). She was present the first three days of trial (Vol. IV, p. 145). Judge Stanley was not absent from her presence for 10 or 15 minutes in some other room in the courthouse. She would have noticed if he

had wandered into the back of the clerk's office. It did not happen (Vol. IV, p. 146). Judge Stanley would not discuss case matters with anyone (Vol. IV, p. 147).

The parties stipulated to deposing Mr. Judd (Vol. IV, p. 154).

The Court then inquired:

> Now, also as a third and final, there is some discussion regarding Mr. Beck's son. Would either party object to the Court taking judicial notice of the court record of the criminal prosecution in that case?
>
> MR. FORDDHAM: No, your Honor. The state would not object.
>
> THE COURT: Okay.
>
> MR. McCLAIN: No objection.
>
> THE COURT: All right. So be it.
>
> (Vol. IV, p. 155)

James Gause testified by phone that he had been an investigator for the State Attorney's office and was in the office when Mr. Beck called the office on March 23, 1995 (Vol. IV, p. 158). He did not go to the Glades County Courthouse prior to March 27 (Vol. IV, p. 157). On cross-examination he conceded it was his understanding that Beck called the State Attorney's office on March 23 but the notes in his book don't reflect that exactly. He knew that he was asked to contact Judge Stanley on March 23 (Vol. IV, p. 162).

Prosecutor Fordham -- called by the defense -- recalled receiving a call from Jerry Beck in the afternoon; he recalled the call from Beck occurred on March 23 in reconstructing events with Gause (Vol. IV, p. 168).

Porter also presented the deposition testimony of Alan Judd (Vol. I, pp. 72-90). On voir dire examination by the prosecutor, Mr. Judd testified that he did not cover the Porter trial in 1978 or the resentencing in 1981 and had no firsthand knowledge of whether Judge Stanley was biased at those times (Vol. I, pp. 74-75). The prosecutor objected to Judd's testimony on the basis that he had no firsthand knowledge of Judge Stanley's state of mind at the time of trial or resentencing (Vol. I, p. 77).

Judd testified that he was employed as a reporter for the New York Times Regional Newspaper Group in March of 1995. He identified an article in the Gainesville Sun on March 23 that he authored (Vol. I, p. 78), an article in the April 1 Gainesville Sun (Vol. I, p. 79). Judd stated that the quoted words attributed to Judge Stanley accurately reflected his remarks (Vol. I, p. 80). In another paragraph the source of the statement was an order issued by the Eleventh Circuit Court of Appeals (Vol. I, p. 81). Judd had not interviewed Judge Stanley prior to the time of the interview for the article (Vol. I, p. 84). He took notes of the conversation but it was not a verbatim transcript (Vol. I, p. 85). Judge

Stanley did not say in the interview that his mind was made up (Vol. I, p. 86).

Following the submission of post-hearing memoranda by the state and defense (Vol. V, R 419-437), at a telephonic hearing on January 31, 1997, the prosecutor and defense represented that the two sides had stipulated that Judge Reese's testimony would be that Jerry Beck had called him and that he had told Beck to call both CCR and the State Attorney's office (Vol. IV, TR 3), the court requested a copy of Mr. Judd's deposition and a copy of Mr. Beck's federal court hearing transcript (which had previously been introduced) and the court confirmed that it was taking judicial notice of the Glades County court file in State of Florida v. Avila and State of Florida v. McMunn[1] regarding the death of Mr. Beck's son. There was no objection (Vol. IV, TR 4-6).

On February 4, 1997, the trial court entered its order on the evidentiary hearing (Vol. II, R 336-348). Judge Anderson's order recited that reduced to its essence, the issue of Judge Stanley's impartiality depended on the credibility of two persons, Jerry Beck and Judge Stanley. The court also noted that Nancy Raulerson, who accompanied Judge Stanley to Glades County and was in his presence at all times (except on the fourth day of trial), denied that any

[1]State v. Mario Avila, Case No. 80-36(A) and State v. Jack McMunn, Case No. 80-36(B).

such conversation occurred between Beck and Stanley when Beck contends that it did (Vol. II, R 338). Beck contended that Stanley had told him that he had changed venue from Charlotte County to Glades County where there were ". . . fair minded people who would listen to the evidence, consider the evidence and then convict the S.O.B. and he [Stanley] would send him to the chair". Judge Stanley denied making any such statement to Beck and testified that he would never do so under any circumstances, especially to Beck, a man he wouldn't even recognize today, and did not know at the time of trial. Beck did not recall: (1) anything else about the conversation; (2) anything else about any other conversation he may have had with Stanley; (3) how long the trial took; (4) the resentencing which occurred in 1981; (5) the original death warrant signed in 1985; or (6) the jury recommendation of life and Stanley's subsequent override (Vol. II, R 339).

Judge Anderson noted that Beck's testimony in the federal evidentiary hearing that he didn't mention the conversation to anyone because "apparently I didn't consider it important" and his professed ignorance regarding the significance of the comment did not comport with the rest of Beck's testimony and common sense (Vol. II, R 340). Judge Anderson further explained that Beck's stated impetus for coming forward seventeen years after the event was a visit to his office by an investigator for the State

Attorney's office on the eve of the scheduled 1995 execution, but that the state had proven to the court that the visit by the State Attorney's investigator did not and could not occur for two reasons: (1) the State Attorney and investigator knew that the file was located in Charlotte County, and (2) there would be no need for the State Attorney to have looked for additional documentation in Glades County while Porter was under a death warrant (Vol. II, R 340).

Judge Anderson noted that a review of the testimony at the federal evidentiary hearing and the hearing in the circuit court as well as the contents of the court files in State of Florida v. Mario Avila and State of Florida v. Jack McMunn, Case Nos. 80-36(A) and (B) (which the parties had consented to the taking of judicial notice) revealed that Mr. Beck's son had been killed in a collision with a sheriff's patrol vehicle operated and occupied by Avila and McMunn following a high speed chase. According to Beck, State Attorney D'Alessandro apparently declined to prosecute the two deputies and Beck rounded up and delivered to Governor Bob Graham a petition with two thousand signatures seeking an investigation by another state agency. The case was eventually prosecuted by Douglas Cheshire, Jr., State Attorney for the Eighteenth Judicial Circuit who obtained a sixteen count indictment in the accident involving the death of Gary Beck. Several of the counts were

dismissed by Judge Wallace Peck as surplusage, a judgment of acquittal at the conclusion of the evidence was granted on several other counts and the jury returned not guilty verdicts as to Avila and McMunn on the remaining manslaughter charges at the conclusion of the trial in October 1980. Judge Anderson noted two potentially significant facts: (1) Beck apparently took it upon himself to make witness reimbursement requests on behalf of witnesses who testified for the state and (2) the State Attorney, at the insistence of Beck, was required to file a petition in the criminal court proceeding to determine the rightful possession of property confiscated as evidence by the state, the pickup truck that Gary Beck was driving at the time of the high speed chase with the deputies which resulted in his death (Vol. II, R 341-343).

Judge Anderson concluded that "there is some evidence to support the contention that Beck possesses a general bias against law enforcement, the State Attorney and the judiciary" (Vol. II, R 343).

Judge Anderson's order further stated that while certain idiosyncracies of Judge Stanley were shown (he carried brass knuckles into court on occasion, carried a gun in court proceedings) Judge Stanley provided the context "which this Court accepts as true" and not determinative of any undue bias at the time Judge Stanley sentenced Porter to death, including the lack of

security in the courtroom during the late 1970s and early 1980s, the prosecution of several high profile drug cases and the assassination of an Assistant State Attorney in his own home (Vol. II, R 343-344).[2]

Judge Anderson found the statements attributed to Judge Stanley as reported in the media to be of marginal veracity and relevancy and inaccurate; further, that remarks Judge Stanley may have made after ceasing to be a circuit judge in 1985 and giving up his license to practice law in 1989 could not be violative of the Code of Judicial Conduct (Vol. II, R 344-345).

Judge Anderson finally observed that Beck did not come forward in 1978 at the time the comment by Judge Stanley was allegedly made to him, he didn't come forward in 1981 when Porter was resentenced by Judge Stanley following an appeal to the Florida Supreme Court, he didn't come forward in 1985 after Judge Stanley had left the bench or after the first death warrant was signed on Porter, he didn't come forward in 1989 after Judge Stanley gave up his license to practice law, and he didn't come forward until 1995 when Porter was only hours away from execution (Vol. II, R 345-346). Beck testified in the federal court proceeding that he didn't think Judge Stanley's comment was important and in the state court stated he was apathetic about Porter's fate, yet seventeen years later

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[2]See Kelly v. State, 469 So.2d 219 (Fla. 2DCA 1985).

urged that he couldn't sleep at night and couldn't live with himself if he knew something that might influence the proceedings without coming forward. The Court concluded: "In short, Beck's testimony doesn't add up" (Vol II, TR 346). The Court ruled that it was not necessary to make the determination that Beck manufactured the claim to vindicate the memory of his son, but simply concluded that the conversation probably did not take place. Judge Anderson concluded that Judge Stanley was impartial at the time he sentenced Porter to death in 1978 and again in 1981 (Vol. II, R 347-348).

SUMMARY OF THE ARGUMENT

I. Appellant Porter was not denied his right to an impartial tribunal at his capital trial. The lower court credited the testimony of former Judge Stanley and disbelieved the testimony of former Clerk Beck on his allegation that Judge Stanley confided in him that he changed venue to secure a conviction and sentence Porter to death. Judge Stanley did not make up his mind about the appropriate penalty until the conclusion of the penalty phase presentation of the aggravating and mitigating circumstances and the jury's recommendation.

II. Since Judge Stanley did not prejudge the case nor announce to Clerk Beck beforehand that he had, Porter is not entitled to a retroactively-imposed motion to disqualify based on an assertion of an incident that did not happen.

III. The lower court did not reversibly err in failing to strike hearsay testimony of investigator Gause. Appellant's complaint about hearsay below was presumably satisfied by defense counsel's request that the prosecutor Fordham provide testimony as to certain facts and appellant sought no additional remedy after the prosecutor's testimony.

IV. This Court prior to the conducting of the evidentiary hearing denied Porter's Motion to Disqualify Twentieth Judicial Circuit and no persuasive reason is advanced for reconsidering that

ruling. Appellant merely expresses dissatisfaction with the credibility choices made by Judge Anderson and the rejection of the testimony of former Clerk Beck.

V. Appellant's initiation of a complaint on appeal that the lower court erred when it took judicial notice of the files in State v. Avila and State v. McMunn must be deemed procedurally barred since Porter twice below announced no objection to the court's prospective action. The materials reviewed are cumulative to other evidence presented.

ARGUMENT

ISSUE I

WHETHER PORTER WAS DENIED HIS RIGHT TO AN IMPARTIAL TRIBUNAL AT THE CAPITAL TRIAL PRESIDED OVER BY JUDGE STANLEY.

The trial court made a credibility determination that Judge Stanley was more believable than Clerk Beck. This Court and the United States Supreme Court have recognized the superior vantage point of the trial judge to the appellate court in such matters. This Court has frequently opined in the context of motion to suppress evidence issues that the trial court's rulings on credibility choices is presumptively correct. See Escobar v State, 699 So.2d 988 (Fla. 1997); E. Johnson v. State, 660 So.2d 637 (Fla. 1995); see also Wuornos v. State, 644 So.2d 1012, 1019 (Fla. 1994)(Court's duty is to review the record in the light most favorable to the prevailing party); Jones v. State, 648 So.2d 669 (Fla. 1994); Trepal v. State, 621 So.2d 1361 (Fla. 1993); Owen v. State, 560 So.2d 207 (Fla. 1991). As stated in State v. Spaziano, 692 So.2d 174, 178 (Fla. 1997):

> We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective.

Accord, Green v. State, 583 So.2d 647, 652 (Fla. 1991)("Because the trial judge sees and hears the prospective jurors, he or she has the ability to assess the candor and the credibility of the answers given to the questions presented.") See also Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858, 105 S.Ct. 844, 857 (1985) quoting from Marshall v. Lonberger, 459 U.S. 422, 434, 74 L.Ed.2d 646 (1983):

> As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.... How can we say the judge is wrong? We never saw the witnesses.... To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd*, 252 NY 422, 429, 169 N.E. 632, 634.

As vividly described years ago in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120 - 1121 (Mo. 1908):

> We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled

> witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

Appellant repeatedly alludes to the fact that the trial court failed to take into account the fact that Beck had testified in two proceedings, a federal and state court hearing. Appellant argues, apparently, that the federal court findings and acceptance of Beck's testimony should be binding since the state failed to object or contest the federal magistrate's conclusions.

Appellee would point out the limited nature of the purpose and scope of the federal hearing. The Court of Appeals for the Eleventh Circuit had remanded to the district court:

> . . .for an evidentiary hearing to inquire into whether Porter or his counsel, from time to time, had knowledge that Judge Stanley made the alleged comment to Clerk Beck, or whether Porter or his counsel had other similar knowledge to put them on notice of bias on the part of Judge Stanley.
>
> [11] If, on remand, Porter satisfies the cause standard of Wainwright v. Sykes, then he is entitled to an opportunity at an evidentiary hearing to prove the claim he has proffered--that his sentencing judge lacked

> impartiality and violated his constitutional right to a fair and impartial tribunal.
>
> Porter v. Singletary, 49 F.3d 1483, 1489-1490 (11th Cir. 1995)

In footnote 16 of that opinion the Court allowed that if the district court found on remand that Porter established cause the district court must conduct a hearing on Porter's claim that the sentencing judge lacked impartiality but because an inquiry involving the impartiality of a state judge "would preferably be held in the state courts" either party might request the district court to stay its proceedings pending a motion to reopen the state proceedings. That is what happened. The only purpose and effect of the federal evidentiary hearing before the magistrate was to determine whether the cause requirement had been satisfied. Since the merits prong of whether Judge Stanley was impartial was deferred until after the cause hearing it matters not whether the state objected to the federal court cause conclusion.

Appellant initially challenges the lower court's reliance on the testimony of Nancy Raulerson and the visit by state attorney investigators in March of 1995.[3] Porter contends that the lower

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[3]Appellant begins his argument on this issue with an excerpt of Judge Stanley's testimony at the evidentiary hearing (Vol. IV. p. 120). The excerpt does not recite that the answer was in response to the appellant's attempt to cross-examine Judge Stanley regarding his earlier deposition testimony about his "inner nature" which included his life experiences in a German POW camp and his protective nature toward members of his family (Vol. I, pp. 142-143). Cf. Barclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134 (1983) (no constitutional violation found in trial judge's reference to wartime experience and view of Nazi concentration camps).

court erroneously utilized Ms. Raulerson's testimony to reject Clerk Beck's testimony because she admitted not having accompanied Judge Stanley to court on one day, which appellant hypothesizes could well have been the day of the Judge Stanley-Clerk Beck alleged conversation. But Ms. Raulerson's testimony was:

> Q And when was the one day you did not go with him?
> A On a Thursday.
> Q Thursday of the trial week?
> A Right.
> Q But you were there, were you not, with him on the first day of the trial, the second day of the trial and the third day of the trial?
> A Right.

(Vol. IV, p. 145)

In contrast, the testimony of Beck was:

> Q Okay. Now, when in relationship to the over all sequence of the trial did this conversation take place?
> A I don't recall whether it was before the trial started or first day or -- it was sometime before any conclusion of the trial.
> Q Okay. Would you way that it was very early in the trial?
> A Yes, sir. Yes, sir.
> Q Would you say that it was no later than the second day in the trial?
> A. It would have been before the second day of the trial, I believe.
> Q Before the second day of the trial is when the conversation took place?
> A Yes, sir.

(Vol. IV, pp. 32-33)

Jury selection commenced Tuesday, November 28, 1978 and Beck's claim that his conversation occurred "before the second day" is

contradicted by Raulerson's assertion that she missed only the Thursday session.

Appellant complains that the trial court's treatment of the visit by the state attorney investigator to the Clerk's office ignores the evidence. Appellee disagrees. According to Beck the impetus for coming forward seventeen years after the trial was a visit by investigators for the State Attorney's Office looking for a file on the Porter case (Vol. IV, pp. 17, 22, 25). Beck acknowledged in the hearing below that his earlier testimony in federal court would have been erroneous if he stated that State Attorney personnel had informed him that Porter was to die within twenty-four hours (Vol. IV, p. 31). (See testimony of Beck in federal hearing, Vol. II, p. 188-189, "What I was looking at here is, according to the State Attorney's Office, they related to me that the man was suppose to die within twenty-four hours or so. I didn't feel like I could live with myself if I had something there that might change the circumstances or something of that nature. I would have problems sleeping the rest of my life. Q. And is that what prompted you to call in 1995? A. Yes, sir, that's it").

The significance of investigator Gause's testimony that he subsequently went to the Glades County Clerk's Office was that it was a response and reaction to Mr. Beck having contacted the prosecutor's office to report the alleged incident with Judge

Stanley seventeen years earlier (Vol. IV, p. 159, R 164/see also R 169).

Appellant argues (at Brief, p. 58) that Mr. Beck adequately explained his lack of knowledge of the status of Porter's case in his federal and state appearances. In short, appellant urges that Beck should be deemed credible even though Beck recalls almost nothing other than that Judge Stanley made an outlandish assertion of prejudicial bias to a total stranger and the listener did not report such an event to anyone for almost two decades and that the triggering device for recall of an incident was a conversation with State Attorney personnel that did not occur.

Porter contends that corroborative of Beck's credibility is the fact that Clerk Beck put his livelihood and career on the line when coming forward with the information about Judge Stanley. He points to Beck's testimony that he lost his attempt at re-election after making his allegations. But the electorate's refusal to endorse his candidacy may be easily interpreted as a loss of confidence in an official whose version of events, in Judge Anderson's words, "doesn't add up" (Vol. II, R 346).

On the one hand, in the federal court hearing Beck indicated that he did not think Judge Stanley's comment was important (Vol. II, R 174, R 189) and did not think he'd give much thought to it (Vol. II, R 176) and yet, on the other hand, he did not feel like he could live with himself and would have problems sleeping the

rest of his life if he did not come forward in 1995 (Vol. II, R 188-189). And in the state court hearing below he contended that he did not have trouble living with himself for the seventeen year period after the trial (Vol. IV, TR 43). He was apathetic (Vol. IV, TR 44). He did not have trouble sleeping for seventeen years (Vol. IV, TR 48).[4]

Appellant complains about the lower court's acceptance of Judge Stanley's testimony. But Judge Stanley recalled no conversation with Clerk Beck (Vol. IV, TR 96), nor being in the back of the clerk's office, in the absence of Ms. Raulerson, with any other individual (Vol. IV, TR 98). He testified that some of the things he read in the newspapers that was said he did not say (Vol. IV, TR 98). Stanley asserted that "I was a judge too long, that I'm going to go to the end of trial before I make any decision" (Vol. IV, TR 99). He was receptive during the sentencing phase to hear anything offered in mitigation to the sentence and would have listened to any mitigating circumstances with an open mind (Vol. IV, TR 99). If the mitigating circumstances had outweighed the aggravators he would have been amenable to sentencing to life instead of death (Vol. IV, TR 100). Prior to

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[4]Appellant chides the lower court for not discussing the testimony of deputy clerk Blackwell but that witness did not testify as to any knowledge regarding the 1978 trial. He repeated in hearsay fashion that Beck reported to him in March of 1995 about his alleged conversation years earlier with Judge Stanley. On cross-examination, he stated that on the day prior to Beck reporting his concerns to him he did not recall state attorney investigators being in the office looking at files (Vol. IV, TR 75).

the penalty phase he never told anyone that he knew what he was going to do (Vol. IV, TR 100). Judge Stanley explained that even after listening to an entire trial you await completion of the second phase before you make a final decision (Vol. IV, TR 102). Judge Stanley reiterated that he did not make up his mind on sentencing until after the jury made its recommendation (Vol. IV, TR 133).

Appellant also complains about the judgment and sentence form and the remarks attributed to Judge Stanley in newspaper articles. Judge Stanley testified that he did not type in the words, a secretary or someone else did the typing and Judge Stanley sentenced Porter when he appeared before him in open court (Vol. IV, pp. 106-107) and insisted that he sentenced Porter after -- and not until -- the jury returned with its recommendation. He did not make up his mind and did not sign the sentencing document prior to the jury's recommendation (Vol. IV, pp. 133-134). The only thing he did with the document was affix his signature, he did not affix the date on the document and the clerk could have affixed the date (Vol. IV, pp. 134-135).[5]

With respect to alleged remarks to the media, James Greenhill of the Ft. Myers News Press conceded that he had no information or

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[5]Even the Eleventh Circuit Court of Appeals recognized the date on the judgment form was readily explainable as clerical error and "fell far short of overcoming the presumption of regularity and supporting a claim of judicial bias". Porter v. Singletary, 49 F.3d 1483, 1488 (11th Cir. 1995).

evidence bearing on the 1978 trial and sentencing or resentencing in 1981 (Vol. IV, R 77) and acknowledged having written the article -- defense exhibit 4 -- in March of 1996 after the federal evidentiary hearing before Magistrate Schwartz (Vol. IV, R 82) and admitted that his conversation with Judge Stanley at that time was not tape recorded and the witness only wrote down select phrases (Vol. IV, R 87).[6]

When Judge Stanley testified concerning newspaper articles attributing statements to him, Stanley did not mean that he knew he would sentence Porter to death, that "I was a judge too long, that I'm going to go to the end of the trial before I make any decision" (vol. IV, TR 98-99). He added:

> . . . But I will say this, that as a matter of fact, that if you listened to an entire trial like that, you'd have an opinion, but that's not the way it works.
>
> Q. You still have another phase that you are waiting to go through?
>
> A. You're awaiting that before you make a final decision.

(Vol. IV, R 102)

Stanley also testified that he did not think he would ever tell anybody what his sentence would be or what he thought it was

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[6]While appellant remains offended by Stanley's purported statement to Greenhill in 1996 that he didn't care about the jury recommendation, the judge makes the final decision, Stanley hardly can be criticized for an elliptical remark, especially since the sentencing judge's decision is final until appellate review and there would be no reason for Stanley to care in 1996 about the recommendation when the Florida Supreme Court had affirmed his judgment and sentence in 1983. Porter v. State, 429 So.2d 293 (Fla. 1983).

going to be before it came up (Vol. IV, R 127) and disputed the accuracy of the newspaper quote.

Appellant next refers to public statements about death sentences:

> Q. Have you ever indicated to a reporter, and specifically in the Miami Herald article, that you had been advocating for the death penalty and appeared in debates regarding the death penalty?
>
> A. No. I will merely say this: that I was questioned at one time about the death penalty, in fact, questioned a number of times about it. And I stated at that time -- they were saying, well, suppose that the judge that passed sentence had to actually put the man to death.
>
> I said fine. I'll go along with that provided that as of the time I say the magic words that I reach right down by my left knee, come out with the pistol and shoot him right between the eyes. And they said, no, you couldn't do that. That would violate his civil rights. So, therefore, I couldn't put him to death.
>
> * * *
>
> A. I was talking to people that were in favor of or against the death penalty, and I made the statement then.

(Vol. IV, R 108-109)(emphasis supplied)

The instant remarks apparently were made in a discussion -- an academic exercise with other death penalty proponents or opponents; they were not made in a judicial capacity regarding any pending litigant. While perhaps reflective of a lack of squeamishness by the witness, there is no requirement that a jurist in an academic discussion with other citizens must announce a personal revulsion

to the imposition of the death sentence to sustain a judgment made two decades earlier. See Brown v. Doe, 2 F.3d 1236, 1249 (2nd Cir. 1993), cert. denied, 510 U.S. 1125, 127 L.Ed.2d 403 (1994)(due process not violated when judge used example of defendant's conviction and sentence in post-hoc re-election campaign because no evidence of partiality during trial); United States v. Barry, 961 F.2d 260, 263-65 (D.C. Cir. 1992)(judge's impartiality not reasonably questioned at resentencing when remarks of judge at original sentencing, based on evidence adduced at trial, foreshadowed subsequent remarks at Harvard Law School forum affirming defendant's guilt and questioning jury's impartiality); United States v. Bauer, 84 F.2d 1549, 1559-60 (9th Cir. 1996); cert. denied, 117 S.Ct. 267 (1996)(no bias shown when judge stated in published article that he considered marijuana distribution a serious and pervasive social problem because judge's views on legal issues do not constitute active and deep-rooted animus); United States v. Young, 45 F.3d 1405, 1415-16 (10th Cir. 1995), cert. denied, 115 S.Ct. 2633 (1995)(judge's remark that it was obvious that defendant would be convicted did not demonstrate deep-seated bias because opinion acquired during judicial proceeding). See also Quince v. State, 592 So.2d 669 (Fla. 1992)(rejecting defense assertion that motion to disqualify judge should have been granted because of comment by judge years earlier in an educational address

mentioning that out of state lawyers "look down their noses at us" as it did not make specific reference to the Quince proceeding).

Appellant cites In re Inquiry Concerning a Judge, Judge E.L. Eastmoore, 504 So.2d 756 (Fla. 1987), in which this Court approved the Judicial Qualifications Commission recommendation of a public reprimand for a judge who had compelled a newspaper reporter to come to his chambers, unconnected to any legal proceedings, because the reporter had failed to respond to a hallway greeting, and for the failure in a child custody matter to afford a full opportunity to testify and addressed her in an improperly raised voice. Judge Stanley engaged in no such improper judicial conduct in Porter's trial.

Appellant next alludes to Judge Stanley's testimony regarding weapons. Judge Stanley testified that he had never walked into a courtroom at the time he was a judge that he did not have a gun and that there was a period in Charlotte County when drug cases were prevalent that he had a sawed off machine gun on his lap. Indeed, a prosecutor was shot and killed at his door (Vol. IV, TR 118). As to brass knuckles that he had brought home from Gestapo headquarters following his service as a paratrooper prisoner of war the witness answered that he did not think he had them in the sentencing proceeding but in his office but in any event never threatened anyone (Vol. IV, TR 117). Judge Anderson ruled:

> 17. The Defendant has, through counsel, established that Judge Stanley has certain

> "idiosyncracies" which, without explanation, might lead one to the conclusion that Judge Stanley was biased against all criminal defendants. Judge Stanley testified that he carried brass knuckles with him into the courtroom on occasion, that he always carried a gun with him in criminal court proceedings, and at the time he sentenced Porter, he carried a submachine gun with him into court and had it lying across his lap. However, Judge Stanley provides context for these practices which this Court accepts as true and not determinative of any undue bias or partiality at the time Stanley sentenced Porter to death.
>
> 18. Specifically, Judge Stanley testified that in the late 70's and early 80's, no security was provided in courtroom proceedings like that we enjoy today. Due to the prosecution of several high profile drug cases, and the assassination of an Assistant State Attorney in his own home, the Court adequately explained the reason why he carried brass knuckles, guns or other weapons into court.

(Vol. II, R 343-344)

Appellant cites In re Inquiry Concerning a Judge, re: Wallace E. Sturgis, Jr., 529 So.2d 281 (Fla. 1988) in which a public reprimand was ordered for fourteen transgressions including having waved a gun when a lawyer approached the bench, ex parte communications with litigants and lawyers, engaging in the practice of law after ascension to the bench, the failure to resign from fiduciary appointments upon being elevated to the bench followed by the failure to carry out the fiduciary duties in a proper manner, the improper keeping of funds and using his position to prevent inspection of files. With respect to Porter's "gun" charge,

appellee notes that this Court ruled unanimously on his last appeal to this Court that appellant had previously attempted to urge the presence of a gun required a finding of judicial bias and this Court denied relief. Porter v. State, 653 So.2d 374, 377, n 2 (Fla. 1995). Additionally, the Court of Appeals explained:

> In similar vein, the district court emphasized that Porter was aware of Judge Stanley's wearing brass knuckles and a gun at the sentencing hearing (where sentence was pronounced) and had raised that on direct appeal. District Court Order March 30, 1995, at 22. We agree that the record reveals that Porter was on early notice of those facts. However, the brass knuckles and gun were readily explained by the State in the earlier proceedings as being the result of security precautions, and the November 30 date was explained by the State as a clerical error. That evidence is not comparable at all to the evidence now proffered. Unlike the newly proffered evidence, it fell far short of overcoming the presumption of regularity and supporting a claim of judicial bias.
>
> Porter v. Singletary, 49 F.3d 1483, 1488 (11th Cir. 1995)(emphasis supplied)

Despite appellant's apparent unhappiness with the fact that years ago courtroom security and the safety of government and judicial officers was less risk-free than today, appellate reversal is not required, especially where as here -- unlike in Sturgis, *supra* -- Judge Stanley did not wave or brandish a weapon to or at others in the court.[7] (Moreover, appellant misstates Judge

[7]Appellee further observes that the direct appeal record in this case (Florida Supreme Court Case No. 55,841) contained documents relating to Porter's escape from jail -- and recapture -- prior to standing trial for the murder of Mr. and Mrs. Walrath (R 58-71).

Stanley's testimony at pages 72-73 of the brief: the reference to the sawed-off machine gun on his lap was to a Charlotte County drug case, not Porter's capital trial -- Vol. IV, TR 118).

Porter next asserts that Judge Stanley's lack of impartiality is demonstrated by his alleged personal feelings about Porter and his crime. At the hearing the witness was asked about his "inner nature", a reference to Judge Stanley's earlier deposition wherein he was asked what his disagreement with the jury's recommendation is (Vol. I, TR 142; Vol. IV, TR 119-120). To the extent that counsel may have been asking the witness if he disagreed with the jury recommendation the witness correctly answered that he did since he overrode it and thought death was the more appropriate sanction (Vol. IV, TR 119). If the questioner was asking about his "inner nature" or his present personal views about the nature of the crime or what he might have done had a member of his family been a victim, the question was irrelevant, but answered.[8] The

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Porter received a ten year sentence for this escape (R 793, Case No. 55,841). Court personnel would properly be concerned about such matters.

[8]The defense inquiry as to the judge's mental processes was improper. Case law holds that post-decision statements by a judge about his mental processes in reaching decision may not be used as evidence in a subsequent challenge to the decision. See Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904); United States v. Crouch, 566 F.2d 1311, 1316 (5th Cir. 1978); Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982), reh. denied, 706 F.2d 311 and 708 F.2d 734 (1983), cert. denied, 464 U.S. 1002, 78 L.Ed.2d 697 (1983); Washington v. Strickland, 693 F.2d 1243, 1263 (11th Cir. 1982), reversed on other grounds, 466 U.S. 668, 80 L.Ed.2d 674 (1984); Fulghum v. Ford, 850 F.2d 1529, 1535 (11th Cir. 1988); Perkins v. LeCureux, 58 F.3d 214,

point remains that Judge Stanley testified that he weighed the aggravating and mitigating factors "but the aggravating circumstances went way beyond the mitigating circumstances" (Vol. IV, TR 100) and yes, he would have given a sentence of life imprisonment rather than death if the mitigating circumstances had outweighed the aggravators (Vol. IV, TR 100).

Appellant relies on a number of district court decisions, Fogelman v. State, 648 So.2d 214 (Fla. 4DCA 1995); Rucks v. State, 692 So.2d 976 (Fla. 2DCA 1997); Deren v. Williams, 521 So.2d 150 (Fla. 5DCA 1988); Heath v. State, 450 So.2d 588 (Fla. 3DCA 1984). In Fogelman the trial court improperly told a witness she was acting as an advocate and had commented to other attorneys that if the defendant had done to his daughter what he did to another victim he'd kill him, during the course of the trial; unlike the situation presented there, Judge Stanley's remarks depicted retrospective musings about the correctness of his decision almost two decades earlier. Similarly, Rucks, Deren and Heath all involve disqualifying conduct occurring contemporaneously with the judicial duties being performed.

Appellant next asserts that Judge Stanley's alleged lack of impartiality is shown by reliance on information outside the record in the 1978 sentence. Here, appellant merely alludes to Porter's first direct appeal wherein this Court noted an apparent violation

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220 (6th Cir. 1995); State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994).

of the recently-decided case of Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393 (1977). This Court remanded to provide an opportunity to the defense to rebut statements in the Larry Schapp deposition. Porter v. State, 400 So.2d 5 (Fla. 1981). The Gardner error was corrected on remand. This Court determined:

> [1] The mandate of this Court required only that Porter be allowed to rebut, contradict, or impeach Schapp's deposition testimony. The defense attempted only to impeach Schapp's statement. It offered no evidence, i.e., testimony or evidence at resentencing that Porter did not say what Schapp claimed he said, to rebut or contradict that statement. Impeaching a witness goes only to that witness' credibility, and in the absence of rebuttal or contradictory evidence the trial court could justifiably rely on Schapp's deposition testimony. The essential findings of the trial judge are supported by the record.
>
> Porter v. State, 429 So.2d 293, 296 (Fla. 1983)

Judge Stanley was not the only jurist thought to have committed Gardner error years ago. See, e.g., Jacobs v. State, 357 So.2d 169 (Fla. 1978); Barclay v. State, 362 So.2d 657 (Fla. 1978); Meeks v. State, 364 So.2d 461 (Fla. 1978); Songer v. State, 365 So.2d 696 (Fla. 1978); Funchess v. State, 367 So.2d 1007 (Fla. 1979); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Messer v. State, 384 So.2d 644 (Fla. 1979); Spaziano v. State, 393 So.2d 1119 (Fla. 1981).

The short answer to appellant's hypothesis of ex parte communication between prosecutor and judge is that there is no evidence of any such ex parte communication and Porter did not even

question Judge Stanley at the hearing below regarding such a contention.

Appellant contends that Judge Stanley's alleged lack of impartiality infected the 1981 resentencing proceedings. While Judge Stanley did not recall that proceeding after all these years, the appellate record therein (Case No. 61,063, reported at 429 So.2d 293) is brief in size and reflects the trial judge's accomplishing the purpose of the limited remand as well as permitting counsel to argue anything else. Since Judge Stanley was not biased in 1978, he was not in 1981.

Appellant's further attempt to relitigate the sentencing order language -- this Court previously denied habeas relief challenging the sentencing language (". . . more sympathy for the feelings of the victims than . . . the sensibilities of the murderer") in Porter v. Dugger, 559 So.2d 201 (Fla. 1990) -- must be rejected. Appellee notes that the comment constituted a valid rebuttal to the defense argument earlier to the jury appealing for mercy to Mr. Porter (R 769, Case No. 55,841) and seeking to treat Porter's life as a flame or candle that should not be extinguished. (R 772, Case No. 55,841).[9] Presumably if the sentencing court had not addressed

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[9]See also Yates v. State, ___ So.2d ___, 23 Florida Law Weekly D426, 427 (Fla. 5DCA 1998)(Harris, J., concurring specially)("The fact that a judge opposes domestic violence is no more relevant at sentencing than the fact that a judge opposes robbery or drug abuse; nor does it distinguish a particular judge from any other member of the bench. So far as I know, all judges oppose criminal conduct.")

the request for sympathy yet another issue would have been raised on direct appeal.[10]

Lastly, appellant complains that at resentencing the Court read from a prepared order. The record (Fla. Case No. 61,063, TR 49) reveals this exchange:

> MR. WOODARD: Your Honor, may we, just for the purposes of the record, have the record reflect the obvious that the Court in reading the sentence, read from a prepared Order that the Court signed here in the presence of everyone?
>
> THE COURT: Sure.
>
> MR. WOODARD: Thank you, Your Honor.
>
> THE COURT: And the Court would merely add on that, that the Court has had ample opportunity to prepare this Order and the Court has heard everything that was to be heard. If there is some consideration that possibly I should have waited, this was here. Anything further to come before the Court?

Appellee notes that the trial court -- in accord with the practice at that time -- had a written order prepared at the time of orally pronouncing sentence. See Grossman v. State, 525 So.2d 833, 841 (Fla. 1988)(". . . we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement")(emphasis supplied). See also Palmes v. State, 397 So.2d 648, 656 (Fla. 1981):

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[10]Appellant's reference to Porter v. Singletary, 49 F.3d at 1490, n 14 must be taken in context. The Court was addressing the state alternative argument that if Judge Stanley was biased in 1978 it would not taint the 1981 proceeding and the Court did not accept the view that the mere passage of time would dissipate bias if there were any.

> [24] [25] Appellant contends that the record shows that the judge did not consider the evidence offered in mitigation. After adjudicating appellant guilty, the court set a time for the sentencing hearing and meanwhile ordered a presentence investigation. At the sentencing hearing, after hearing all the evidence and argument, the judge stated her findings, which she read from a pre-prepared order. Appellant argues this shows no consideration was given to his evidence and argument offered at that hearing. The fact that the judge recited findings from an order prepared before the final sentencing hearing does not compel the conclusion that she did not give the required consideration to the evidence presented by the defense. All of the court's findings of aggravating circumstances were based on evidence that was adduced at the trial proper. Thus there was nothing wrong with her having these findings and considerations in mind at the start of the sentencing hearing. The fact that the pre-prepared order found that there were no mitigating circumstances does not show that the judge did not consider the evidence and argument offered in mitigation. The recitation and filing of the sentencing findings merely indicate that the court concluded that nothing presented by the defense at the hearing required her to add to or change her pre-prepared findings.
>
> (emphasis supplied)

It was not until twelve years after Porter's resentencing that this Court promulgated Spencer v. State, 615 So.2d 688 (Fla. 1993) adding for the first time the requirement of an intervening recess after hearing evidence and argument for preparation of written findings. In Armstrong v. State, 642 So.2d 730 (Fla. 1994) this Court rejected a defense contention that preparation of an order before sentencing hearing constituted an impermissible

predetermination of sentence without hearing argument and evidence since the court allowed Armstrong to present additional evidence at sentencing, and Spencer was only a change in procedure to be applied prospectively. See also Card v. State, 652 So.2d 344, 345 (Fla. 1995); Layman v. State, 652 So.2d 373, 376 n 5 (Fla. 1995).

As in Armstrong and as envisioned in Palmes, *supra*, resentencing Judge Stanley afforded Porter an opportunity to present additional mitigation at resentencing -- even going so far as to grant a defense motion for continuance to have the opportunity to present appellant's family members as mitigation witnesses (R 9-11, R 16-17, FSC Appeal No. 61,063).[11]

Porter contends that he is entitled to a new trial. He charges that Judge Stanley changed venue to a county where he felt confident that Porter would be found guilty, but the lower court disbelieved Mr. Beck who alleged that Stanley asserted this to him, and additionally the direct appeal record shows that it was trial defense counsel who had requested a change of venue (R 20-21, FSC Case No. 55,841). As argued previously, Judge Stanley's statement at the hearing below regarding what he may or may not have done if a member of his family were involved constitutes a retrospective remark of a citizen years after retirement from the bench and the practice of law -- not while engaged actively in a judicial capacity.

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[11]Appellant's family members ultimately did not testify but it was not because of any decision by Judge Stanley.

Appellant asserts that Judge Stanley denied a motion to suppress and a motion in limine, rulings apparently so innocuous that they did not even merit mention by the appellate public defender on direct appeal. The insubstantiality of the claim is reflected in the direct appeal record at R 258-264 (FSC Case No. 55,841) shortly before commencement of voir dire on November 28, 1978.

With respect to the change of venue, defense counsel sought a change of venue on October 26, 1978 due to extensive pre-trial publicity (R 20-80, FSC Case No. 55,841). At a hearing on the motion conducted October 30, 1978, the trial court agreed that the trial could not properly be held in Charlotte County but was not convinced that it was necessary to remove from the entire circuit (R 249-251, FSC Case No. 55,841). On November 2, 1978 the court granted the change of venue and ordered it removed to Glades County (R 81, FSC Case No. 55,841). A second motion for change of venue was filed on November 15, 1978 on the basis of the size of the community (R 169-170, FSC Case No. 55,841) which was denied on November 20, 1978 (R 172, FSC Case No. 55,841) after hearing argument (R 253-255, FSC Case No. 55,841).

Appellant interprets the court's statements at that hearing as demonstrating Judge Stanley's plot to move the case to Glades County -- and does not adduce the total colloquy between counsel and the court, which is less nefarious:

THE COURT: Okay.

MR. WIDMEYER: Your Honor, I brought this new motion for a change of venue in the case of State of Florida versus Raleigh Porter. I fully realize, Your Honor has already granted one change to Moore Haven, and I would like to point out to the Court that I would not have brought another motion to change it from Moore Haven, unless I had good grounds. First of all, it has come to my attention, through my investigators' efforts, there is no place in Moore Haven to sequester a jury during the nightly recesses for this case. I know that it is up to Your Honor about handling the sequestration, and I realize that, but I fully intend to ask for it, and if there is no place to put them, then Your Honor doesn't have that discretion any longer, and the defendant doesn't have the right for you to exercise that discretion.

THE COURT: You can ask for anything, and if necessary, I can order them sequestered in Fort Myers, Jacksonville, or wherever it might be, because I'm sure that can be taken care of.

MR. WIDMEYER: Very well. My second point, if Your Honor will notice in the motion, paragraph 2, I have cited some statistics for TV coverage in that area, and the two stations, WINK, 11, and WBBH of Channel 20, overall reach forty-eight percent of all households in Glades County with television, and on a weekly basis manage to cover over a hundred percent of the TV households, and on a daily basis reach ninety percent of all households. Additionally, the disparity in size between Glades County and Charlotte County, and I realize paragraph 3 has created some fervor over there, and I didn't mean it to, it would be chosen from a much smaller and less culturally and intellectually diverse group of citizens. By that I don't mean any derogatory thing at all. By that I mean, just when you have a much smaller population, you lose a lot of diversity.

THE COURT: Does that mean something like you want your cake and eat it, too? You

> wanted it moved from Charlotte County. Mr. Widmeyer, let me say this, I will be glad to listen to whatever you want to put on the record. There's not a way in the world I am going to change this thing now. If it reaches the point, when we're in Glades County, that we can not get a fair and impartial jury, then I will listen to additional motions for change of venue, but after it's been set, I'm not going to change it again.
>
> MR. WIDMEYER: Thank you, Your Honor, for your candor. For the record, I would like to close in saying, I have been informed also that the defendant would not be housed, if the chief jailer has his way, that he would transport the defendant back to here every afternoon, which could make it difficult to chase the defendant down if I needed to find him.
>
> THE COURT: You will be able to find him. I don't know where I'm going to be staying. All these things will have to work out at the time. Any time that you change venue from your local county, it's going to cause some type of problems. I'm aware of that, but like I say, when you do it, why when you request it, you're taking all these things into consideration.
>
> So be it.

(R 254-256, FSC Case No. 55,841)

Thus, the colloquy establishes only mere annoyance that the defense complaint (or at least a portion of it) seemed to be that Glades County was smaller than Charlotte County and the defense now wanted a larger community when earlier it wanted the trial moved from Charlotte County. Moreover, the court indicated that any logistics problem of transporting the prisoner, or sequestering the jury if it developed that a jury could not be selected there were matters that could be handled as the need arose.

Porter also argues that even if Mr. Beck made up the conversation or the conversation never took place a motion to disqualify Judge Stanley twenty years ago would have had to be granted. There is no need to speculate on what may or may not have been required under a hypothetical set of circumstances -- especially concerning a conversation that did not take place.

At the conclusion of his findings and order Judge Anderson alludes to language in this Court's prior decision in Dragovich v. State, 492 So.2d 350 (Fla. 1986), and in an alternative ruling opines that if that language correctly stated Florida law it would be difficult to see how the allegations regarding Judge Stanley's alleged discussion with others about Porter's guilt would be legally sufficient to support a motion for post-conviction relief. The trial court's observation constitutes mere surplusage and dicta; it is understandable that Judge Anderson would note that if a judge's remarks would not suffice for disqualification prior to a trial court's presiding over a trial, obtaining collateral relief would seem more problematic. Thus, relief should be denied both as a matter of fact and of law. While appellee agrees that the facts presented in Dragovich and the instant case are distinguishable, Judge Stanley did not prejudge the Porter case and the "conversation" with Clerk Beck did not happen.

Mr. Porter is not entitled to a new sentencing proceeding. Judge Stanley was impartial. Porter asserts that he should receive

a new resentencing retaining the benefit of the jury life recommendation. But this Court has previously recognized that the jury recommendation did not meet the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975):

> Defense counsel's description of an electrocution might well have been calculated to influence the recommendation of a life sentence through emotional appeal.
>
> Porter v. State, 429 So.2d 293, 296 (Fla. 1983)

And the jury did not have access to the Schapp deposition wherein he described Porter's intentions to steal a car and leave no witnesses. Id. at 296. As counterweight to the three aggravators found for this brutal beating - strangulation double homicide (HAC, homicide while engaged in a robbery for pecuniary gain and avoid arrest), the defense had proffered as mitigation Porter's age, being married with two children, lack of significant criminal history and employment history. This Court observed in footnote 2 of that opinion:

> FN2. Porter was 22 years old at the time of the crimes. Additionally, although Porter had been married and had fathered 2 children, at the time of the crimes he was living with a woman other than his wife. At resentencing the trial court allowed Porter to put on more mitigating evidence. The court, therefore, did not restrict the presentation of mitigating evidence, but merely found that the evidence presented carried little or no weight in mitigation.
>
> Porter v. State, 429 So.2d 293, FN2 (Fla. 1983)

The total absence of meaningful mitigation -- there was no mental health expert evidence to suggest that Porter's culpability should be lessened nor history of drug use as some capital defendants frequently urge -- renders the instant case comparable to Washington v. State, 653 So.2d 362 (Fla. 1995) wherein this Court approved the jury life recommendation override by Judge Schaeffer in a case that similarly presented information unavailable to the jury and only "inconsequential nonstatutory mitigating circumstances" such as close family ties and maternal support. Id. at 366.[12]

Moreover, it is extremely odd that Judge Stanley, in appellant's view, would have the preconceived notion to impose the death penalty prior to trial, yet the record reflects that during the penalty phase Judge Stanley erroneously ruled to the detriment of the prosecutor and to the benefit of the defendant that the state could not introduce evidence of crimes to rebut the no significant history mitigator absent a showing of convictions (R 745-747, FSC Case No. 55,841). See Washington v. State, 362 So.2d 658, 666-667 (Fla. 1978); Booker v. State, 397 So.2d 910, 918 (Fla. 1981); Smith v. State, 407 So.2d 894, 901 (Fla. 1981).

Relief should be denied.

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[12]Additionally both this Court and the federal courts have rejected Porter's assertions that trial counsel rendered ineffective assistance by the alleged failure to present other mitigation. Porter v. State, 478 So.2d 33, 35 (Fla. 1985); Porter v. Singletary, 14 F.3d 554, 556-560 (11th Cir. 1994).

ISSUE II

WHETHER JUDGE STANLEY'S DISQUALIFICATION WOULD HAVE BEEN REQUIRED HAD TRIAL COUNSEL KNOWN ABOUT BECK.

As determined by the lower court, Clerk Beck's story of a conversation with Judge Stanley -- who confided in him early in the trial (and who didn't know him) that he had changed venue to obtain a guilty verdict so that he could sentence him to death, a story controverted both by Judge Stanley and Nancy Raulerson and about which Mr. Beck remained curiously silent for seventeen years although he alternately stated that he didn't regard it as important yet couldn't live with himself if he didn't report it almost two decades later and who remembered the incident because of a conversation with State Attorney investigators which did not take place -- was not worthy of belief. Judge Stanley did not prejudge the case or tell Beck that he had.

In Omar Blanco v. State, 702 So.2d 1250 (Fla. 1997), this Court rejected as procedurally barred a claim that the trial court erred in denying a motion to recuse the judge and noted in a footnote that if the Court were to address the motion for recusal on the merits it would find no error. It should make little sense for a jurisprudence to recognize a theory of retroactive recusal to undo a conviction and sentence where the evidentiary hearing to determine the existence of the alleged bias two decades after the

incident has resulted in a determination that the claim is meritless (even if a facially sufficient motion to recuse made contemporaneously might have succeeded where no proper vehicle permits the truth of the matter to be discerned at that time).

To allow a judgment entered twenty years earlier to be set aside because trial counsel might have filed a motion to disqualify based on an assertion that has been rejected would create untold mischief in the criminal justice system and easily permit dissatisfied litigants a ready vehicle to sabotage valid judgments.

ISSUE III

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FAILING TO STRIKE HEARSAY TESTIMONY OF RON GAUSE.

At the evidentiary hearing, former state attorney investigator James R. Gause testified via telephone that he was in the office when the phone call came in from Jerry Beck on March 23, 1995. A few days later he went to the Glades County courthouse -- on March 27. He did not go there before that (Vol. IV, R 157-159). The files in a case are maintained in the county of original jurisdiction. On cross-examination Gause stated that his daybook or activity book reflected that he called Judge Stanley pursuant to prosecutor Fordham's request on March 23 and that he went to the Glades County courthouse on March 27 to look at records. He did not talk to Mr. Beck at the clerk's office on March 27 (Vol. IV, R 160-163). On redirect examination Gause stated that Fordham asked him to call Judge Stanley because Back had called (Vol. IV, R 164).

The defense moved to strike the testimony regarding Beck's calling on the 23rd because the witness was only relying on what Fordham told him (Vol. IV, R 164). The motion was denied and the defense called Fordham to testify (Vol. IV, R 165). Prosecutor Fordham testified that he received a phone call from Beck in the early afternoon hours of March 23; he had not read the newspaper article that day (Vol. IV, R 166). He did not recall asking Gause to do anything until he got the call from Beck (Vol. IV, R 169).

Mr. Beck had testified that he came forward with his information about his alleged conversation with Judge Stanley years earlier when in March of 1995 he received a phone call from his office that investigators with the State Attorney's office were looking for a case file in the Porter case and this incident jogged him memory (Vol. IV, R 17, R 22, R 25). Beck stated that the files were not kept in Glades County (Vol. IV, R 27).

Judge Anderson's order recites:

> 10. Beck states that the impetus for coming forward 17 years after the alleged conversation took place was a visit to his office by an investigator for the State Attorney's office on the eve of Porter's scheduled execution in 1995. Beck states that the investigator was looking for additional documentation when Porter was within 24 hours of execution and that this jogged Beck's memory. However, the State has proven to this Court that the visit by the State's investigator did not occur and, indeed, would not have occurred for two reasons. First, the State Attorney (and his investigator) obviously knew where the file was located (Charlotte County), and second, there would be no need for the State Attorney to have looked for additional documentation in Glades County while Porter was under a death watch.

(Vol. II, R 340)

Appellant complains that Gause's testimony constituted inadmissible hearsay and was beyond the scope of his knowledge. Assuming, only *arguendo*, that Gause who did not speak to Beck but only acted in response to a directive from prosecutor Fordham, provided hearsay evidence Fordham testified to the matter, as the

defense suggested should be done (Vol. IV, R 165-170). Appellant did not seek further corrective action and presumably was satisfied as to its resolution in the lower court. No further judicial remedy was sought and the complaint now must be deemed barred.[13]

[13]The only objection urged below as to Gause's testimony was with reference to Jerry Beck calling on March 23 because the witness had no knowledge of that, he was relying on what Mr. Fordham told him (Vol. IV, R 164). There was no objection to testimony about what caused him to call Judge Stanley; any complaint ab initio is untimely and barred. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

ISSUE IV

WHETHER THE TWENTIETH JUDICIAL CIRCUIT SHOULD HAVE BEEN DISQUALIFIED FROM MR. PORTER'S CASE.

Following the federal district court's determination that Porter had established cause to surmount the abuse of the writ doctrine and the procedural bar of Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977) as mandated by the Eleventh Circuit Court of Appeals in Porter v. Singletary, 49 F.3d 1483, 1489-1490 (11th Cir. 1995), this Court in its order of November 5, 1996 recited:

> The Joint Motion to Reopen Case filed in the above causes is hereby granted and the trial court is directed to hold an evidentiary hearing and determine the impartiality of Judge Richard M. Stanley, Jr. as a basis for a new sentencing hearing pursuant to Florida Rule of Criminal Procedure 3.850.

(Vol. I, R 1)

Porter sought to vacate the notice of hearing in the circuit court in part because of a pending motion in the Florida Supreme Court of a motion to disqualify the Twentieth Judicial Circuit (Vol. I, R 4-14). The state had filed in this Court its response in opposition to motion to disqualify Twentieth Judicial Circuit on or about November 18, 1996 arguing that the issue of credibility of witnesses former Judge Stanley and Clerk Jerry Beck would be an issue irrespective of where or to whom the case was assigned, that the passage of time and distance since retired Judge Stanley had sat on the bench and since Porter's 1978 trial would have dissipated whatever alleged taint present judicial officers in the

Twentieth Judicial Circuit may have been exposed to and the contention that Judge Reese would be a material witness was insignificant since Judge Reese had no personal information relating to the 1978 trial (Vol. I, R 18-20).[14]

As this Court is aware, this Court on January 16, 1997 issued its order denying the Motion to Disqualify Twentieth Judicial Circuit.

Appellant now complains that the lower court gave deference to Judge Stanley, criticizes Judge Anderson's reference to Stanley's "idiosyncracies", asserts that Judge Anderson did not attempt to evaluate Stanley's testimony and disregarded Eleventh Circuit language to support Judge Stanley's First Amendment right to free speech.

Judge Anderson's order did evaluate the credibility of both witnesses, Clerk Beck and Judge Stanley. As to Beck -- and again as urged in Issue I, *supra*, the demeanor of live witnesses was alone observed by Judge Anderson -- the court found that his testimony "doesn't add up" (Vol. II, R 346). He claimed that Judge Stanley, whom he did not know, confided in him that he changed venue to secure a conviction and sentence Porter to death but could not recall anything else about the conversation. He did not

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[14]At the evidentiary hearing the parties stipulated that Mr. Beck had contacted Judge Reese about the information he had to ask what he should do with it (Vol. IV, R 8). See also Vol. IV, Transcript of January 31, 1997 where the parties stipulated that Judge Reese told Beck to contact both the State Attorney's office and CCR with his information (p. 3).

mention it to anyone else for seventeen years, on the eve of an execution and testimony that he did not consider it important did not comport with ". . . common sense" (Vol. II, R 340).[15]

In contrast, Judge Stanley recalled no incident drinking coffee with anyone in the back area of the clerk's office (Vol. IV, R. 97), was corroborated by the testimony of secretary Nancy Raulerson who accompanied Stanley to court that he was not absent from her presence in some other room in the courthouse at a time Beck claimed the conversation occurred (Vol. IV, R. 146), and Judge Stanley confirmed that he did not and would not have made the statement Back attributed to him before trial (Vol. IV, R. 122). Judge Stanley explained that you await the penalty phase before you make a final decision (Vol. IV, R. 102). He did not tell Beck before trial he would send Porter to the chair (Vol. IV, R. 124, 127).

With respect to Judge Stanley's "idiosyncracies" (e.g., carrying brass knuckles, carrying a gun, etc.) Judge Anderson noted that Stanley:

> 17. . . . provides context for these practices which this Court accepts as true and not determinative of any undue bias or partiality at the time Stanley sentenced Porter to death.
>
> 18. Specifically, Judge Stanley testified that in the late 70's and early 80's, no security was provided in courtroom proceedings

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[15]This testimony also contrasts with Beck's assertion that he could not sleep at night and live with himself if he knew something about the proceedings without coming forward.

> like that we enjoy today. Due to the prosecution of several high profile drug cases, and the assassination of an Assistant State Attorney in his own home, the Court adequately explained the reason why he carried brass knuckles, guns or other weapons into court.
>
> (Vol II, R 342-343)

Appellant also asserts that Judge Anderson ignored the Eleventh Circuit Court of Appeals' comment that Canon 3B(9) of the Canons of Ethics requires a judge to make no public comment that might reasonably be expected to affect the outcome or fairness of a case pending or impending in any court. The provision is inapplicable in the instant case. At the time former Judge Stanley allegedly made statements to the media regarding his general capital punishment views he was not a judge -- having retired from the bench in 1985 (Vol. IV, R 94) and retired from the practice of law in 1989 (Vol. IV, R 121). Appellant cites no authority for the proposition that the Code of Judicial Conduct continues to operate a decade after a citizen ceases to function as a judicial officer forcing all who have served in such capacity to forfeit forever their First Amendment rights.

ISSUE V

WHETHER THE LOWER COURT ERRED IN THE MANNER IT TOOK JUDICIAL NOTICE.

Appellant next complains that although he twice below acknowledged that there was no objection to the lower court's taking judicial notice of the court files in State v. Avila and State v. McMunn -- once during the evidentiary hearing and once afterward (Vol. IV, p. 155; Vol. IV, TR 4-6 of January 31, 1997 hearing) it was reversible error to glean inferences from the record to support his finding that there is some evidence to support the contention that Beck possesses a general bias against law enforcement, the State Attorney and the judiciary. Appellant has failed to preserve any complaint on appellate review of this matter by objection in the lower court. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

Even if the claim were preserved, no reversible error appears. Appellant does not identify what in the court files of State v. Avila and State v. McMunn he either disagrees with or would choose to litigate -- and as to the trial court's alleged failure to provide an opportunity to present information, appellee submits that opportunity was given both at the evidentiary hearing and at the subsequent telephone conference call on January 31, 1997 -- when the defense proffered nothing. Further, quite apart from the Avila/McMunn court files, the state's contention of animosity or

bias by Beck toward the prosecutor and law enforcement was suggested by the testimony of Beck himself at the state and federal hearings (the latter was introduced below, Vol II, R 158-191) -- Beck stated that the only problem he had with State Attorney D'Alessandro was with regard to the death of his son (Vol. IV, R 41-42). Beck had testified at the federal evidentiary hearing that when the prosecutor declined to prosecute the case in which his son was killed he and a number of others had petitioned the governor for the appointment of a special prosecutor which he delivered to the governor's office and that a subsequent prosecution by a new prosecutor had resulted in acquittal (Vol. II, p. 34).[16]

Since appellant raised no complaint below regarding consideration of the Avila/McMunn court files, offered no objection below either prior to or subsequent to the lower court's ruling and even now does not specify what fact relied on in the court files he chooses to contest and since the trial court's conclusion is supported by other evidence to which the Avila/McMunn files are only cumulative, this Court must reject the claim that reversible error is present.

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[16]Beck also testified that he did not recall posting a document on the wall outside the door of his office that Mr. D'Alessandro did not prosecute the case involving his son (Vol. IV, p. 47).

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Litigation Director, Office of the Capital Collateral Regional Counsel, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this 27th day of February, 1998.

COUNSEL FOR APPELLEE