IN THE SUPREME COURT OF FLORIDA

CASE NOS. 90,101; 85,404; 85,410

RALEIGH PORTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of postconviction relief following the granting of a motion to reopen the case filed jointly by Mr. Porter and the State of Florida. The reopened cases were Case Nos. 85,410 and 85,404. This Court assigned Case No. 90,101 to the instant appeal.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"R2" -- record on resentencing appeal to this Court;

"PC-R1" -- record on 1995 appeal to this Court;

"PC-R2" -- record on appeal to this Court in reopened case;

"Supp. PC-R2" -- supplemental record on appeal to this Court in reopened case.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Porter has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Porter, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

Raleigh Porter's capital trial, sentencing, and resentencing proceedings were presided over by a judge who made the following comments during the evidentiary hearing ordered by this Court:

> [] 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 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.

(H. 108-09) (emphasis added).

* * *

> [] I never walked into a courtroom at the time that I was a judge that I didn't have a gun. . . .
>
> I might as well just lay it out, but I sat in court with a sawed off machine gun laying across my lap.

(H. 118) (emphasis added).

* * *

> I'll just lay this out for you. I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr. Porter wouldn't have had to be put to death. But if he had done that to my family, I'd a [sic] killed him.

(H. 117) (emphasis added).

The lower court judge found that Judge Stanley's actions merely constituted "idiosyncracies" (PC-R2. 343). Mr. Porter submits that Judge Stanley's actions

constituted a flagrant abuse of judicial authority and a blatant flaunting of the Canons of Judicial Ethics. Raleigh Porter is entitled to relief.

STATEMENT OF THE CASE AND FACTS

Mr. Porter was arrested on August 22, 1978, for two counts of first-degree murder and related offenses in the Twentieth Judicial Circuit in and for Charlotte County, Florida. Judge Richard M. Stanley presided over Mr. Porter's trial. Due to the extensive amount of pretrial publicity, Mr. Porter sought a change of venue to a county outside the Twentieth Judicial Circuit (R. 20). The trial court granted the motion in part, moving venue to Glades County, another county in the same circuit (R. 175). Mr. Porter thereafter filed a second request for a venue change from Glades County due to adverse pretrial publicity in that county as well, and again requested a change to a county outside the Twentieth Judicial Circuit (R. 169). Following a hearing, see R. 253-57, Judge Stanley denied the motion (R. 172).

Trial commenced in Moore Haven on Tuesday, November 28, 1978, and the guilt phase verdict was returned by the jury on November 30, 1978 (R. 183). On December 1, 1978, the penalty phase was conducted in Moore Haven, at which time the jury returned two life recommendations. On December 11, 1978, the judge sentencing occurred before Judge Stanley in Punta Gorda, Charlotte County, at which time Judge Stanley overrode the life recommendations and publicly announced his decision to impose two sentences of death (R. 786).

On direct appeal, this Court remanded for a judge resentencing due to

Gardner[1] error. Porter v. State, 400 So. 2d 5 (1981). Resentencing was held before Judge Stanley on August 3, 1981. Judge Stanley again imposed the death sentence. On appeal, this Court affirmed the sentences of death. Porter v. State, 429 So. 2d 293 (Fla. 1983).

On September 30, 1985, a death warrant was signed by Governor Graham. Mr. Porter filed a Rule 3.850 motion. The trial court denied all relief that same day, and this Court affirmed the summary denial of this motion as well as the request for a stay of execution. Porter v. State, 478 So. 2d 33 (Fla. 1985).

Mr. Porter then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of Florida, which was summarily denied. On appeal, the Eleventh Circuit Court of Appeals granted a stay of execution and remanded the case to the district court for an evidentiary hearing. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986).

During the pendency of Mr. Porter's case in the federal district court, Mr. Porter filed a habeas petition in this Court, which was subsequently denied. Porter v. Dugger, 559 So. 2d 201 (Fla. 1990).

The federal district court denied all relief following the evidentiary hearing. Porter v. Dugger, 805 F. Supp. 941 (M.D. Fla. 1992). On appeal, the Eleventh Circuit affirmed the denial of all relief. Porter v. Singletary, 14 F. 3d 554 (11th Cir. 1994), cert. denied, 115 S. Ct. 532 (1994).

On March 1, 1995, Governor Chiles signed Mr. Porter's second death warrant.

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[1]Gardner v. Florida, 430 U.S. 341 (1977).

On March 20, 1995, Mr. Porter filed a second Rule 3.850 motion. Argument on the motion was held before Judge Isaac Anderson on March 23, 1995. In addition to arguing the need for an evidentiary hearing on the claims alleged in the 3.850 motion, Mr. Porter's counsel also informed Judge Anderson that he had just learned that "the trial Judge had decided to impose death before the penalty phase had even occurred" (Transcript of Proceedings, 3/23/95, at 13). This argument was based on a newspaper article published that day, discussed in more detail infra. Later that afternoon, Judge Anderson summarily denied Mr. Porter's motion.

Mr. Porter's appellate brief[2] informed the Court in more detail of the new evidence that had developed since the March 23 hearing as a result of Judge Stanley's comments to the media:

> Newly discovered evidence, comprised of facts which first came to light in a newspaper article published March 23, 1995, establish that Raleigh Porter was sentenced to death by a judge who was biased against him, and who harbored such a predisposed attitude to impose a death sentence in this case that he made up his mind to impose death even before the penalty phase proceeding was conducted. Mr. Porter's postconviction counsel have as expeditiously as possible investigated this claim since the publication of Judge Stanley's remarks on March 23, 1995. These facts only recently came to light and were not previously ascertainable. These remarks require an evidentiary hearing at this time.
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> * * *
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> On Thursday, March 23, 1995, the Gainesville Sun, in an article concerning Mr. Porter's case, reported that Judge Stanley indicated that

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[2]The appeal was designated case number 85,410, which was the appeal that was eventually reopened by joint motion of the parties. The third case number in the instant case, 85,404, was assigned to the state habeas petition filed under warrant, and was also reopened by the Court's order of November 5, 1996.

> he had made the decision to sentence Mr. Porter to death the moment the jury returned with the guilty verdict: **"When the judgment was brought out by the jury that he [Raleigh Porter] was guilty, . . . I knew in my own mind what the penalty should be, and I sentenced him to it."** The Gainesville Sun, March 23, 1995, at 10A. Mr. Porter's postconviction counsel has also spoken to two reporters who have interviewed Judge Stanley during the past week. These reporters are Alan Judd with the Gainesville Sun and John Pancake with the Miami Herald. Counsel has been advised that Judge Stanley further stated that about the time of the Porter case, he was speaking at a public forum advocating the death penalty. During this public appearance, Judge Stanley expressed his view that he would be delighted to be able to personally carry out executions if he could pull his gun out of his boot and shoot the death-sentenced individual between the eyes.
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> * * *
>
> Here, Judge Stanley has now admitted in his media statements that he did not engage in a weighing process in 1981 since his decision to impose death was made in 1978. This evidence was not previously available. Collateral counsel cannot inquire of a judge's thought processes. State v. Lewis, 19 Fla. L. Weekly S545, S546 (Fla. 1994). Counsel had no means to obtain the judge's admission of a predetermined death sentence until he voluntarily disclosed it to the media. However, Judge Stanley's admission now establishes that Rule 3.850 relief must issue in light of Mr. Porter's unconstitutional death sentence.

Summary Initial Brief on Appellant's Appeal from the Denial of his Motion for Fla. R. Crim. P. 3.850 Relief and in Support of Appellant's Application for Stay of Execution, Case No. 85,410, at 12; 14; 17 (footnotes omitted) (emphasis in original).

Oral argument was conducted before this Court on March 28, 1995. Following the argument, counsel returned to their office and learned that Glades County Clerk of Court Jerry Beck had called CCR while counsel were attending the oral argument. One of Mr. Porter's attorneys, Todd Scher, returned Mr. Beck's telephone call. Following the phone call, Mr. Porter filed a supplemental pleading with an affidavit from Mr. Scher informing the Court of the information learned from Clerk Beck. Mr.

Scher's affidavit stated as follows:

> 1. I, Todd Scher, am an Assistant Capital Collateral Representative assigned to the case of Raleigh Porter. Today, March 28, 1995, our office received a phone call at approximately 11:18 a.m. from Jerry Beck, the Clerk of the Circuit Court for Glades County. Approximately 10 minutes later, I returned the call.
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> 2. Mr. Beck informed me that he was the Clerk of Court at the time of Raleigh Porter's first-degree murder trial. Mr. Beck began the conversation by indicating that he had some information regarding Mr. Porter's case but he was not sure the information was pertinent so he was going to inform our office as well as the State Attorney's Office.
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> 3. Mr. Beck related that he recalled that either before or during Mr. Porter's trial, which took place in Glades County, Judge Stanley came to the courthouse early one morning and stopped by the clerk's office. Mr. Beck and Judge Stanley sat down and had coffee together. During their conversation, Mr. Beck asked Judge Stanley why he had changed the venue in the Porter trial from Charlotte County to Glades County. Judge Stanley indicated that he moved the trial to Glades County because Glades County had people who would listen to the evidence and then would convict the son of a bitch. Then Judge Stanley said he would send Porter to the chair.

(Notice of Supplemental Information, March 28, 1995).

In addition to notifying the Court of the substance of Clerk Beck's statement to Mr. Scher, Mr. Porter also filed a supplemental pleading informing the Court of a MIAMI HERALD article appearing that morning in which Judge Stanley made additional remarks:

> The article supports Mr. Porter's appeal of the denial of Rule 3.850 relief and motion for stay of execution. The article reports of another interview with Judge Stanley concerning Raleigh Porter's death sentence. The article states, "The judge in the case, Richard M. Stanley of Naples, wasn't so sympathetic. And unbeknown to Porter's lawyers, he's already decided that Porter should die." The article also specifically quotes Judge Stanley regarding a debate with foes of capital punishment:

> They said to me, "Judge, suppose that they passed a law that said the man who passes the death sentence has to flip the switch on the electric chair?" I said to them, "Well, I will go along with that as long as they allow me, right after I pronounce the sentence, to reach down by my left leg and come up with my pistol and shoot 'em right between the eyes."

(Notice of Supplemental Authority, March 28, 1995).

Later that same day, this Court summarily affirmed the denial of relief, Porter v. State, 653 So. 2d 375 (Fla. 1995), noting in a footnote only that it had "considered the affidavit filed by Porter on March 28, 1995, as supplementing the record." Id. at 377-78 n. 2.

The following day, March 29, 1995, Mr. Porter filed a second federal habeas petition. At that point, Mr. Porter had been able to supplement his allegations with an affidavit of Clerk Beck, which provided:

> 1. My name is Jerry L. Beck and I am the Clerk of the Circuit and County Court for Glades County, Florida. I have been the Clerk here for more than eighteen years and I first took office in 1977.
>
> 2. In 1978, the trial of State vs. Raleigh Porter was held here in Glades County. The presiding judge, Richard Stanley from Charlotte County, either shortly before or during Mr. Porter's trial, came by the clerk's office early one morning and we sat down and had coffee together. I asked Judge Stanley why he had changed the venue from Charlotte to Glades County. Judge Stanley said that there had been a lot of publicity in the local area and that he moved the trial to Glades County because we had good, fair-minded people here who would listen and consider the evidence and then convict the son of a bitch. Then, Judge Stanley said, he would send Porter to the chair.
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> 3. On Monday, March 27, 1995, representatives from the Office of the State Attorney came to my office to get copies of documents from the Porter case file. This was the first time I thought about this case in many years and it caused me to recall the comments that Judge Stanley made to me. Since I am not an attorney and did not know if Judge Stanley's statements were at all relevant to the present

> disposition of the Porter case, I decided to come forward and reveal what I know. I called Chief Judge Thomas Reese to find out the proper way to make known this conversation. He said that if I was concerned I should contact both the Office of the Capital Collateral Representative and the Office of the State Attorney. I did so on Tuesday, March 28, 1995.
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> 4. I had no reason for not coming forward earlier except that nothing occurred that caused me to recall the Judge's comments about the Porter case. I feel that it is up to the courts to decide the importance of this information, which is why I have come forward with what I remember. I am a firm believer in the death penalty and I am not interested in influencing this case in any way.

(PC-R2. 327).

The federal district court denied relief without an evidentiary hearing, finding the claim about Judge Stanley procedurally barred and that "whether the judge was predisposed to the death penalty is not relevant." Porter v. Singletary, No. 95-109-Civ-FtM-17D (Order, March 30, 1995, United States District Judge Elizabeth Kovachevich). On appeal, the Eleventh Circuit Court of Appeals stayed Mr. Porter's execution, reversed the district court's findings with respect to the allegations about Judge Stanley, and remanded for an evidentiary hearing on the issue of whether cause and prejudice[3] defeated any procedural bar. Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995).

In first addressing the State's claim that Mr. Porter's counsel lacked diligence in discovering this information, the Eleventh Circuit held as a matter of law that collateral counsel had no duty to investigate the impartiality of Judge Stanley in the manner suggested by the State:

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[3]See Wainwright v. Sykes, 433 U.S. 72 (1977).

> In light of the Canons governing judicial conduct, we do not believe that an attorney conducting a reasonable investigation would consider it appropriate to question a judge, or the court personnel in the judge's court, about the judge's lack of impartiality. Canon 3(E)(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably be questioned. The Commentary to Canon 3(E)(1) provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Id. at 1489.

The Court went on to hold that Mr. Porter was entitled to an evidentiary hearing:

> Thus, it appears from Porter's proffer that Judge Stanley made wholly unanticipated and unpredictable remarks to the Clerk of Court during the trial, and that he has recently made similarly unanticipated and unpredictable remarks to reporters. This is not a case involving merely an uncorroborated news report or rumor. Nor does this case involve a conclusory proffer of judicial bias. In this case, the proffer is that the person who was then and continues to be the Clerk of Court, an officer of the court, has come forward sua sponte with specific and ostensibly reliable evidence that the judge had a fixed predisposition to sentence this particular defendant to death if he were convicted by the jury. The proffer is supported by the sworn affidavit of the Clerk. We conclude that Porter has proffered sufficient evidence on the issue or whether he has established cause to surmount the abuse of the writ doctrine and the state procedural bar. Therefore, we must remand this case to the district court 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.

> 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, 49 F. 3d at 1489-90.[4]

The Court distinguished the new proffers of evidence of lack of impartiality from the evidence that Mr. Porter had previously presented, namely, the fact that Judge Stanley wore brass knuckles and displayed a gun during Mr. Porter's judge sentencing, and the fact that the judgment and sentence indicating that Mr. Porter was to be sentenced to death was dated before the penalty phase. As to the brass knuckles and gun, the Eleventh Circuit noted that these issues "were readily explained by the State in the earlier proceedings as being the result of security precautions." Id. at 1488. Further, the sentencing order was "explained by the State as a clerical error." Id. The Eleventh Circuit held that "[t]hat 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." Id.

After the State unsuccessfully sought to vacate of the stay in the United States Supreme Court, Singletary v. Porter, 514 U.S. 1048 (1995), the case was set for an evidentiary hearing on March 27, 1996 before United States District Court Magistrate George T. Swartz. Eleven (11) witnesses were called on behalf of Mr. Porter. Aside

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[4]The Court further held that "[i]f Porter can prove that his sentencing judge lacked impartiality, we readily conclude Porter would also have satisfied the prejudice prong of [Wainwright v.] Sykes. Id. at 1490 n.13.

from Clerk Beck, these witnesses comprised the gamut of attorney and investigators that had worked on Mr. Porter's case since the original trial. The State did not call any witnesses.[5]

At the federal evidentiary hearing, Jerry Beck testified that he was and had been the elected Clerk of Court for Glades County, Florida, since 1977 (PC-R2. 159). In March of 1995, Mr. Beck contacted the CCR office as well as the State regarding Mr. Porter's case (PC-R2. 161); he then identified an affidavit he had executed on March 29, 1995, as well as an amended affidavit he had written with "a little clarification in my statement" (PC-R2. 163). However, the clarification did not address the substance of his statement with regard to the conversation with Judge Stanley (PC-R2. 163).

Mr. Beck explained that at the time of Mr. Porter's trial, which was conducted in Glades County, "Judge Stanley came in early for the trial, came in the clerk's office. I was the only one there at the time. I came in early, and I had coffee made and I invited him to have a cup of coffee, and we sit down at the table and had a cup of coffee" (PC-R2. 164). Mr. Beck then related the substance of the conversation:

> A [by Mr. Beck] As I indicated here in the affidavit, that Judge Stanley had indicated that there had been a tremendous amount of press coverage in the Charlotte County area, and he is looking for another place to relocate where there's not so much publicity, not so much interest in the case, and they moved it to Glades County. And he had indicated he thought there was some good fair minded people there that would listen to the evidence.

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[5]The transcript of the federal evidentiary hearing was admitted into evidence during the state court hearing. See PC-R2. 149-321.

Q And what else did he say?

A He said that they would consider the evidence, they'd convict the S.O.B., and then he would send him to the chair.

(PC-R2. 165).

Mr. Beck never told anyone of this conversation prior to March of 1995 (PC-R2. 166-67). Mr. Beck explained that he discussed this matter with Twentieth Judicial Circuit Chief Judge Reese before contacting CCR and the State:

A [by Mr. Beck] The State's Attorneys Office had sent some investigators into the clerk's office to search some type of documents or review the case, see if anything else had been entered, I suppose the reason for it.

I was in Lake Placid at the time with the county attorney. I received a call in Lake Placid, and really that's the first time that I had even thought about the case. It had been quite a number of years since and the time had passed out of mind.

And I got to thinking about it, and remembering back the conversation, what had transpired, and I didn't know what -- I didn't know of any procedures to take or how to handle anything, so Judge Reese, being the Chief Judge of this district, I called him and asked him what procedures were available for me to make known this conversation that had been held.

Q And after that conversation with Judge Reese did you call my office?

A After some soul searching, yes.

Q Was it a difficult --

A Extremely.

(PC-R2. 167-68).

On cross-examination, Mr. Beck indicated that he could not recall the exact day the conversation occurred, but that "it occurred early in the morning" at some

point during Mr. Porter's trial (PC-R2. 169). Mr. Beck explained that he did not know Judge Stanley other than knowing he was a circuit court judge (PC-R2. 170). Mr. Beck explained again on questioning by the State what occurred on that morning:

> Q Okay. Now, you both sat down and started having a cup of coffee, and I think you indicated that you asked him why he had changed the venue?
>
> A Yes, sir.
>
> Q And he answered, what was his answer?
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> A He answered that, as I said a moment ago, that they'd had a lot of publicity in the Charlotte County area and he was looking for a place where he could hold it where there hadn't been so much publicity, more disinterest, over there. And that Glades County had some good, honest people over there that would listen to the evidence, they would convict him and -- convict the son of a bitch and he would send him to the chair.
>
> Q Those were his exact words?
>
> A To the best I recollect, yes, sir.

(PC-R2. 170-71) (emphasis added).

Mr. Beck further explained that he was "a little surprised" by Judge Stanley's comment, and did not think the Judge was joking because "I would assume when a judge of that stature speaks, I think you should be able to put credibility into it" (PC-R2. 172). Mr. Beck did not discuss the conversation with Mr. Porter's trial attorneys because "I do my best not to interfere with trials or influence them in any way" (PC-R2. 174). After the trial, he did not discuss the matter with the appeal lawyers because "I wasn't keeping up with the case. After it left Glades County, it was transported from Charlotte County to Glades County for the purpose of the trial and I

would assume anything after that would be handled out of Charlotte County" (PC-R2. 175). Mr. Beck was not aware that the case had been remanded by the Florida Supreme Court for a resentencing (PC-R2. 176), was unaware of the death warrant in 1985 (PC-R2. 177), and was unaware that Mr. Porter's case was pending for several years in the federal courts (PC-R. 177-78). Mr. Beck again explained that it was the State's investigators who caused him to recall the conversation and come forward in 1995:

> Q [by Mr. Landry] Not until March '95. Well, why do you believe that it was important for the courts to decide the importance of this information in 1995 rather than at any time in the last seventeen years?
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> A [by Mr. Beck] The fact that the State Attorney's investigator showed up in the office there, I understood the execution to be taking place in a day or two, and I did not have any idea whether that was relevant to it or important, and I felt that I should put it in the hands of those in the system for those folks to make a decision.

(PC-R2. 178).

Mr. Beck denied that he had any interest in financial rewards or movie contracts and had no animosity whatsoever toward Judge Stanley (PC-R2. 182). The State then questioned Mr. Beck about the death of his son. Mr. Beck explained when his son was killed by a drunk driver, Governor Graham removed the State Attorney's Office for the Twentieth Judicial Circuit after receiving a petition signed by over two thousand citizens (PC-R2. 183). After Governor Graham assigned a special prosecutor, the trial resulted in an acquittal (Id.). Mr. Beck explained that he was not angry with the State Attorney's Office and in fact has "some good friends that are employed by the State Attorney's Office, as well as prosecutors and investigators"

(Id.). This incident had nothing to do with his coming forward with the information about Judge Stanley's conversation, which he reported "because we had a man who was scheduled to die within twenty-four hours, and if that conversation had any relevance to the case then I thought it should be made available" (PC-R2. 184).

On redirect, Mr. Beck explained that when he came forward, he had no intention of influencing the case or have Mr. Porter's execution stayed (PC-R2. 185). As to the death of his son, Mr. Beck explained that it had nothing to do with his coming forward; in fact, Mr. Beck's son was killed some sixteen years earlier in April of 1980 (PC-R2. 188).

At the federal evidentiary hearing, Stephan Widmeyer, see PC-R2. 197-205, and Robert Jacobs, see PC-R2. 192-196, testified that they represented Mr. Porter at original trial proceedings; Mr. Widmeyer handled the guilt and judge sentencing phases, and Mr. Jacobs conducted the penalty phase before the jury. Mr. Widmeyer recalled that he showed up at the judge sentencing proceeding confident that Judge Stanley would sentence Mr. Porter to life, given the jury's two life recommendations (PC-R2. 200-01). However, at the sentencing proceeding conducted before Judge Stanley back in Charlotte County, Judge Stanley overrode the jury's life recommendations while wearing brass knuckles and had a gun visible on the bench (PC-R2. 202-03). Mr. Widmeyer executed an affidavit concerning his observations of the brass knuckles and gun and provided that affidavit to direct appeal counsel (Id.). Both Mr. Widmeyer and Mr. Jacobs stated unequivocally that they did not know of Judge Stanley's remarks to Clerk Beck, and had no similar knowledge of bias on part

of Judge Stanley, and that had they known that Judge Stanley had made such remarks, they would have sought Judge Stanley's disqualification from Mr. Porter's case (PC-R2. 199 (Widmeyer); PC-R2. 193 (Jacobs)).

Judge W. Wayne Woodard, currently a county court judge in Charlotte County, was employed by the Charlotte County Public Defender's Office in 1981 and was assigned to represent Mr. Porter during his resentencing proceedings (PC-R2. 206). Judge Woodard stated unequivocally that at no time was he made aware that Judge Stanley had made the statements to Clerk Beck, or had any similar knowledge of bias on part of Judge Stanley (PC-R2. 207-08). Had he been aware of such information, Judge Woodard testified that he would have "taken whatever measures were available to raise the issue" (PC-R2. 208).

After considering the evidence and the arguments of the parties, the magistrate entered an order finding:

> The evidence presented at the hearing and the record in the case shows that neither Porter nor his counsel had knowledge that Judge Stanley made the alleged comment to Clerk Beck and that neither Porter nor his counsel had other similar knowledge to put them on notice of bias on the part of Judge Stanley. Therefore, Petitioner has established cause to surmount the abuse of the writ doctrine and the state procedural bar.

Report and Recommendation, Porter v. Singletary, No. 95-109-Civ-FtM-17(D) (May 24, 1996).[6] The magistrate credited Clerk Beck's testimony that he had not told anyone about the conversation with Judge Stanley until March 28, 1995. After receiving no objection by the State to the magistrate's findings, the district court

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[6]This order is attached to Mr. Porter's brief for the Court's review.

adopted his findings and ordered the case administratively closed "pending the state court's ruling on the parties' joint motion to reopen the state proceedings." Order, Porter v. Singletary, No. 95-109-Civ-FtM-17(D) (June 14, 1996).[7]

On October 14, 1996, Mr. Porter and the State jointly sought to reopen this Court's case numbers 85,410 and 85,404 in order "to address the impartiality of Judge Stanley." The parties also asked for a briefing schedule and oral argument. On November 5, 1996, the Court granted the motion (without permitting briefing or oral argument), and remanded for an evidentiary hearing to "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."

On November 7, 1996, Mr. Porter sought an order from this Court disqualifying the Twentieth Judicial Circuit from conducting the evidentiary hearing because "[t]he appearance of impropriety in having a sitting judge evaluate the testimony of fellow colleagues, including the former chief judge of the Circuit and the active Clerk of Court for a county in the circuit, more than justifies the assignment to another judicial circuit." Motion to Disqualify Twentieth Judicial Circuit and Request for Assignment of Another Judicial Circuit, at 4. Mr. Porter also sought clarification of the Court's order, requesting that "the scope of the hearing . . . be expanded to include the issue of Judge Stanley's lack of impartiality not only 'as a basis for a new sentencing hearing,' as ordered by the Court, but also as a basis for a new trial." Motion for Clarification of Order at 2. Mr. Porter pointed out that the parties, in their joint motion, did not

[7]This order is attached to Mr. Porter's brief for the Court's review.

limit their request to only sentencing issues; rather, the parties requested briefing as to "the impartiality of Judge Stanley." Id. at 3.[8] The Court declined to enlarge the scope of the hearing,[9] and the evidentiary hearing was scheduled for January 17, 1997 (PC-R2. 2-3).

In advance of the hearing, Mr. Porter subpoenaed Judge Stanley for a deposition, and the State filed a motion to quash, alleging, inter alia, "Judge Stanley is experiencing severe health problems" and acknowledging that Mr. Porter had indicated to the State his desire to depose Judge Stanley and that the State requested that "any subpoena for Judge Stanley should be issued in care of the Office of the State Attorney" (PC-R2. 35-36). Mr. Porter responded that during a telephone conversation, the State had agreed to allow Mr. Porter to depose Judge Stanley, and that the subpoena was to be served on the State Attorney's Office "because Judge Stanley did not want to divulge his address to Mr. Porter's counsel" (PC-R2. 55-57). The State never obtained an order quashing the subpoena, and the deposition took place as scheduled (PC-R2. 112-48).

Mr. Porter also subpoenaed various reporters for the hearing in order to establish the accuracy of the quotations attributed to Judge Stanley in the media.

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[8]The Eleventh Circuit's remand did not so limit Mr. Porter's challenge to Judge Stanley. Rather, the Court wrote that Mr. Porter should be provided a hearing to establish that "his sentencing judge lacked impartiality and violated his constitutional right to a fair and impartial tribunal." Porter v. Singletary, 49 F. 3d at 1490.

[9]Justice Anstead issued a dissent, in which Justice Shaw concurred, writing that "[i]t is apparent that this claim, if established, would provide a basis for a claim for a new trial. Instead of treating defendant's claims piece-meal, we should allow them both to be treated in the same proceedings below."

The Ft. Myers News-Press sought to quash the subpoena of reporter Jim Greenhill (PC-R2. 41-48), and Mr. Porter filed a response (PC-R2. 59-67). The Sarasota Herald-Tribune Company also sought to quash the subpoena of reporter Alan Judd (Supp. PC-R2. 411). These motions were set to be heard on the morning of the hearing (PC-R2. 38-40). After reviewing the submissions of the parties and the arguments of counsel, Judge Anderson orally denied the motions to quash the subpoenas for Greenhill and Judd (Transcript of Evidentiary Hearing at 4) [hereinafter "H.__"].[10]

Mr. Porter first called Jerry Beck to testify. Mr. Beck testified that he was elected Clerk of Court in Glades County in 1976, but was defeated in his election in

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[10]Judd could not appear in person, and it was agreed between the parties that his deposition would be taken at a later date and the record would be supplemented with that information (H. 5). A similar situation occurred with Twentieth Judicial Circuit Chief Judge Reese, who was subpoenaed by Mr. Porter but unavailable (H. 6). Rather than depose Judge Reese, the State agreed to stipulate to a proffer of Judge Reese's testimony offered by Mr. Porter's counsel:

> What I anticipate his testimony to be is that Mr. Beck, before calling my office about this information, contacted Judge Reese.
>
> My understanding is that they had a conversation, Mr. Beck informed Judge Reese of which his statement was going to be and obtained advise from Judge Reese and to the extent that Mr. Beck's credibility comes into question during these proceedings, it's important the fact that Mr. Beck went to Judge Reese supports that the statement was made and that certainly Mr. Beck was concerned about what he should do and when to seek counsel, so to speak, from the chief [judge].

(H. 7).

September of 1996 (H. 10-11). He contacted the CCR office on March 28, 1995, because he had recalled a conversation he had with Judge Richard Stanley either before or during the Raleigh Porter trial (H. 13). Prior to contacting CCR, Mr. Beck contacted Chief Judge Reese:

> Q [by Mr. Scher] Prior to contacting my office or the CCR Office in Tallahassee, what did you do before you contacted my office in terms of this statement?
>
> A [by Mr. Beck] Before I contacted your office, I contacted Judge Reese.
>
> Judge Reese was the Chief Judge of the Circuit and I expressed to him what I had recalled, the conversation being with Judge Stanley and he listened.
>
> When I got through talking to him, he said that if I was concerned, then I should call the CCR.
>
> I was unfamiliar with what that was. I asked him and he provided me with the phone number to your office.
>
> Q Could you explain, if you can, why you decided to go talk to Judge Reese?
>
> A Recalling the conversation that I had with Judge Stanley, I did not know whether that conversation had relevance to the Porter case or not.
>
> I didn't feel like that I was in any position to make that decision. I felt I should put it in someone else's hands and let them make that decision whether it's relevant or not.

(H. 14). Mr. Beck also discussed the matter with his chief deputy at the Clerk's office, Dick Blackwell (H. 22).

Mr. Beck again recounted the conversation he had with Judge Stanley:

> Q [by Mr. Scher] When you contacted me, you indicated that you had information that you recalled a conversation with Judge

Stanley, what was that conversation?

A The conversation was that he had came into the Clerk's office early, I normally arrive at the office before working time, I usually went in put on a pot of coffee.

Judge Stanley came in. I did not know him, I knew the name as being a judge in the 20th Judicial District.

I introduced myself and asked if he would like to have a cup of coffee and he said, sure, he would.

So we went back and sat down at a table.

I asked him why the trial, the Porter trial had been transferred to Glades County and he stated that Glades County had a lot of good honest people there, a jury could be selected which would listen to the case, consider the evidence, and convict him and then he would send him to the chair.

Q Now, you just stated that Judge Stanley said that they would listen to the evidence and convict him.

Do you recall if he used those exact words or was there another phrase that he used?

A It's been a long time ago. I cleaned that up a little bit.

Q It's important for you to state --

A He said they would convict the son of a bitch.

Q And after that is when he stated the he would send him to the chair?

A Yes.

(H. 14-16).

Mr. Beck explained that he had "completely forgotten about the trial" until he "received a phone call from the office that some of the investigators from the State Attorney's Office was in the office looking for a case file on the Porter case and they

called and asked me about it" (H. 17). At the time, he "didn't know whether [Mr. Porter] was still in prison or if sentence already [was] served or whatever, but when I got that call, it reminded me -- brought that conversation back and later on, I went, left Mr. Ryder's (phonetic) office, and of course, I thought about it a great deal" (H. 17-18). Mr. Beck did not have any intent to influence the case at all and did not know Mr. Porter or anyone in his family (H. 18-19); however, when he was caused to recall the conversation after receiving the phone call about the State Attorney investigators looking for records in Mr. Porter's case, he remembered the conversation because it left "a lasting impression in my memory" (H. 22).

After he contacted CCR, Mr. Beck was visited by a CCR investigator and an affidavit was executed (H. 19). After the original affidavit was signed, Mr. Beck explained that he executed an amended affidavit to reflect "a slight difference in the terminology that's used in the statement" (H. 20). There was no alteration of that part of the statement reflecting Judge Stanley's words, however (H. 20).[11]

Mr. Beck testified that it was difficult to come forward with this information because if he "kept his mouth shut, then the burden would be on me, and I didn't feel like I wanted to live with that. I don't think I wanted to live with the possibility that I

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[11]The record shows that the difference in the amended affidavit from the original affidavit is in paragraph 3. In the original, Mr. Beck stated that after he spoke to Chief Judge Reese, Judge Reese "said that if I decided to come forward I should contact both the Office of the Capital Collateral Representative and the Office of the State Attorney" (PC-R2. 324-25). In the amended affidavit, Mr. Beck changed the terminology to instead state that Judge Reese "said that if I was concerned, I should contact both the Office of the Capital Collateral Representative and the Office of the State Attorney" (PC-R2. 327). The substance of the conversation with Judge Stanley, however, remained unchanged in the two affidavits, as Mr. Beck testified (H. 20).

may have contributed to somebody else's death because of my not saying something" (H. 21). Mr. Beck acknowledged that he lost his efforts for re-election that year due to his coming forward with the information in the Porter case (H. 21).

Mr. Beck was then cross-examined by the State, when he explained that, since the trial, he had no further connection with the Porter case until the State Attorney investigators visited the Clerk's Office in March of 1995:

> A [by Mr. Beck] What brought it back to my memory, as I stated a moment ago, was when the State Attorney's investigators came to the Clerk's Office in Glades County looking for some Raleigh Porter case files.
>
> I did not know where Mr. Porter was. I didn't know whether he was still in prison or whether his sentence had been carried out. I had no idea.
>
> In Glades County, we only have the one small weekly paper. I do not subscribe to either, well, the Fort Myers paper is not even available over there, the Palm Beach paper, you can get it on the news stand. I did not know anything about it.

(H. 25).

The State Attorney then questioned Mr. Beck extensively about his certainty about the visit by the State Attorney's investigators to the Clerk's Office:

> Q [by Mr. Fordham] How certain are you that it was a State Attorney investigator there at the courthouse that day?
>
> A [by Mr. Beck] I was in Lake Placid at Attorney Ryder's (phonetic) office and my office staff calls and identified there were two men there as being from the State Attorney's Office.
>
> Q My question is, how certain are you that they were State Attorney's investigators?
>
> A I did not see them. My staff identified them as being State Attorney's investigators.

Q But the question is, how certain were you that they were State Attorney investigators?

A I believe my staff. I mean, I wasn't there to see them, but I believe my staff when they identified them.

(H. 26-27).

On questioning by the State, Mr. Beck detailed that the conversation with Judge Stanley occurred "in the back portion of the clerk's office, it had a table back there near the corner where the coffee pot was located" (H. 32). He could not recall the exact date when the conversation occurred, but believed that it was around the second day of trial and certainly "sometime before any conclusion of the trial" (H. 32). When asked about whether Judge Stanley used the exact words as Mr. Beck testified, Mr. Beck stated that he was not paraphrasing, and that "I can certainly swear to the basic statement, yes" (H. 34), and recalled the specifics of the words used by Judge Stanley "very vividly" (H. 39).

Mr. Beck was briefly questioned about the death of his son some sixteen years earlier. This incident occurred some time after Mr. Porter's trial (H. 42), and Mr. Beck acknowledged "no problems" with State Attorney Joseph D'Allessandro, and "have never had any particular problems with him as far as myself, personally" (H. 40). As for his reasons for not coming forward earlier, Mr. Beck explained that "not knowing anything about Mr. Porter's case, out of sight, out of mind. I did not know anything. Once I became aware that he had not, the sentence had not been served on him, he was alive, according to the information that I had received by way of the State Attorney's Office, that his time was -- of execution was short, I had that

information and I was concerned" (H. 47). Mr. Beck then reiterated his prior statements and testimony that he would have had trouble sleeping if he did not come forward with this information in 1995 after he had been caused to recall it due to the visit by the State Attorney's Office to the Clerk's Office in March of that year (H. 47-48).

On redirect, Mr. Beck explained why Mr. Porter's case had not been on his mind at all after it went back to Charlotte County:

> Q [by Mr. Scher] You indicated on cross-examination and the State had questioned you about not recalling what the verdict was in this case and what the recommendation was of the jury.
>
> Why is that? Why didn't you know what had happened to Mr. Porter's trial?
>
> A A lot of time had passed. I'm sure at the time of the trial I had heard, I had more information at that time.
>
> A lot of time has transpired, the case had been returned to Charlotte County, there is no news, nothing of the newspapers or anything, it was just forgotten and --
>
> Q As a Clerk of Courts in Glades County, was one of your jobs to keep up with everything going on in Charlotte County?
>
> A No, sir.

(H. 52).

Mr. Beck also clarified that his son's death occurred in April of 1980, and had nothing to do with his coming forward (H. 52). In fact, Mr. Beck did not like the fact that he had to be in court to testify to these matters (H. 53).[12]

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[12]As in federal court, Mr. Beck did not appear voluntarily, but was subpoenaed to testify (PC-R2. 32).

Mr. Porter then called Dick Blackwell, the director of criminal courts for Clerk of Court in Collier County, Florida (H. 60). Prior to that time he was chief deputy Clerk of Court for Glades County, Florida (H. 61). Mr. Beck was his boss, and Mr. Blackwell was the next in command after Mr. Beck (H. 62). He testified that they had a "[v]ery close" working relationship, and saw each other on a daily basis (H. 62).

Mr. Blackwell then identified an affidavit he had executed on March 29, 1995 (H. 63-64). See PC-R2. 328. Mr. Blackwell recalled a visit by investigators from what he thought was CCR who "requested to see certain records pertaining to the Raleigh Porter case, and my recollection was that Mr. Beck was not there at the time" (H. 64).[13] When Mr. Beck came into the office the following day, Mr. Blackwell informed him of the visit (H. 64). Mr. Beck then called Mr. Blackwell into his office and "asked me to close the door, and he said, something is bothering me and I'd like to talk to you about it. And then at that point, he went into the details of the issue that we're discussing" and told him of the statement made to him by Judge Stanley (H. 65). Due a hearsay objection by the State, Mr. Blackwell's testimony as to what Mr. Beck stated was proffered for the record:

> A Mr. Beck said to me that there was the occasion that he had arrived early one morning to his office, which was his normal way of doing during his first -- I believe he said his first term in office. This was prior, long before I was there.

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[13]Later on, Mr. Blackwell clarified that he was not certain if it was CCR or the State Attorney's Office who came looking for the records (H. 70). Subsequently during the hearing it was established that it was an investigator from the State Attorney's Office, not CCR, who came to the Glades County clerk's office in search of records. See H. 163.

> And that about the same time Judge Stanley had arrived at the courthouse, he greeted Judge Stanley, they talked just briefly, exchanging [pleasantries]. And Mr. Beck invited Judge Stanley into the office for a cup of coffee. Judge Stanley accepted, came into his office, and Mr. Beck made some inquiry as to why they had chosen Glades County for a change of venue from Charlotte County on the trial.
>
> And so he was asking Judge Stanley about this, and Judge Stanley supposedly responded that there had been a lot of publicity in Charlotte, so there was a concern about getting a fair trial and that he had confidence in the good people of Glades County that they would listen to the evidence, find him guilty, and I'll send the son of a bitch to the electric chair, or words to that effect.

(H. 68).

Mr. Blackwell detailed that Mr. Beck had explained that Judge Stanley's comment "took him back a little bit, and he was uncomfortable with it. But the trial went forward, and he got involved into other issues of running the clerk's office and had pretty much kind of forgotten about it or the outcome of the trial" (H. 67). After he learned of the visit by investigators in 1995, Mr. Blackwell explained that "all of this memory flooded back into [Mr. Beck's] mind, and he felt very uneasy about the knowledge that he had of that conversation, knowing that this was a pending death penalty case" (H. 67). When recounting this to Mr. Blackwell, Mr. Beck was "very concerned" and was not discussing the incident in a joking manner (H. 68).

Mr. Blackwell advised Mr. Beck about what to do:

> Q [by Mr. Scher] What was your advice to Mr. Beck after hearing this information?
>
> A [by Mr. Blackwell] Well, he asked me, he says, what do you think I should do? And I said, I think you know what to do, otherwise, we wouldn't be having this conversation.

* * *

Q Did he indicate to you that he wanted to come forward to influence Mr. Porter's case and stop the execution in any way?

A No, sir. As a matter of fact, he said to me, he said, my personal feeling is that the man is guilty. And then I responded by saying, well, obviously the jury has thought so.

(H. 68).

Mr. Beck had also expressed his concerns about coming forward, and that it was difficult for him to come forward (H. 69). Mr. Beck is "very highly regarded in the community, very active in civics" (H. 73). After an objection as to form, Judge Anderson observed "I can take from that that his reputation for truthfulness and honesty is good" (H. 73).

Mr. Porter then called James Greenhill, a reporter from the Ft. Myers News-Press (H. 79). Mr. Greenhill interviewed Judge Stanley, and the interview appeared on March 28, 1995 (H. 79-80; PC-R2. 329-30). Mr. Greenhill was asked to identify the accuracy of various quoted remarks attributed to Judge Stanley in the press. Mr. Greenhill testified that the statements in quotation marks, appearing below, were verbatim and accurate quotations of remarks spoken by Judge Stanley:

"Heinous, atrocious and cruel are the magic words," Stanley, 71, said of the Porter case Wednesday. "If such a thing had happened at my house, I would have shot the son of a .... If I had the case to try again, I would not have changed. If the jury found him guilty, I would have sentenced him to death."

The jury unanimously chose a life sentence. "I don't care," Stanley said. "The judge makes the final decision."

(H. 82-83). Mr. Greenhill also testified to the accuracy of the paraphrased remark made by Judge Stanley that he "has no memory" of the discussion with Jerry Beck

(H. 84). Mr. Porter then moved the newspaper article into evidence, and the State objected (H. 85). Judge Anderson indicated that he would "reserve ruling on the acceptance of that document into evidence at this time" (H. 85).

Mr. Porter then rested his case, with the exception of the deposition of reporter Alan Judd, which the parties agreed could be supplemented at a later time (H. 90). Mr. Porter also introduced into evidence without objection the transcript of the federal evidentiary hearing (H. 92), as well as Judge Stanley's deposition (H. 93).

The State called Judge Stanley as a witness. Judge Stanley testified that he retired as a judge in 1985 (H. 95), and was a circuit court judge in 1978 when he presided over Mr. Porter's trial. Judge Stanley acknowledged that he only had a "basic recollection" of the trial and that "[a]s far as being able to tell you everything that happened every day, no, sir, I could not do it" (H. 95).

Judge Stanley testified that he did not recall having a conversation with Jerry Beck but that he had "seen a lot in the newspaper about it in the last period of time" (H. 96). Judge Stanley reiterated that he "did not talk to Mr. Beck on it that I know of, no sir." (id.) (emphasis added), and that "I do not remember Mr. Beck" (H. 97). See also H. 121 ("I have no memory of Mr. Beck at all, period"); H. 122 ("I will say to you the same thing I said to a reporter or whatever. I don't remember. I don't know. I could have. It might not. I do not know. I don't remember it") (emphasis added).

Judge Stanley described his usual routine when going to Mr. Porter's trial in Glades County:

> A [by Judge Stanley] Mrs. Nancy Raulerson, who was my secretary, and, of course, we were in Punta Gorda, we would go -- go

back and forth from Punta Gorda to Moore Haven. When we got there, we would go into the courthouse. As far as to exactly what we did, I do not know, other than the fact that we were together.

Q [by Mr. Fordham] Okay. Can you say, sir, that you did not, at any time, arrive, before the courthouse was open, early and alone, without Ms. Nancy Raulerson, go into the back of the clerk's office and sit and coffee and a conversation with anyone?

A I do not remember having any conversation with anyone on it. Some of the things that I've read that was said, I did not say. I would not say.

(H. 97-98) (emphasis added).

Judge Stanley did recall that his "ultimate sentence was death" and that it was possible that he had told the media that he knew what the sentence should be in Mr. Porter's case when the jury found him guilty (H. 98). He would have been willing to "listen" to any mitigating circumstances offered at the penalty phase of Mr. Porter's case, but that he had a death sentence in mind after the jury found him guilty:

Q [by Mr. Fordham] Would it be fair to say, sir, that absent adequate mitigating circumstances, you knew what should have happened at that point? In other words, if you had not heard mitigating circumstances, would you have known what you should have done?

A I merely say that I believed when the time came for me to make a decision, I believe I made the right decision. I would make the right decision again right now under the same circumstances.

(H. 99-100) (emphasis added).

Judge Stanley acknowledged speaking to several reporters about Mr. Porter's case, but remembered no specific names (H. 101). Judge Stanley also did not tell a reporter that when the jury came back with a guilty verdict he knew what the penalty was going to be (H. 102). He did acknowledge that "if you have listened to an entire

trial like that, you'd have an opinion, but that's not the way it works" (H. 102). While "I might know what, in my own mind, I thought [the sentence] should be, but I'm not going to start telling people" (H. 127).

On cross-examination, Judge Stanley was shown the judgment and sentence form that was entered in 1978. Judge Stanley acknowledged that his signature appeared on that document, which was signed and dated November 30, 1978, and indicated that Mr. Porter was to be sentenced to death by execution (H. 105).[14] Judge Stanley also acknowledged that the form was executed in Glades County, as it indicated that it was "[d]one and ordered in open court at Glades County, Florida" (H. 106). Judge Stanley did not remember whether he sentenced Mr. Porter to death in Glades County, but "that's my signature and that's what is says on here" (H. 106).

Judge Stanley was further questioned about whether Mr. Porter's sentence was filled in when Judge Stanley signed the sentencing order on November 30, 1978:

> Q [by Mr. McClain] Would you have signed the document without --
>
> A I would have read it before I signed it.
>
> Q And it would have been filled out completely?
>
> A That's correct.
>
> Q So when you signed that document on November 30th, the sentence was contained in there?

---

[14]The jury in Mr. Porter's case, sitting in Glades County, found him guilty on November 30, 1978. The penalty phase did not commence until December 1, 1978. The sentencing before Judge Stanley occurred on December 11, 1978, in Charlotte County.

A Yes, sir.

* * *

Q So the date of your signature, November 30, 1978, you sentenced Mr. Porter to death?

A Evidently, yes, sir.

Q Okay, and would you have signed that document before the sentence was filled out?

A No.

Q Okay.

A No.

Q So would it be fair to say on November 30, 1978, you had decided the sentence?

A On November the 30th, 1978, I decided it?

Q Yes.

A What I'm saying is that's what the paper says.

Q Okay. And that's the court file?

A If that's the court file, that's when I did it. I mean, whatever.

(PC-R2. 106-08) (emphasis added).

Judge Stanley denied telling a reporter from the Miami Herald that he had publicly advocated for the death penalty and appeared in debates about the death penalty, but then admitted to these same facts:

> 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 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.

Q [by Mr. McClain] Now, when did you make that statement?

A Oh, God knows. I've made it a number of times.

(H. 108-09) (emphasis added).

Judge Stanley denied that he made this statement during a debate on the death penalty; rather, "I was talking to people that were in favor of or against the death penalty, and I made the statement then" (H. 109). He had no idea if these comments were made during the 1960's or 1970's or 1980's but he has felt that way for a long time and "I feel that way right now" (H. 109). He reiterated that he did not know how many times he made these statements, but analogized it to "[h]ow many times have I said good morning?" (H. 110).

Judge Stanley also recounted that in light of all the publicity that this matter had received, he had been contacted by friends; for example, he received a Christmas card that said "tell Dick to stick to his guns on the Porter case" (H. 111). Judge Stanley was asked to explain what that meant:

Q [by Mr. McClain] What did that mean?

A [by Judge Stanley] I don't know. You tell me what it meant.

Q Well, you're the one who received it. What did you think it meant?

A What do you think it meant? I think it meant the same thing that you think.

Q And what is that?

A That is, stick to your guns on the Raleigh Porter case. I sentenced him to death. Stick to it.

(H. 110-11) (emphasis added).

Judge Stanley was then questioned about Mr. Porter's resentencing in 1981:

Q [by Mr. McClain] How many sentencing proceedings did Mr. Porter have?

A I have no idea.

Q Do you recall whether there was a resentencing?

A A resentencing -- I do not remember, no sir.

Q If you indicated in the deposition that you did not recall a resentencing, is that consistent with your testimony here? In the deposition you indicated you did not recall that there was a resentencing, you didn't believe that there was one.

A That's correct.

Q So you believe the sentencing only happened one time in front of you?

A To the best of my knowledge, from the last time -- from the time that I sentenced Mr. Porter, I did not see him again until this morning when I saw him in court.

Q Okay. And based on the judgment that is there before you, when would that have been?

A Based on that judgment, it would be in 1978, 30th day of November, 1978.

(H. 116).

Judge Stanley was then questioned about Mr. Porter's first sentencing proceeding when trial counsel reported that Judge Stanley had worn brass knuckles:

Q Do you recall whether you had any brass knuckles at the sentencing proceeding?

A I do not think I did. I will say this. The brass knuckles that you keep talking about were steel knuckles. I was a prisoner [of] war in Germany. I was a paratrooper.

I brought back two pair of steel brass knuckles I got of a Gastopho [sic] headquarters in Chatham, Germany. I had those in my office and all. I never had them in a sentencing hearing or threaten anyone with them or anything of that nature.

(H. 117) (emphasis added). When asked why Mr. Porter's trial counsel, Mr. Widmeyer, reported at the time that he saw the brass knuckles, Judge Stanley could not recall who Mr. Widmeyer was and "don't know what he would know" (H. 117-18).

In addition to the brass --or steel-- knuckles, Judge Stanley was questioned whether he had carried a gun to Mr. Porter's sentencing:

Q [by Mr. McClain] Do you recall if you had a gun at the time of -- were you armed with a gun at the time of the sentencing?

A [by Judge Stanley] I will merely say this, that I never walked into a courtroom at the time that I was a judge that I didn't have a gun.

And there's a time there in Charlotte County when we were having all the drug cases and everything, I said -- I might as well just lay it out, but I sat in court with a sawed off machine gun laying across my lap.

And you look at me odd like that, but by the same token, the prosecuting officer in that courtroom was shot by someone coming up and knocking on his door, and he went to the door, and he was killed. Yes, I had a gun.

(H. 118) (emphasis added).

Judge Stanley acknowledged that he disagreed with the jury's recommended life sentences because "I didn't think it was proper" and "I felt that it should have

been something else, yes, if that's what you want" (H. 119). Judge Stanley was then questioned about a statement he made during his deposition that it was in his "inner nature" to disagree with the jury's recommendations:

> Q [by Mr. McClain] Did you indicate in the deposition that two days ago, in reference to your disagreement with the jury's recommendation, that it was because of your inner nature that you disagreed with it?
>
> A Because I felt that it should have been something else, yes, if that's what you mean.
>
> Q Well, no. I mean, the question is, do you recall using the words, the basis -- my inner nature was your answer?
>
> A What you're trying to get me to say is -- I'll just lay this out for you. I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr. Porter wouldn't have had to be put to death. But if he had done that to my family, I'd a killed him.
>
> Q And do you recall in the deposition indicating that, in explaining your inner nature, you talked about your family describing you as the meanest, or your brother's describing you as the meanest person he knew?
>
> A Why don't we go ahead and get all of that brought out?
>
> Q Okay.
>
> A And what that was, I stated that -- I was a paratrooper. I was a prisoner of war. My brother was a first lieutenant in the infantry, and he had a direct hit with a motor shell in lost his entire left leg.
>
> He was in Atlanta, Georgia at Lawson General Hospital when I came back from overseas. I went there, of course, to see him on furlough and so forth. And we'd been walking down the street, and we would meet another paratrooper. And a lot of paratroopers would not solute [sic] regardless of the rank that you had; it was whether you had parachute wings on or not.
>
> And they'd walk past without saluting him. I'd call him to come back here, jocko. Didn't you see that lieutenant? And depending on

what they said, well, you see him now, why don't you salute him? And if they had it -- it's up to you. You got a choice. You can either salute him or whip my butt. Let's get at in one-way or another.

That's what made my brother go back and say I was the meanest man he ever saw. But if it was my family and I would have done just exactly what I said.

Before I was a lawyer, I had 4 years, 10 months, and 27 days at the parachute infantry, and I lived in it even though I got to be a lawyer.

(H. 118-21) (emphasis added).

Judge Stanley also was questioned further on Ms. Raulerson's attendance at the trial in Glades County:

Q [by Mr. McClain] I believe on direct examination you indicated that Nancy Raulerson was your secretary at the time of Mr. Porter's trial; is that correct?

A [by Judge Stanley] That's correct.

Q You indicated that during the trial she traveled with you to Glades County; is that correct?

A That's correct.

Q And that she was with you most of the time?

A She was in court. We went back and forth.

Q All right. Was there ever a time that she was not there?

A There might have been one day when she stayed in Charlotte County taking care of business there.

Q Okay. So you -- so she may have missed a day and not have been present?

A That's correct. I honestly don't remember scheduling and so forth 19 years ago or whatever it was.

(H. 129-30) (emphasis added).

Judge Stanley was also questioned about his contacts with the State Attorney's Office. Judge Stanley denied ever having any contact with the State until the day of his deposition, when he met and spoke with Assistant State Attorney Fordham for the first time (H. 115). He recalled mentioning Ms. Raulerson's name during the deposition, which occurred on January 15, 1997, and knew that she had been subpoenaed for the hearing, but did not know how the State knew to subpoena Ms. Raulerson, whose subpoena was issued on January 14, 1997,[15] one day prior to the deposition (PC-R2. 115).

On redirect, when asked whether the sentencing order dated November 30, 1978, could be a scriveners error, Judge Stanley stated that "30th day of November is what it says here" (H. 134). After more questioning, Judge Stanley stated that "I know I signed this document. My signature is on it. Exactly when I signed what, I don't know" (H. 135). As for the resentencing in 1981, the State showed Judge Stanley his sentencing order in 1981; Judge Stanley remembered signing it but that he "would not have remembered [the resentencing] if you hadn't shown me that, because just generally, no, it didn't change anything" (H. 137).

On recross, Judge Stanley acknowledged that the judgment and sentencing form was dated "November 30, 1978, filed in Glades County, Florida" (H. 136-37), and that the document "speaks for itself, I would say" (H. 137). When asked where he was when he signed the document, he acknowledged that the form stated Glades County, so he "would assume that" he was in Glades County when he executed the

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[15]See PC-R2. 50.

judgment and sentence form (H. 138). As for when he signed the document, the document, which indicates November 30, 1978, "speaks for itself" (H. 138). After reading the document again, Judge Stanley admitted that "I do not remember signing this" and conceded that this memory regarding these events in 1978 had dimmed with time (H. 139). However, he stated that it was his normal practice to read and judgment and sentence before signing it, and before signing a judgment and sentence it would be accurate and filled in completely (H. 140). At that point, Judge Anderson, over Mr. McClain's attempt to argue that this was addressed in the State's redirect examination, intervened and ordered Mr. McClain to address another area in order to "not cloud it any more" (H. 140-41).

Finally, Judge Stanley was asked about his apparent recollection on redirect examination of Mr. Porter's resentencing in 1981:

> Q [by Mr. McClain] During my cross-examination, you indicated you did not recall any other sentencing besides the one that occurred in 1978. You now recall the 1981 resentencing?
>
> A [by Judge Stanley] Not really, no.
>
> Q When you say "not really," do you have any memory of it at all?
>
> A No.
>
> Q And so would it -- is there any question that I can ask you that you would have any memory of regarding the 1981 sentencing? I mean, it's just not there?
>
> A No.
>
> Q It's not in your head?
>
> A No.

(H. 141).

The State then called Nancy Raulerson, who was Judge Stanley's secretary in 1978. She recalled that for the trial, held in Glades County, she and the judge would ride together and that she went with him every day except for one day (H. 144), which she believed was a Thursday (H. 145). She explained their routine when going to Moore Haven:

> Q [by Mr. Fordham] Now, would you tell us, Ms. Raulerson, what the logistics were. You would drive over there, and what would you do when you get there and things like that?
>
> A [by Ms. Raulerson] We would just drive over, and there was a little restaurant right across the street, and we would both go over there and have coffee and breakfast and then go right to the courtroom and go right back there for lunch and then go back to the courtroom and come back to Punta Gorda.
>
> Q Did you do that pretty much each of those mornings you went over there?
>
> A Yes, sir.

(H. 145) (emphasis added).

Ms. Raulerson testified that during all the time she and Judge Stanley were in Glades County, there was never an occasion when the judge was gone from her presence for 10 or 15 minutes (H. 146), and that on those days she went to Glades County with Judge Stanley, she would have known if he had gone into the clerk's office (H. 146).

On cross-examination, Ms. Raulerson acknowledged talking to someone from the State Attorney's Office because "they just called me and asked me if I would come to this hearing" and that this conversation occurred "two or three months ago"

(H. 147). She did not know how they knew to call her (H. 147). She admitted talking to Judge Stanley at some point about being subpoenaed, but only told him "that I would be here" pursuant to her subpoena (H. 149).[16] Further, as to the day she didn't go to Glades County with Judge Stanley, she had no idea what he did, and would have no way of knowing if he had coffee with Jerry Beck that day (H. 151).

Prior to calling the final witness, the State renewed its request to exclude all the media testimony, which the Court again indicated it was taking under advisement (H. 155). The Court also asked whether the parties had any objection to the court's taking judicial notice of the court file with respect to the criminal case arising from the death of Mr. Beck's son, and neither party objected (H. 155).

The State's final witness was Ron Gause, who appeared by telephone (H. 156). Mr. Gause was an investigator for the State Attorney's Office for the Twentieth Judicial Circuit, and was employed as such in 1978 as well as in 1995 (H. 158). Mr. Gause was in the office when a call came in from Jerry Beck, which was, according to his notebook, on March 23, 1995 (H. 158). On March 27, 1995, Mr. Gause went to the Glades County Courthouse (H. 158-59). He testified that prior to March 27, 1995, he had not gone to the Glades County Courthouse, and that in his experience, the files in a criminal case are maintained in the county with jurisdiction over the crime, not where venue was changed (H. 159).

On cross-examination, Mr. Gause explained that in his datebook, he had an entry stating "at three o'clock, verbatim, it says ex-judge Stanley in State v. Porter,

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[16]Ms. Raulerson was subpoenaed three days before the hearing. See PC-R. 50.

which means I called Judge Stanley on that day" (H. 160) (emphasis added). He called Judge Stanley "[t]o find out -- I do not remember the exact allegations, but Mr. Beck had told our office that Stanley said certain things. What they were exactly, I do not recall. But that's why I called Stanley to see whether he said these things" (H. 160). He explained that the date book does not reflect that he spoke with Mr. Beck on March 23 (H. 160); rather, he recalled that "Mr. Fordham, who was the lead attorney in our office at that time, called me in, and to the best of my recollection, told me what happened and that there was going to be -- we needed to check into it, to check these things out" (H. 161). Mr. Gause was not aware that on March 23, 1995, an article had appeared in the Gainesville Sun with some quoted statements from Judge Stanley, or that this issue was discussed at a hearing on March 23, 1995 (H. 161). Thus, when Mr. Fordham asked him to call Judge Stanley on March 23, 1995, Mr. Gause did not know if that inquiry was prompted by the newspaper article (H. 161). There was nothing in his book stating that Mr. Beck contacted the State Attorney's Office on March 23, "but that was my understanding" (H. 161). Mr. Gause only knew that he was asked to call Judge Stanley on March 23, 1995, and that he did so (H. 162).

Furthermore, Mr. Gause's datebook did reflect that he went to the Glades County Courthouse on March 27, 1995, at which time he would have identified himself as an employee of the State Attorney's Office (H. 162). If Mr. Beck had understood that someone from the State Attorney's Office came to the Glades County Courthouse on that day, that understanding would be accurate because "I was there

that day and certainly would have told him who I was" (H. 163). Mr. Gause did not speak with Mr. Beck, however, on March 27, 1995, because "I don't think he was there" (H. 163). Mr. Gause explained why he had been sent to the Glades County Courthose on March 27, 1995:

> Q [by Mr. McClain] Why were you at the Glades County Courthouse on Monday, March 27th?
>
> A To check the dockets of books to see what was entered in the books.
>
> Q So you didn't specifically want to talk to Jerry Beck?
>
> A No.
>
> Q You were just simply looking at the records?
>
> A Yes.

(H. 163) (emphasis added).

Based on Mr. Gause's testimony, Mr. Porter objected to and moved to strike the testimony referring to Mr. Beck calling on March 23, 1995 "because the witness had no knowledge of that. He is simply relying on what may or may not have been told to him by Mr. Fordham and what his notes are of his actions in light of the direction that he was given" (H. 164). The State responded that "the fact remains that Mr. Gause only responded to my direction, and as he acknowledged in his testimony, the very first time I talked with him about this case and asked him to call Judge Stanley, I had told him it was because of a phone call from Jerry Beck" (H. 165). Mr. Porter argued that "Mr. Fordham is the appropriate witness and should be on the witness stand providing the evidence" (Id.). Judge Anderson then denied Mr.

Porter's motion to strike Gause's testimony, and the State rested (Id.).

In rebuttal, Mr. Porter called Assistant State Attorney Fordham to testify. Mr. Fordham testified that he recalled that Mr. Porter's case was under a death warrant in March, 1995, and had not personally read the newspaper article on March 23, 1995, but did receive a call from Mr. Beck "in the early afternoon hours of that day" (H. 166). When reminded that the parties were in a hearing on March 23, 1995, for a Huff hearing during the afternoon of March 23, 1995, Mr. Fordham did not know what hearing it was nor did he remember when it was (H. 166-67). The only physical or documentary evidence that supported the notion that Mr. Beck contacted him on March 23, 1995, was "[j]ust in reconstructing it with Ron [Gause] and with entries in our office papers" (H. 168). When asked if he was present during the hearing when Mr. McClain raised the issue of the new evidence regarding Judge Stanley, Mr. Fordham professed to having "no active role in the hearing" although he was present (H. 168).[17] As to what prompted him to have Mr. Gause do anything, "I don't remember telling Ron to do anything on this case until such time as I got the phone call from Jerry Beck" (H. 169). Mr. Fordham did not let Mr. McClain or CCR know about this phone call because Mr. Beck "told me that he had just talked to your office" and he also said that "Judge Reese had suggested he call us both" (H.

[17]The record establishes that Mr. Fordham was present for the Huff hearing on March 23, 1995, which commenced at 1:30 PM, during which Mr. McClain referred to the Gainesville Sun article discussing an interview with Judge Stanley.

169).[18] Mr. Fordham indicated he was present during the federal hearing when it was established that the phone call from Mr. Beck was made on March 28, 1995 (H. 170).[19]

Following Mr. Fordham's testimony, the hearing was concluded until the following week when the parties perpetuated the testimony of Alan Judd. Mr. Judd was a reporter for the New York Times Regional Newspaper Group in 1995, and authored a newspaper article appearing in the Gainesville Sun on March 23, 1995, regarding Mr. Porter's case (PC-R2. 78). Mr. Judd also authored an article appearing on April 1, 1995, in the same newspaper (PC-R2. 79).

With respect to the March 23 article, Mr. Judd verified that the remarks attributed to Judge Stanley that appeared in quotation marks were verbatim statements made by the Judge (PC-R2. 79-80). These remarks appeared as follows:

> "I felt so sorry for that old, old couple and what they had to go through," Stanley, now retired in Naples, said during a recent interview. "One of those old people had to watch their spouse of 50 years killed by that son of a bitch."
>
> The jury deliberated just 17 minutes before recommending that Porter get a life sentence. But Florida is one of four states in which judges can overrule a jury's sentencing recommendation in a capital case, and Stanley had already decided on a harsher punishment.
>
> "When the judgment was brought out by the jury that he was guilty," Stanley said, "I knew in my own mind what the penalty should

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[18]However, the State stipulated during the hearing below that Judge Reese would testify that Clerk Beck's phone call occurred on March 28, 1995.

[19]At the federal evidentiary hearing, the State did not contest the date of the phone call or object to the magistrate's findings under 28 U.S.C. § 636(b)(1), and Clerk Beck was found credible and his testimony was accepted as true.

be, and I sentenced him to it."

(PC-R2. 332). Mr. Judd also confirmed having been told that by Judge Stanley that he (Judge Stanley) made remarks during a debates on the death penalty advocating the position of reaching down and pulling up a gun to shoot the defendant between the eyes (PC-R2. 81).

On cross-examination, Mr. Judd was questioned about Judge Stanley's physical health when he made the comments. Mr. Judd explained that "[a]s far as I know, his physical health was fine" and in fact, "shortly thereafter around the time the stay was issued he was on a hunting trip unavailable to me for comments" (PC-R2. 83). Mr. Judd was questioned about whether he knew of unhealthy people who could still hunt, and Mr. Judd did not know one way or another (PC-R2. 83), but that Judge Stanley "gave me no reason to believe that he was no capable to speak to me on the telephone" and that he "had a very detailed memory of the trial and the sentencing which would indicate that his mental state was fine at that time to me" (PC-R2. 84). Mr. Judd was also asked if he had any knowledge that Judge Stanley was not hallucinating when he gave his interview to Mr. Judd, to which Mr. Judd responded: "His details that he recited to me were very similar to the details I had read in clippings about the case and in court papers" (PC-R2. 84).

Following the deposition, Mr. Porter supplemented his case with Mr. Judd's testimony (PC-R2. 70). Thereafter, the parties filed post-hearing memoranda. See Supp. PC-R2. 419-21 (State's memorandum); Supp. PC-R2. 422-37 (Mr. Porter's memorandum).

On February 4, 1997, Judge Anderson entered an order finding that "the only safe conclusion that this court can draw from the evidence presented is that the conversation as alleged by Jerry Beck probably didn't take place, or if it did, that the Judge made the comments in a joking manner and they were received as such by Mr. Beck" (PC-R2. 347).[20] Further, Judge Anderson, relying on Dragovich v. State, 492 So. 2d 350 (Fla. 1986), found that even if the statement was made and was not made in a joking manner, "this Court fails to see how such an allegation would be sufficient as a matter of law to support a [sic] postconviction relief under Rule 3.850" (PC-R2. 347). Mr. Porter timely filed a notice of appeal (PC-R2. 353).

[20]Judge Anderson did not address the evidence that a motion to disqualify Judge Stanley would have been made and would have been granted had trial or resentencing counsel been advised of Clerk Beck's assertion. See Argument II, infra.

SUMMARY OF THE ARGUMENTS

I. Judge Richard M. Stanley was not impartial when he presided over Raleigh Porter's trial and resentencing proceedings, thereby establishing Mr. Porter's right to a new trial and/or sentencing. Prior to the close of the evidence at trial, Judge Stanley told the presiding Clerk of Court in Glades County over a cup of coffee early one morning prior to trial that he had changed the venue of Mr. Porter's trial from Charlotte to Glades County because Glades County had fairminded people who would listen to the evidence, convict the "son of a bitch" and then he would sentence Mr. Porter "to the chair." Clerk Jerry Beck -- a state official and a constitutional officer -- testified to Judge Stanley's comments in federal court, where a federal magistrate credited Beck's testimony about the conversation as well as the fact that Beck did not contact either the State or Mr. Porter's counsel until March 28, 1995. After the federal courts ruled in Mr. Porter's favor on the procedural bar issue, the parties jointly sought to reopen the state court proceedings. At the evidentiary hearing ordered by this Court, Mr. Porter again presented the testimony of Jerry Beck, as well as other witnesses who corroborated Beck's testimony and further established Judge Stanley's lack of impartiality. Judge Stanley testified on behalf of the State that he did not remember Clerk Beck, and vacillated about whether or not the conversation with Beck took place. Stanley testified that he accompanied by his assistant, Nancy Raulerson, when they went to Glades County every day but one day. Nancy Raulerson also testified that she accompanied Judge Stanley to Glades County, where they would go to a coffee shop across the street from the courthouse

to get a cup of coffee before the trial. However, Raulerson acknowledged that there was one day she did not accompany Stanley to Glades County, and would have no way of knowing if Stanley had a cup of coffee and talked with Clerk Beck on the day she was not there. Judge Stanley further testified that the judgment and sentencing form he executed in Mr. Porter's case was dated November 30, 1978, the day of the guilty verdict. The form, which included Mr. Porter's sentence of death, was completely filled in when Judge Stanley signed it on November 30, 1978, indicating that he sentenced Mr. Porter to death on that date. The penalty phase did not commence until December 1, 1978, when the jury returned two life recommendations. Judge Stanley also acknowledged making public statements about the death penalty at the time of Mr. Porter's trial and keeping a sawed-off machine gun on his lap during Mr. Porter's trial. Judge Stanley also testified that had Mr. Porter committed this crime against someone in the judge's family, Mr. Porter would not need to have been sentenced to death because the judge would have killed Mr. Porter himself. Judge Stanley did not remember at all Mr. Porter's resentencing in 1981. Judge Anderson completely ignored the testimony presented by both Mr. Porter and the State, for to be sure the testimony presented by the State further established Mr. Porter's entitlement to relief. Judge Anderson found that the conversation "probably didn't take place" or if it did it was said in a "joking manner." However, the evidence overwhelmingly established that the conversation did take place, and whether it was said in a joking manner or not is not relevant. Further, "joking" around about sentencing a defendant "to the chair" prior to the end of the trial is repugnant to any

notion of judicial decorum and propriety, and also establishes Judge Stanley's lack of impartiality. Judge Anderson also failed to address Mr. Porter's argument that had Mr. Porter's trial and/or resentencing attorneys known of the conversation, a motion to disqualify Judge Stanley would have to have been granted under well-settled precedent which precludes a judge from contesting the truth of allegations made in a motion to disqualify. The only case cited by Judge Anderson, Dragovich v. State, is completely inapposite to the situation in Mr. Porter's case, for in Mr. Porter's case, as the Eleventh Circuit Court of Appeals found, the evidence established that the judge had a fixed predisposition to sentence Raleigh Porter to death if found guilty by the jury. In sum, Judge Anderson's order contains findings made of whole cloth and that are totally inconsistent with the evidence presented and with the law. Mr. Porter is entitled to a new trial and/or a new sentencing proceeding at which time he would be entitled to the benefit of his prior jury recommendations of life.

II. Had Mr. Porter's trial and/or resentencing attorney's known of Clerk Beck's conversation with Judge Stanley, a motion to disqualify Judge Stanley from presiding over Mr. Porter's trial would have to have been granted. Here, a state official and a constitutional officer possessed information that established that Judge Stanley was not impartial and was biased against Mr. Porter. Mr. Porter's trial and resentencing attorneys testified during the federal evidentiary hearing that they would have sought Judge Stanley's disqualification had they known of Clerk Beck's information. Judge Stanley would have been precluded under Florida law from contesting the truth of the allegations, so even if he denied having the conversation

with Clerk Beck, the motion would have to have been granted.

III. The lower court failed to strike portions of the testimony of State's witness Ron Gause, which was hearsay and beyond the scope of the witness' knowledge. During the hearing, Gause testified that Clerk Beck contacted the State Attorney's Office on March 23, 1995, which led Gause to contact Judge Stanley. Howeover, Gause testified that he only told by the Assistant State Attorney that Mr. Beck had called on March 23, 1995, and had no personal knowledge of the call. Mr. Porter objected to the hearsay testimony, but Judge Anderson erroneously failed to strike this portion of Gause's testimony.

IV. Mr. Porter renews his request to move the evidentiary hearing to a county outside the Twentieth Judicial Circuit. Judge Anderson clearly expressed unjustified deference to Judge Stanley, without ever analyzing his testimony and that of other witnesses, which established Judge Stanley's lack of credibility. Fairness dictates that Mr. Porter be afforded a hearing in a judicial circuit in no way connected to his case.

V. Judge Anderson erred in the manner in which he took judicial notice of court records. Judge Anderson failed to comply with the judicial notice statutes and their requirements of notice and opportunity to be heard on the matters judicially noticed, as well as failing to make the judicially noticed records part of the record in Mr. Porter's case. Judge Anderson thereby precluded this Court and the parties from arguing on appeal anything about the contents of these records due to his failure to comply with the judicial notice statutes. Reversal is required.

ARGUMENT I

MR. PORTER WAS DENIED HIS RIGHT TO AN IMPARTIAL TRIBUNAL AT ALL PHASES OF HIS CAPITAL TRIAL PRESIDED OVER BY JUDGE RICHARD M. STANLEY.

A. INTRODUCTION.

> ***I'll just lay this out for you. I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr. Porter wouldn't have had to be put to death. But if he had done that to my family, I'd a [sic] killed him.***

(Testimony of Judge Richard M. Stanley, Jr).

The Eleventh Circuit Court of Appeals recognized in Mr. Porter's case that "[t]he law is well-settled that a fundamental tenet of due process is a fair and impartial tribunal." Porter v. Singletary, 49 F. 3d 1483, 1487-88 (11th Cir. 1995). Here, the former Clerk of Courts for Glades County -- an elected state official and a constitutional officer -- testified under oath in both federal and state court that, prior to the ending of Mr. Porter's capital trial, Judge Richard Stanley told him that venue was changed from Charlotte County to Glades County, where there were good fairminded people who would convict "the son of a bitch" and then Judge Stanley would "send him to the chair." True to his word, Judge Stanley thereafter overrode two jury recommendation of life imprisonment and sentenced Mr. Porter to death. Mr. Porter is entitled to a new trial and/or a new sentencing proceeding at which he would be entitled to his prior jury recommendations of life.

At the evidentiary hearing held before Judge Anderson, Mr. Porter presented more than competent and substantial evidence that this conversation occurred and

that Judge Stanley was not impartial when he presided over Mr. Porter's capital trial in 1978 and his resentencing proceedings in 1981. When this Court remanded for the hearing, it presumed that the evidence presented by Mr. Porter would be evaluated and considered; however, as explained in detail below, the lower court totally ignored the evidence presented by Mr. Porter, and in fact, ignored the evidence presented by the State because to be sure, the evidence presented by the State corroborated the evidence presented by Mr. Porter, and established without a doubt his entitlement to relief. Judge Anderson totally ignored the federal magistrate's acceptance of Clerk Beck's testimony and the State's decision not to object to either the findings of the magistrate judge or the federal judge's order adopting the magistrate's findings.

B. JUDGE STANLEY LACKED IMPARTIALITY.

The lower court wrote that the "issue of the impartiality vel non of Judge Richard Mr. Stanley, Jr., depends on the credibility of two persons and two persons only, they being Jerry Beck and Richard Stanley" (PC-R2. 338) (emphasis in original). However, instead of evaluating the evidence elicited from these witnesses and the evidence corroborating the testimony and credibility of Mr. Beck (and negating the credibility of Stanley), the lower court ignored all of the testimony and reached what it classified as "the only safe conclusion" that "the conversation probably did not take place" or that "if it did, that the Judge made the comments in a joking manner and

they were received as such by Mr. Beck" (PC-R2. 347).[21] The court also concluded that even if the conversation occurred and Stanley was serious, "this Court fails to see how such an allegation would be sufficient as a matter of law to support a postconviction relief under Rule 3.850" (PC-R2. 347). None of these inconclusive and alternative findings are borne out by the evidence or the law.

The lower court's determination that the conversation "probably did not take place" was premised on two primary grounds: the testimony of Nancy Raulerson and that the visit by investigators from the State Attorney's Office on March 27, 1995 -- which was the precipitating factor causing Mr. Beck to come forward -- "did not occur and, indeed, would not have occurred" (PC-R2. 340).[22] However, the lower court's findings are totally contrary to the evidence presented below.

First, the lower court found that the conversation "probably did not take place" because Nancy Raulerson "accompanied Stanley to Glades County and was in his presence at all times except on the fourth day of the trial when she stayed in Charlotte County" and "denied that any such conversation took place between Beck and Stanley" (PC-R. 338). However, the lower court ignored the evidence that Ms.

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[21]Whether made in a joking fashion or not, the comments warranted disqualification. Had trial or resentencing counsel known of Clerk Beck's account, a motion to disqualify would have been filed and would have been granted. See Argument II, infra.

[22]The lower court explicitly rejected the attempts by the State to demonstrate that Mr. Beck was biased due to the events surrounding his son's death almost eighteen (18) years ago, concluding that this alleged "bias" was "irrelevant" to the issues (PC-R2. 343). Moreover, any finding that Mr. Beck harbored some "general bias" against the judiciary, for example, as Judge Anderson suggested, is simply preposterous. Jerry Beck served as the Clerk of Courts for Glades County for twenty years.

Raulerson did not accompany Judge Stanley to Glades County on one of the days of Mr. Porter's trial, and the significance of that fact. As she explained at the hearing, she accompanied the judge every day of the trial but one, which she believed was a Thursday (H. 145).[23]

Ms. Raulerson's absence makes Mr. Beck's testimony about Judge Stanley accepting a cup of coffee from the presiding clerk of court perfectly logical and credible and consistent, given Ms. Raulerson's testimony that on the days she did accompany Stanley to Glades County, their daily routine included stopping for coffee before going to the courthouse:

> Q [by Mr. Fordham] Now, would you tell us, Ms. Raulerson, what the logistics were. You would drive over there, and what would you do when you get there and things like that?
>
> A [by Ms. Raulerson] We would just drive over, and there was a little restaurant right across the street, and we would both go over there and have coffee and breakfast and then go right to the courtroom and go right back there for lunch and then go back to the courtroom and come back to Punta Gorda.

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[23]The record reflects that jury selection commenced in Mr. Porter's trial on Tuesday, November 28, 1978, trial commenced Wednesday, November 29, 1978, a verdict was rendered late Thursday, November 30, 1978, and the penalty phase occurred on Friday, December 1, 1978. As noted above, Ms. Raulerson believed the day she missed was a Thursday. However, she also testified that the guilty verdict had come in after the day she missed (H. 151). Mr. Beck testified that he recalled the conversation occurring either on the first or second day of trial, and certainly "sometime before any conclusion of the trial" (H. 32). If Ms. Raulerson was absent on a day prior to the rendering of the verdict, then that would make her absence fall on either the first or second day of trial, which is perfectly consistent with Mr. Beck's recollection. However, whether the conversation occurred on the morning of Wednesday or Thursday, the conversation occurred prior to the guilt verdict, which was not announced until the afternoon of November 30, 1978, and certainly prior to the penalty phase, which did not commence until December 1, 1978.

Q Did you do that pretty much each of those mornings you went over there?

A Yes, sir.

(H. 145) (emphasis added). In light of this daily routine, it makes perfect sense that Judge Stanley, without Ms. Raulerson's company on the day she remained in Charlotte County, would accept an invitation from the presiding clerk of court for a cup of coffee, as Mr. Beck testified he offered to Judge Stanley:

> Judge Stanley came in. I did not know him, I knew the name as being a judge in the 20th Judicial Circuit. I introduced myself and asked if he would like to have a cup of coffee and he said, sure he would.

(H. 15) (emphasis added).

Moreover, while Ms. Raulerson did testify that she never saw Judge Stanley conversing with Mr. Beck, she was not in a position to know what occurred on the day she was not present:

Q [by Mr. McClain] Okay. And do you know -- I suppose the answer to this question is obvious, but let me ask it anyway. Do you know what Judge Stanley did the day he arrived in Glades County and you weren't there?

A [by Ms. Raulerson] Oh, the day I didn't go?

Q Right.

A No.

Q Okay. So he may have met with Jerry Beck that morning over coffee?

A I don't know.

Q You have no way of knowing?

A I have no way of knowing.

(H. 151) (emphasis added). Therefore, the lower court's blanket statement that Ms. Raulerson "denied that any such conversation took place between Beck and Stanley" ignores the dispositive fact that she was absent for a day and had "no way of knowing" what occurred on the day she was not there.

The lower court also questioned Mr. Beck's testimony about the conversation because Mr. Beck did not recall anything else about the conversation, did not know how long the trial took, did not know about Mr. Porter's resentencing in 1981 or his death warrant in 1985, and did not know that the jury had recommended life and that Stanley had overridden that recommendation (PC-R2. 339). The lower court placed a great deal of emphasis on Mr. Beck's testimony about what precipitated Mr. Beck to come forward in 1995:

> 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 warrant.

(PC-R2. 340) (emphasis added). These findings are made out of whole cloth, totally disregard the evidence presented at the hearing, and ignore the fact that the State's own witness admitted on the stand that he, acting as the State Attorney's

investigator, in fact went to the Glades County Clerk's Office on March 27, 1995.[24]

First, as to Mr. Beck's lack of knowledge about the status of Mr. Porter's case after the trial ended, Mr. Beck explained at both the federal hearing and the state court hearing why he did not know about the status of the case. At the federal hearing, Mr. Beck explained that "I wasn't keeping up with the case. After it left Glades County, it was transported from Charlotte County to Glades County for the purpose of trial and I would assume everything after that would be handled out of Charlotte County" (PC-R2. 175). Mr. Beck further explained at the state court hearing that "[i]n Glades County we only have the one small weekly paper" and he did not know anything about the status of Mr. Porter's case over the years (H. 25); further, as a Clerk in Glades County, one of his jobs was not to keep abreast of every case being litigated in other counties (H. 52). None of this evidence was considered or discussed by the lower court. There is no reason why Mr. Beck should know the length of Mr. Porter's trial, or the resentencing in 1981, or the 1985 death warrant, all of which the lower court faulted him for (PC-R2. 339). In fact, Judge Stanley himself did not recall the 1981 resentencing, yet he was the one who resentenced Mr. Porter to death.

The lower court also questioned Mr. Beck's testimony because he allegedly could not remember anything else about any other conversation he may have had with Judge Stanley (PC-R2. 339). However, Mr. Beck was never questioned about

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[24]Judge Anderson's order also ignores the federal magistrate's findings accepting Clerk Beck's testimony and the State's failure to object or contest the federal magistrate's conclusions.

any other conversations with Judge Stanley, and there was no other conversation that Mr. Beck had with Judge Stanley other than the one he testified about; the lower court faulted Mr. Beck for not recalling something that never occurred.

A great deal of time was spent by the State, and consequently by the trial court, on the issue of the precipitating event which led Mr. Beck to come forward in 1995 -- namely, the visit by the State Attorney investigators. As detailed in the statement of facts, supra, the State focused heavily on this issue during its cross-examination to inexplicably[25] argue that this visit never occurred. See H. 25-27. However, Mr. Beck emphatically recalled that his office received a visit by a State Attorney investigator on March 27, 1995, which caused him to recall the conversation with respect to Mr. Porter's case. Id.

The lower court wrote the "State has proven to this Court that the visit by the State's investigator did not occur and, indeed, would not have occurred" (PC-R2. 340). Once again, the lower court failed to listen to, much less consider, the evidence in this case. During the hearing, the State's own witness established that this visit occurred exactly as described by Jerry Beck. Ron Gause, the investigator for the State Attorney's office in 1995, testified on behalf of the State that his datebook reflect that he went to the Glades County Courthouse on March 27, 1995, at which time he would have identified himself as an employee of the State Attorney's Office (H. 162). Mr. Gause acknowledged that if Mr. Beck had understood that

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[25]It is inexplicable because the State then called a State Attorney investigator to establish that he, on behalf of the State Attorney's Office, went to the Glades County Clerk's Office on March 27th, just as Clerk Beck testified.

someone from the State Attorney's Office came to the Glades County Courthouse on that day, that understanding would be accurate because "I was there that day and certainly would have told him who I was" (H. 163) (emphasis added). Mr. Gause did not speak with Mr. Beck, however, on March 27, 1995, because "I don't think he was there" (H. 163).[26] Mr. Gause explained why he had been sent to the Glades County Courthose on March 27, 1995:

> Q [by Mr. McClain] Why were you at the Glades County Courthouse on Monday, March 27th?
>
> A To check the dockets of books to see what was entered in the books.
>
> Q So you didn't specifically want to talk to Jerry Beck?
>
> A No.
>
> Q You were just simply looking at the records?
>
> A Yes.

(H. 163) (emphasis added).

Judge Anderson simply ignored the evidence. The lower court's suspicions about Mr. Beck based on Beck's testimony about the visit on March 27, 1995, are flatly contrary to the record, as the State's own evidence establishes. Mr. Gause's testimony is completely consistent with and corroborates Jerry Beck's testimony about the events of March 27, 1995, which precipitated his recollection of the conversation with Judge Stanley. The lower court's finding that the State established

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[26]This is perfectly consistent with Mr. Beck's testimony that he was in Lake Placid, Florida, on March 27, 1995 (H. 26-27).

that the visit did not occur is wrong, and reflects the lower court's failure to listen to the evidence, review this record and determine the issues remanded to it by this Court.[27]

Additional evidence corroborating Mr. Beck's credibility was adduced below, but that too was completely ignored by the lower court, which instead made up findings not borne out by any evidence presented by either side. One key aspect of Mr. Beck's testimony ignored by the lower court is the fact that Mr. Beck, a Clerk of Court for nearly twenty years, literally put his livelihood and career on the line when coming forward with the information about Judge Stanley. As he explained, his bid for re-election in 1996 was unsuccessful due to his coming forward in Mr. Porter's case:

> Q [by Mr. Scher] You indicated earlier that you are no longer the Clerk of Court and you lost the election in this past year?
>
> A [by Mr. Beck] That's correct.
>
> Q Did this matter become an issue during your re-election?
>
> A I have been told that it did.
>
> Q And you were subsequently not re-elected, is that the case?
>
> A That's correct.
>
> Q Did you want to be re-elected?
>
> A I campaigned for election.

(H. 21). This is strong evidence buttressing his credibility, yet it too was ignored by

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[27] See Argument IV.

the lower court.

Furthermore, the lower court did not discuss at all the testimony of Mr. Blackwell, who worked with Mr. Beck for a number of years, and who corroborated Mr. Beck's personal struggle over his decision to come forward. Mr. Blackwell testified that Mr. Beck was "very concerned" about what to do and that it was difficult for him to come forward (H. 68). Mr. Beck also told Mr. Blackwell that even though his "personal feeling is that the man is guilty" (H. 68), Beck "felt very uneasy about the knowledge that he had of that conversation, knowing that this was a pending death penalty case" (H. 67). Mr. Blackwell further testified that Mr. Beck's reputation for honesty and truthfulness in the community was good (H. 73). This important evidence was likewise ignored by the lower court.

The lower court also failed to acknowledge the significance of the fact that Mr. Beck went to discuss this matter with Chief Judge Thomas Reese on March 28, 1995, before calling CCR and the State. As Mr. Beck explained, he decided to discuss his options with the Chief Judge out of concern about what to do. It is ludicrous to suggest that Mr. Beck would concoct out of thin air this conversation, then go to the lengths of discussing it with the Deputy Clerk of Court as well as the Chief Judge of the Twentieth Judicial Circuit, in addition to, of course, putting his career in jeopardy by coming forward. However, the lower court ignored this fact as well.

As to Judge Stanley, the lower court wrote that "Stanley denies making any such comment to Beck, and further 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 the trial" (PC-R2. 339).[28] Again, the lower court credited Judge Stanley's testimony without actually analyzing it. In fact, the lower court's order discusses none of Stanley's testimony whatsoever.

Judge Stanley's testimony was far from conclusive about his memory of either Mr. Beck, the conversation, or even of Mr. Porter's case at all. However, none of these facts are discussed at all by the lower court (although the lower court was quick to fault Mr. Beck's memory on events that were outside his scope of knowledge to begin with or on events that never occurred). The record reflects that Judge Stanley's "denials" of the conversation or of knowing Mr. Beck were inconsistent. At one point, Judge Stanley testified that he did not recall having a conversation with Jerry Beck -- not that he denied having a conversation (H. 96). He then testified that he "did not talk to Mr. Beck on it that I know of, no sir." (id.) (emphasis added), and that "I do not remember Mr. Beck" (H. 97). See also H. 121 ("I have no memory of Mr. Beck at all, period"); H. 122 ("I will say to you the same thing I said to a reporter or whatever. I don't remember. I don't know. I could have. It might not. I do not know. I don't remember it") (emphasis added). There is a significant difference between not remembering the conversation or Mr. Beck, and not having the conversation at all. The lower court ignored all of the evidence establishing Judge Stanley's inconsistent memory.

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[28]Yet oddly, Judge Stanley repeated these statements to the media and acknowledged in his testimony that the substance of the statements was true even if he did not recall telling Clerk Beck the substance of the statements.

Further, Judge Stanley's putative denials of having the conversation are not corroborated by his own actions and statements at the evidentiary hearing. Noticeably absent from the lower court's order is any mention of the judgment and sentence form, which was addressed extensively at the hearing. The evidence adduced below, from Judge Stanley himself, established that the judgment and sentencing order was signed on November 30, 1978, the day the guilt verdict was rendered, but before the commencement of the penalty phase. Judge Stanley acknowledged that his signature appeared on that document which indicated that Mr. Porter was to be sentenced to death by execution (H. 105). Judge Stanley also acknowledged that the form was executed in Glades County, as it indicated that it was "[d]one and ordered in open court at Glades County, Florida" (H. 106). Judge Stanley did not remember whether he sentenced Mr. Porter to death in Glades County, but "that's my signature and that's what is says on here" (H. 106).

Judge Stanley testified that Mr. Porter's sentence was filled in when Judge Stanley signed and executed the sentencing order on November 30, 1978:

> Q [by Mr. McClain] Would you have signed the document without --
>
> A I would have read it before I signed it.
>
> Q And it would have been filled out completely?
>
> A That's correct.
>
> Q So when you signed that document on November 30th, the sentence was contained in there?
>
> A Yes, sir.

* * *

Q So the date of your signature, November 30, 1978, you sentenced Mr. Porter to death?

A Evidently, yes, sir.

Q Okay, and would you have signed that document before the sentence was filled out?

A No.

Q Okay.

A No.

Q So would it be fair to say on November 30, 1978, you had decided the sentence?

A On November the 30th, 1978, I decided it?

Q Yes.

A What I'm saying is that's what the paper says.

Q Okay. And that's the court file?

A If that's the court file, that's when I did it. I mean, whatever.

(PC-R2. 106-08) (emphasis added).

Aside from the conversation with Jerry Beck and the fact that the sentencing order reflects Judge Stanley's imposition of death before the commencement of the penalty phase, Mr. Porter also presented evidence in the form of statements made by Judge Stanley to the media. These statements, independently and in conjunction with the other evidence adduced below, established Judge Stanley's lack of impartiality as to Mr. Porter. For example, Judge Stanley told reporter Jim Greenhill

that "[h]einous, atrocious, and cruel are the magic words. . . . If such a thing had happened at my house, I would have shot the son of a . . . If I had the case to try again, I would not have changed. If the jury found him guilty, I would have sentenced him to death" (H. 82-83) (emphasis added).[29] When asked about the fact that the jury returned a life recommendation, Judge Stanley stated "I don't care. . . The judge makes the final decision" (H. 82-83).[30] Moreover, Judge Stanley told reporter Alan

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[29]Judge Stanley's comment to Mr. Greenhill also demonstrated Stanley's proclivity for calling Mr. Porter a "son of a bitch." When speaking to Jerry Beck, Judge Stanley stated that he would send Mr. Porter to the chair when the jury convicted "the son of a bitch" (H. 14-16). As noted above, Judge Stanley, when speaking to Mr. Greenhill, referred to Mr. Porter as a "son of a ..." (H. 82-83). When speaking to reporter Alan Judd, Judge Stanley stated that "[o]ne of those old people had to watch their spouse of 50 years killed by that son of a bitch" (PC-R2. 332). These comments hardly demonstrate that Judge Stanley had, in 1978 when he spoke with Mr. Beck, or has to this day any respect for judicial decorum which is central to the Code of Judicial Conduct. See, e.g., Canon 3(B)(4) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity"); Preamble to Code of Judicial Conduct ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system"). See also Olszewska v. Ferro, 590 So. 2d 11 (Fla. 3d DCA 1991) ("When a trial judge leaves the realm of civility and directs base vernacular towards an attorney or litigant in open court, there are sufficient grounds to require disqualification")

[30]The lower court found that this quote was "inaccurate" because Mr. Greenhill referred to the fact that the jury's recommendations for life were unanimous (PC-R2. 344). The lower court failed to understand the evidence. The statement in the newspaper about the unanimity of the life recommendation was not the issue, nor was it a quoted statement from Judge Stanley; the significant feature of the quotation was Judge Stanley's attitude that he "didn't care" about the life recommendations because "the judge makes the final decision." In dismissing this evidence, the lower court demonstrated its misunderstanding of the law with regard to jury recommendations of life. The lower court wrote that "the Judge does make the final decision based upon an application of the relevant aggravators and mitigators while taking into consideration the jury's recommendation" (PC-R2. 344). This is not the case when dealing with a jury recommendation of life, and Judge Anderson's view of

Judd that "[w]hen the judgment was brought out that he was guilty, . . . I knew in my own mind what the penalty should be, and I sentenced him to it" (PC-R2. 332). Stanley's comments to the media are corroborated by the judgment and sentence form, discussed above, which reflects that Mr. Porter was sentenced to death by Judge Stanley on November 30, 1978. Again, none of this evidence was addressed by the lower court, which failed to account for these statements in the overall evidentiary picture presented below. But see Porter v. Singletary, 49 F. 3d at 1487 (evidence of lack of impartiality contained in Beck affidavit "finds some corroboration in a proffered statement by Judge Stanley to news reporters"). While the lower court summarily dismissed the media statements as bearing marginal veracity and

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the law has expressly rejected by this Court:

> According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory, there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987). A judge cannot simply "consider" the jury's recommendation of life; the life recommendation must be given "great weight" by the judge. Tedder v. State, 322 So. 2d 1, 5 (Fla. 1975). And once a jury has recommended life, the judge's role is streamlined: "under Tedder, the trial court's role is *solely* to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely on recommending life imprisonment." Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (emphasis added). Thus, the lower court's order is as factually inaccurate as it is legally incorrect.

relevance (PC-R2. 344),[31] the Eleventh Circuit Court of Appeals, which announced the law relating to the proper disposition of this matter, disagreed. Id.[32]

Other evidence adduced by Mr. Porter -- and ignored by the lower court -- established Judge Stanley's lack of impartiality. For example, Judge Stanley

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[31]The finding that the quotations in the newspapers lacked veracity is totally contrary to the evidence. Both news reporters testified to the accuracy of the quoted remarks attributed to Judge Stanley. Such evidence, in the form of quoted remarks in the media, is an appropriate method of determining whether a judge has violated the Code of Judicial Conduct. See In re Inquiry Concerning a Judge re Hugh D. Hayes, 541 So. 2d 105 (Fla. 1989) (issuing public reprimand to judge who made remarks to the media when quoted remarks "attribute to [the judge's] unjudicial statements"); Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988) (judge's quoted comments made to newspapers warranted disqualification due to fear of lack of impartiality).

[32]The lower court apparently denied the State's requests to exclude the media testimony, as it did discuss the media evidence in its order. The news articles, which were offered into evidence during the evidentiary hearing, were admissible as evidence used to refresh Judge Stanley's recollection as to the statements attributed to him, see § 90.613, Fla. Stat (1997), as well as extrinsic impeachment evidence of Judge Stanley's testimony that he did not speak to reporters or make the particular statements to the reporters. See § 90.614 (2), Fla. Stat (1997). Newspaper articles are also self-authenticating and therefore admissible without additional extrinsic evidence of authenticity. See § 90.902, Fla. Stat (1997). The statements made by Judge Stanley, quoted in the newspaper articles, are also admissible as substantive evidence establishing that Judge Stanley was predisposed to sentence Mr. Porter to death under the exception to the hearsay rule for then-existing mental, emotional, or physical condition. See § 90.803 (3)(a)(1), Fla. Stat (1997). Judge Stanley's state of mind at the time of Mr. Porter's trial is at issue in these proceedings. Because Judge Stanley's state of mind -- i.e. his impartiality or lack thereof -- is at issue, the statements he made to the news reporters, the accuracy of which were established by the news reporters themselves, "is an issue in the action." § 90.803 (3)(a)(1), Fla. Stat (1997). Cf. Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994) ("[t]his state of mind exception admits qualifying extrajudicial statements only if the declarant's state of mind is at issue"). As noted earlier, the Eleventh Circuit Court of Appeals acknowledged that the statements made by Judge Stanley to the media corroborated the evidence of predisposition exhibited in Stanley's comment to Jerry Beck. Porter v. Singletary, 49 F. 3d at 1486.

acknowledged making public statements regarding his feelings about death sentences:

> 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 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.
>
> Q [by Mr. McClain] Now, when did you make that statement?
>
> A Oh, God knows. I've made it a number of times.

(H. 108-09) (emphasis added). Judge Stanley denied that he made this statement during a debate on the death penalty; rather, "I was talking to people that were in favor of or against the death penalty, and I made the statement then" (H. 109). He had no idea if these comments were made during the 1960's or 1970's or 1980's but he has felt that way for a long time and "I feel that way right now" (H. 109). He reiterated that he did not know how many times he made these statements, but analogized it to "[h]ow many times have I said good morning?" (H. 110).

Judge Stanley's acknowledged public comments about desiring to shoot defendants between the eyes with his gun further demonstrate his lack of impartiality and his disregard for judicial decorum. See Porter, 49 F. 3d at 1487 n. 6; id. at 1489 n. 12; Canon 4(A), Code of Judicial Conduct ("A judge shall conduct all of the judge's quasi-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere

with the proper performance of judicial duties"). Judge Stanley's desires to personally carry out executions by shooting defendants between the eyes calls to mind this Court's observations in In re Inquiry Concerning a Judge, Judge E.L. Eastmoore, 504 So. 2d 756 (Fla. 1987):

> We take this opportunity to remind ourselves that tyranny is nothing more than ill-used power. We recognize that it is easy, especially under the stress of handling many [adversarial] matters, to lose one's judicial temper, but judges must recognize the gross unfairness of becoming a combatant with a party. A litigant, always nervous, emotionally charged, and perhaps fearful, not only risks losing the case but also contempt and a jail sentence by responding to a judge's rudeness in kind. The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience, and understanding. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary.

Id. at 758 (emphasis added).

Rather than assessing Stanley's remarks in terms of affecting his impartiality, Judge Anderson expressed sympathy with Judge Stanley, noting that any infringement on Judge Stanley's ability to make public comments "would be a patent violation of his First Amendment right to free speech" (PC-R2. 345). Judge Anderson again flaunted the express conclusion of the Eleventh Circuit Court of Appeals, which observed that "Canon 3B(9) 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." Porter v. Singletary, 49 F. 3d at 1489 n. 12. Here, Judge Stanley's public comments about his desire to shoot death-sentenced defendants between the eyes with a gun pulled from leg is certainly a comment that could "reasonably be expected to affect the outcome or fairness of a case." Judge

Anderson's concern about Judge Stanley's first amendment rights notwithstanding, these comments further corroborate Judge Stanley's lack of impartiality in this case.

Judge Stanley's use of various forms of weaponry during Mr. Porter's trial also demonstrates a flagrant abuse of judicial authority and unquestionable bias. Judge Stanley testified that during Mr. Porter's trial, he carried a sawed-off machine gun and kept it on his lap:

> Q [by Mr. McClain] Do you recall if you had a gun at the time of -- were you armed with a gun at the time of the sentencing?
>
> A [by Judge Stanley] I will merely say this, that I never walked into a courtroom at the time that I was a judge that I didn't have a gun.
>
> And there's a time there in Charlotte County when we were having all the drug cases and everything, I said -- I might as well just lay it out, but I sat in court with a sawed off machine gun laying across my lap.
>
> And you look at me odd like that, but by the same token, the prosecuting officer in that courtroom was shot by someone coming up and knocking on his door, and he went to the door, and he was killed. Yes, I had a gun.

(H. 118) (emphasis added). Judge Stanley also displayed a pair of brass, or as he explained, steel, knuckles during Mr. Porter's original sentencing:

> Q Do you recall whether you had any brass knuckles at the sentencing proceeding?
>
> A I do not think I did. I will say this. The brass knuckles that you keep talking about were steel knuckles. I was a prisoner [of] war in Germany. I was a paratrooper.
>
> I brought back two pair of steel brass knuckles I got of a Gastopho [sic] headquarters in Chatham, Germany. I had those in my office and all. I never had them in a sentencing hearing or threaten anyone with them or anything of that nature.

(H. 117) (emphasis added). When asked why Mr. Porter's trial counsel, Mr. Widmeyer, reported at the time that he saw the brass knuckles, Judge Stanley could not recall who Mr. Widmeyer was and "don't know what he would know" (H. 117-18).

The lower court wrote that the fact that a presiding judge in a death penalty case had a sawed-off machine gun on his lap during a capital trial and brandished steel knuckles during a capital sentencing proceeding were simply "'idiosyncracies' which, without explanation, might lead one to the conclusion that Judge Stanley was biased against all criminal defendants" (PC-R2. 343). These facts are not idiosyncracies; they are violations of the Code of Judicial Conduct. In In re Inquiry Concerning a Judge, re: Wallace E. Sturgis, Jr, 529 So. 2d 281 (Fla. 1988), this Court was faced with a judicial disciplinary proceeding alleging, inter alia, impropriety when the judge brandishes a gun during court hearings. In his defense, the judge stated that he was "paranoid" due to the fact that he had once been attacked by a defendant during a hearing. Id. at 283. This Court rejected this reasoning, finding "no justification under the circumstances, on either occasion, for the production and waiving of a handgun." Id. Such conduct, the Court concluded, was "violative of the Code of Judicial Conduct." Id.

In Mr. Porter's case, there was no valid "justification" offered by Judge Stanley to adequately explain his bringing in a sawed-off machine gun to Mr. Porter's trial. The lower court did acknowledge the "context" offered by Judge Stanley for his practice (PC-R2. 343), that being the fact that an assistant state attorney had been murdered at his home (H. 118). However, this event, even if considered a

justification for his conduct, did not occur until after Mr. Porter's resentencing in 1981.[33] The putative "context" provided by Judge Stanley, and accepted without question by the lower court, in actuality did not exist at the time of Mr. Porter's trial, and therefore there is no justification for bringing in a sawed-off machine gun into a capital trial. Without any "context" for Judge Stanley's actions, even the lower court acknowledged that his behavior "might lead one to the conclusion that Judge Stanley was biased against all criminal defendants" (PC-R2. 343).

Mr. Porter further established Judge Stanley's lack of impartiality due to the judge's personal feelings about Mr. Porter and his crime. Judge Stanley acknowledged both to the media and during the evidentiary hearing that had Mr. Porter committed this crime against someone in his (the judge's) family, the judge would have killed Mr. Porter himself due to the judge's "inner nature":

> Q [by Mr. McClain] Did you indicate in the deposition that two days ago, in reference to your disagreement with the jury's recommendation, that it was because of your inner nature that you disagreed with it?
>
> A Because I felt that it should have been something else, yes, if that's what you mean.
>
> Q Well, no. I mean, the question is, do you recall using the words, the basis -- my inner nature was your answer?
>
> A What you're trying to get me to say is -- I'll just lay this out for you. I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr. Porter wouldn't have had to be put to death. But if he had done that to my family, I'd a killed him.

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[33]In fact, Assistant State Attorney Berry handled Mr. Porter's resentencing for the State, as the record reflects.

(H. 119-20).

These comments by Judge Stanley unquestionably establish personal bias toward Mr. Porter. The Fourth District Court of Appeals recently addressed an almost identical situation. There, the defendant sought to disqualify a judge who had stated to other attorneys that knowing what the defendant did to the victim, "if she [the victim] were my daughter I would kill him [the defendant]." Fogelman v. State, 648 So. 2d 214, 220 (4th DCA 1995). The Fourth Circuit found this comment warranted disqualification due to obvious bias:

> The remark showed a complete absence of neutrality of the judge toward the defendant. It went beyond comments regarding his opinion of the guilt or innocence of the appellant which might have been formed as a result of listening to the trial evidence. Instead, the comment showed a strong personal bias, which he tied to his concerns as a parent.

Id. (emphasis added). See also Rucks v. State, 692 So. 2d 976 (Fla. 2d DCA 1997) (bias demonstrated when judge described dispute at issue as "the sickest situation" he had encountered as an attorney and judge); Deren v. Williams, 521 So. 2d 150, 152 (Fla. 5th DCA 1988) (bias demonstrated when judge openly expresses sympathy for victims); Heath v. State, 450 So. 2d 588 (Fla. 3d DCA 1984) (reversible error for judge not to disclose personal bias when judge unable to fairly sentence defendant due to strong personal views of the crime in question).

Judge Stanley's lack of impartiality is also corroborated by his reliance on information outside the record when he sentenced Mr. Porter to death in 1978, in violation of Gardner v. Florida, 430 U.S. 341 (1977). In fact, this Court found Gardner error on appeal and remanded for a resentencing before Judge Stanley.

Porter v. State, 400 So. 2d 5 (1981). Judge Stanley's reliance on extra-record information -- the deposition of a State witness -- in order to justify overriding the jury's life recommendation violated due process, and lends further support for Judge Stanley's lack of impartiality where Mr. Porter was concerned.

Furthermore, this deposition was not in the record.[34] Only the State and defense counsel had been provided with copies. The fact that the judge's written findings relied upon this deposition and the defense did not know that the judge would consider the deposition certainly indicates that either the State drafted the sentencing order or the judge engaged in *ex parte* contact in order to obtain a copy.[35] Under either scenario, Mr. Porter's constitutional rights were violated, and certainly this scenario demonstrates lack of impartiality on behalf of Judge Stanley. It is improper for the trial court to direct the prosecutor to draft the sentencing order in a capital case, Patterson v. State, 513 So. 2d 1257, 1262 (Fla. 1987), and it is improper for the trial court to engage in *ex parte* communications with the prosecution with regard to the preparation of orders. Spencer v. State, 615 So. 2d 688 (Fla. 1993); Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). See also Canon 3A(4), Code of Judicial Conduct ("A judge should accord to every person who is legally

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[34]Direct appeal counsel filed a motion before this Court to have the Schapp deposition made a part of the record, and the Court granted the request. The deposition was not, however, part of the record before Judge Stanley.

[35]Because the State Attorney's file was either lost or destroyed at some point, and the version reconstructed in 1994 following a lawsuit filed by Mr. Porter against the Charlotte County State Attorney's Office is admittedly not complete, Mr. Porter can only speculate as to how references to the deposition appeared in the judge's written findings.

interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding").

Judge Stanley's lack of impartiality infected the resentencing proceedings in 1981 as well.[36] While Judge Stanley testified at the evidentiary hearing that he could not remember whether Mr. Porter even had a resentencing, the objective facts demonstrate that regardless of his lack of memory, the same lack of impartiality present in 1978 continued throughout the resentencing. As the Eleventh Circuit pointed out, "common sense and common experience do not provide strong support for the state's argument that a bias of this kind would dissipate in the period between November, 1978, and the August, 1981, resentencing, especially in light of the statements Judge Stanley is alleged to have made recently." Porter v. Singletary, 49 F. 3d at 1490 n.14. "Common sense" does not favor an argument that Judge Stanley who, in 1997, testified that if Mr. Porter had committed the crime against someone in the judge's family "I'd a killed him myself," was devoid of these feelings in 1981. In fact, the sentencing order itself demonstrates otherwise; Judge Stanley wrote that "[i]t so happens that Raleigh Porter was tried by a Judge that has a lot more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer" (R2. 23). Likewise, "common sense" does not bear out any argument that Judge Stanley was somehow "cured" of his bias toward Mr. Porter in 1981, when as late as 1995, he was making statements to the media that if had to do the same thing

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[36]Judge Anderson never addressed the resentencing issue.

again, he would, and that he knew what the sentence would be as soon as the jury brought out its verdict of guilty.

Further, the record itself shows how empty a gesture the resentencing in 1981 actually was.[37] At the actual resentencing hearing before Judge Stanley on August 3, 1981, Mr. Porter presented his evidence, and both sides presented argument. Immediately after counsel concluded their arguments, Judge Stanley, written order in hand, resentenced Mr. Porter to death. In fact, Mr. Porter's resentencing counsel made special note for the record that "the Court is reading the sentence, read from a prepared Order that the Court signed here in the presence of everyone" (R2. 49). Following the reading of the pre-prepared sentencing order, Judge Stanley "specifically note[d]" that he had "taken into consideration all of the testimony before the Court today" (R2. 49). The fact that Judge Stanley had "considered" the evidence presented at the resentencing hearing was not detailed in the sentencing order, as it had been prepared at some point prior to the hearing.

The events detailed above establish that Judge Richard Stanley was not

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[37]The 1981 resentencing was not a de novo resentencing; it was simply to permit the judge to correct the Gardner error by allowing Mr. Porter to confront the information contained in the Schapp deposition. See Porter v. State, 429 So. 2d 293, 295-96 (Fla. 1983) (holding that original remand for resentencing "required only that Porter be allowed to rebut, contradict, or impeach Schapp's deposition testimony"); Porter v. State, 400 So. 2d 5, 8 (Fla. 1981) (Alderman, J., concurring) ("[t]he only reason for remanding this case for resentencing by the trial judge is to give the defendant an opportunity to rebut the deposition of Larry Schapp"). Furthermore, the written sentencing order entered by Judge Stanley in 1978 is virtually identical to the order entered on resentencing, save the references to the Schapp deposition which were simply removed from the 1981 sentencing order. Compare R. 198-91 with R2. 21-23.

impartial. "[T]he evidence as a whole shows a continuing pattern of conduct that does not comport with the standards of impartiality and restraint required of judicial officers." In re Inquiry Concerning a Judge, Joseph M. Crowell, 379 So. 2d 107, 110 (Fla. 1980). Mr. Porter has proven his case with overwhelming evidence.

C. MR. PORTER IS ENTITLED TO RELIEF.

1. New Trial.

"If the judge was not impartial, there would be a violation of due process. The law is well-settled that a fundamental tenet of due process is a fair and impartial tribunal." Porter v. Singletary, 49 F. 3d at 1487-88. See also Bracey v. Gramley, 117 S. Ct. 1793, 1797 (1997) ("the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal.' before a judge with no actual bias against the defendant or interest in the outcome of the particular case"); Knapp v. Kinsey, 232 F. 2d 458, 465 (6th Cir. 1956) ("fairness requires an absence of actual bias or prejudice in the trial of the case. If this basic principle is violated, the judgment must be reversed"). Because Judge Stanley lacked impartiality, "the credibility and integrity of the judicial process require a new trial." Robinson v. State, __ Fla. L. Weekly S__ (Fla. November 13, 1997) (slip op. at 5). At a minimum, Mr. Porter is entitled to an evidentiary hearing to establish his right to a new trial.

It is impossible to compartmentalize the evident bias that Judge Stanley harbored toward Mr. Porter into the different phases of Mr. Porter's case presided over by Judge Stanley. Common sense does not provide strong support for the proposition that Judge Stanley was impartial and unbiased until suddenly, on

November 30, 1978, following the guilty verdict, when he became biased. In fact, the evidence established otherwise. Judge Stanley changed venue to a county where he felt confident that Mr. Porter would be found guilty, so that he could thereafter sentence him to death. Judge Stanley's desire to kill Mr. Porter himself if the crime had been committed against a family member of the judge's does not affect just the sentencing phase. In a case directly on point, the Fourth Circuit Court of Appeals ruled that a judge's comment that "if [the victim] were my daughter I would kill [the defendant] . . . showed a complete absence of neutrality of the judge toward the defendant" and ordered that the judge be disqualified from presiding over that defendant's trial. Fogelman v. State, 648 So. 2d 214, 220 (4th DCA 1995). See also Deren v. Williams, 521 So. 2d 150 (Fla. 5th DCA 1988) (judge's expression of sympathy for the victim established bias warranting disqualification from trial).

Under the federal constitution, the right to be tried by an impartial judge "is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant." Cartalino v. Washington, 122 F. 3d 8, 10-11 (7th Cir. 1997). Accord Anderson v. Sheppard, 856 F. 2d 741, 746 (6th Cir. 1988) ("Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding"). It is also "irrelevant that [Mr. Porter] was convicted by a jury, for the judge's role in presiding over a jury trial is obviously not of a merely ministerial character." Cartalino, 122 F. 3d at 10. For example, "it is

undisputable that a trial judge can communicate hostility and bias to a jury in ways that are not ascertainable from a reading of a 'cold' written record of the proceedings." Anderson, 856 F. 2d at 746. Further, Judge Stanley sat in the courtroom with a sawed-off machine gun on his lap. Notwithstanding this violation of the Canons of Ethics, the likelihood that one or more jurors observed the judge with a sawed-off machine gun on his lap during the trial is enough to warrant relief. "[J]ustice must not only be done but must manifestly be seen to be done." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring).

In Morgan v. Illinois, 504 U.S. 719 (1992), the United States Supreme Court addressed an analogous situation of whether a juror who was automatically predisposed to sentence a defendant to death violated the defendant's right to a fair and impartial jury and must be removed for cause. Id. at 726. The Supreme Court held in the affirmative, writing that "because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." Id. at 729. The Morgan Court analogized the situation to a biased judge:

> Surely if a particular Illinois case the judge, who imposes sentence should the defendant waive his right to jury sentencing under the statute . . . was to announce that, to him or her, mitigating evidence is besides the point and that he or she intends to impose the death penalty without regard to the nature and extent of mitigating evidence if the defendant is found guilty of a capital offense, that judge is refusing in advance to follow the statutory direction to consider that evidence and should disqualify himself or herself.

Id. at 738-39.

Even if Judge Stanley's conduct could not be considered to reflect an actual bias, it is clear that 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 [Mr. Porter]." Ungar v. Sarafite, 376 U.S. 575, 588 (1964).

Although Mr. Porter need not point to adverse rulings to establish his entitlement to relief, Cartalino, the judge who would have personally killed Mr. Porter if he did the crime to his family ruled adversely on numerous key motions filed by Mr. Porter. For example, Judge Stanley denied a motion to suppress and a motion in limine with respect to forensic evidence illegally seized from Mr. Porter (R. 180; 181). Interestingly, when Mr. Porter's trial counsel originally sought a change of venue, they argued that "a fair and impartial trial by jury cannot be held either in Charlotte County or elsewhere in this circuit" (R. 21). Judge Stanley granted the motion in part, but moved the venue to Glades County, another county within the Twentieth Judicial Circuit (R. 175). A second motion for a venue change was later timely filed by Mr. Porter, alleging that "television coverage in Glades County has been such as to preclude a fair and impartial jury from a venire" (R. 169). At a hearing on the motion, however, Judge Stanley stated "Does that mean something like you want your cake and eat it, too?" (R. 255). Judge Stanley then said that "[t]here's not a way in the world I am going to change this thing right now," warning that he would "listen to additional motions" but that "I'm not going to change it again" (Id.). Of course, Judge Stanley had chosen Glades County because he believed that jurors in that county would convict Mr. Porter.

Moreover, even if Mr. Beck made up the conversation, or even if Judge Stanley made the statements in a "joking" manner,[38] Mr. Porter is still entitled to a new trial. Had Mr. Porter's trial counsel been aware of Mr. Beck's statement, even assuming the conversation never took place, a motion to disqualify Judge Stanley based on Mr. Beck's allegations would have to have been granted.[39] When a judge is faced with an initial motion to disqualify, the judge is precluded from passing on the truth of the allegations. Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); § 38.10, Florida Statutes (1995). "[T]he first time a motion is made to disqualify a judge . . . in ruling on such motion the judge is required to accept the allegations in support of the motion as true regardless of whether the judge disputes the truth of the allegations." Jones v. State, No. 91,587 (Order dated November 10, 1997, ordering disqualification of Judge A.C. Soud). Under Florida law, Mr. Beck's allegations would have been legally sufficient, even if disputed by Judge Stanley, to require disqualification. Accord Mims v. Shapp, 541 F.

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[38]Judge Anderson, in one of his alternative rulings, concluded that if the conversation did occur, "the Judge made the comments in a joking manner" (PC-R2. 347). This does not make Judge Stanley's actions justifiable or eradicate his bias. In fact, it almost makes the situation worse. Joking around before a jury verdict in a capital trial about sentencing "the son of a bitch" defendant to "the chair" is no less repugnant to the ethical canons and to the integrity of the judiciary than being saying such in a serious manner. See Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (Anstead, J., specially concurring) (noting that judicial mindset in favor of death penalty "is the very antithesis of the proper posture of a judge in any sentencing procedure").

[39]All of the trial attorneys who have represented Mr. Porter testified that had they been aware of Clerk Beck's allegations, they would have filed a motion to disqualify Judge Stanley. See PC-R2. 199 (Widmeyer); PC-R2. 193 (Jacobs); PC-R2. 208 (Judge Woodard).

2d 415 (3d Cir. 1976) (motion to disqualify judge who told defendant "if I had anything to do with it you would have gone to the electric chair" legally sufficient to require judge's removal). See Argument II, infra.

Relying on this Court's opinion in Dragovich v. State, 492 So. 2d 350 (Fla. 1986), Judge Anderson wrote that "discussion with others about a defendant's guilt (like those attributed to Judge Stanley herein) [are] insufficient as a matter of law to support disqualification of a trial judge in a first degree murder prosecution" (PC-R2. 347). Judge Anderson misapprehended both the holding of Dragovich and the evidence in Mr. Porter's case. In Dragovich, the Court held that a defendant's allegation that his trial judge was biased because the same judge had presided over the co-defendant's trial and heard all the evidence pointing to the defendant's guilt, "without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had," was insufficient to warrant disqualification. Id. at 353. The situation in Mr. Porter's case is nothing like that addressed in Dragovich. Here, Mr. Porter alleged that his trial judge, prior to the close of the evidence, had discussed with the Clerk of Court his decision that if the jury found Mr. Porter guilty, the judge would send him to the chair. The situation in Dragovich is completely inapposite, as the Eleventh Circuit Court of Appeals acknowledged in Mr. Porter's case: "In this case, the proffer is that the person who was then and continues to be the Clerk of the Court, an officer of the court, has come forward with specific and ostensibly reliable evidence that the judge had a fixed predisposition to sentence this particular defendant to death if he were convicted by the jury." Porter v. Singletary,

49 F. 3d at 1489. Mr. Porter is entitled to a new trial.

2. New Sentencing Proceeding.

Mr. Porter is also entitled to a new sentencing proceeding in light of Judge Stanley's lack of impartiality. "In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process." Porter v. Singletary, 49 F. 3d at 1487. The same facts described in Section B, supra, establish Judge Stanley's lack of impartiality with respect to both sentencing proceedings presided over by Judge Stanley.

Judge Stanley "had a fixed predisposition to sentence this particular defendant to death if he were convicted by the jury." Id. at 1489. "A trial judge's announced intention before a scheduled hearing to make a specific ruling, regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice." Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994). Judge Stanley's conduct in orchestrating the venue change to a county where he knew that a guilty verdict would result so that he could thereafter sentence Raleigh Porter to the electric chair certainly implicates the recent observations of Justice Anstead:

> When trial judges take an oath to uphold the law, that includes taking on the responsibility for sentencing in capital cases, including the potential for imposition of the death penalty in those cases where the circumstances mandate its application in accord with legislative policy and judicial restraints. However, such a decision is controlled by the circumstances of each particular case, and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process. Confidence in the outcome of such a process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty when there is "any" basis for doing so. Such a mindset is the

> very antithesis of the proper posture of a judge in any sentencing proceeding.

Hildwin v. Dugger, 654 So. 2d 107, 112 (Fla. 1995) (Anstead, J., specially concurring).

At a minimum, Mr. Porter is entitled to a new resentencing before an impartial judge. At that resentencing, Mr. Porter would be entitled to the benefit of his jury recommendations of life. Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993) ("It is unnecessary to conduct the hearing before a jury because Heiney is entitled to the benefit of the previous jury's life recommendation"); Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994) (same). Relief is warranted.

ARGUMENT II

HAD TRIAL COUNSEL KNOWN OF JUDGE STANLEY'S STATEMENT TO CLERK BECK, JUDGE STANLEY'S DISQUALIFICATION WOULD HAVE BEEN REQUIRED.

At both the federal and state court evidentiary hearings, former Glades County Clerk of Court Jerry Beck testified that, during Mr. Porter's trial, Judge Stanley told him that he had changed venue from Charlotte County to Glades County because Glades County had fair minded people who would listen to the evidence, convict "the son of a bitch" and then Judge Stanley would send Mr. Porter "to the chair." Had Clerk Beck come forward with this information at the time of Mr. Porter's trial, a motion to disqualify Judge Stanley would have to have been granted. Thus a new trial is required at this time.

Clerk Beck was, at the time of Mr. Porter's trial, an elected state official who possessed information relevant to the integrity of a capital trial. As the federal court magistrate found, Clerk Beck did not come forward with this information until March 28, 1997, and that "neither Porter nor his counsel had knowledge that Judge Stanley made the alleged comment to Clerk Beck and that neither Porter nor his counsel had other similar knowledge to put them on notice of bias on part of Judge Stanley." Report and Recommendation, Attachment A at 3. The State of Florida failed to object to the magistrate's findings, see 28 U.S.C. § 636(b)(1), and United States District Judge Elizabeth Kovachevich adopted the magistrate's report. See Attachment B.

As a matter of law, Mr. Porter was deprived of information in the possession of

an elected State official and a constitutional officer. Art. V. § 16, Fla. Const. Had this information been disclosed by Clerk Beck at the time of Mr. Porter's trial, a motion to disqualify would have been filed, as the attorneys who represented Mr. Porter at trial and resentencing testified. See PC-R2. 193 (Jacobs); 199 (Widmeyer); 208 (Woodard).

The lower court failed to address Mr. Porter's argument that had this information been disclosed at the time, Judge Stanley would have to have been disqualified. Even if the conversation between Stanley and Beck "probably didn't take place" or was said "in a joking manner" as Judge Anderson concluded below (PC-R2. 347), had Clerk Beck told Mr. Porter's counsel that he did have this conversation, there is no question that a motion to disqualify Judge Stanley would have been granted. The law is well-settled that "the first time a motion is made to disqualify a judge . . . in ruling on such motion the judge is required to accept the allegations in support of the motion as true regardless of whether the judge disputes the truth of the allegations." Jones v. State, No. 91,587 (Order dated November 10, 1997, ordering disqualification of Judge A.C. Soud). Accord Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978).

A motion to disqualify alleging that Judge Stanley had told the Clerk of Court, prior to the close of the evidence, that if the jury found Mr. Porter guilty he would "send him to the chair" would clearly have been legally sufficient to warrant Judge Stanley's disqualification. "A trial judge's announced intention before a scheduled hearing to make a specific ruling, regardless of any evidence or argument to the

contrary, is the paradigm of judicial bias and prejudice." Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994). However, due to the inaction of Clerk Beck, in no way attributable to Mr. Porter, this information did not become available to Mr. Porter until 1995. Mr. Porter is entitled to a new trial and/or resentencing before an impartial tribunal.

ARGUMENT III

THE LOWER COURT FAILED TO STRIKE THE HEARSAY TESTIMONY OF RON GAUSE.

During the evidentiary hearing below, the State called former State Attorney investigator Ron Gause as a witness. Mr. Gause testified that he was in his office when a call came from Jerry Beck, which was, according to Gause's datebook, on March 23, 1995 (H. 158). On cross-examination by Mr. Porter's counsel, Gause testified that he his datebook reflected an entry for March 23 which stated "at three o'clock, verbatim, it says ex-judge Stanley in State v. Porter, which means I called Judge Stanley that day" (H. 160). He called Judge Stanley "[t]o find out -- I do not remember the exact allegations, but Mr. Beck had told our office that Stanley said certain things. What they were exactly, I do not recall. But that's why I called Stanley to see whether he said these things" (H. 160).

Gause further explained on cross-examination that his datebook did not reflect that he spoke to Clerk Beck on March 23 (id.); rather, he testified that "Mr. Fordham, who was the lead attorney in our office at the time, called me in, and to the best of my recollection, told me what happened and that there was going to be -- we needed to check into it, to check these things out" (H. 161). He reiterated that there was nothing in his datebook reflecting that Mr. Beck had contacted the State Attorney's Office on March 23, but "that was my understanding" from what he had been told by Mr. Fordham (H. 161).

Following this testimony, Mr. Porter's counsel objected to and moved to strike the testimony referring to Clerk Beck calling on March 23, 1995 "because the witness

had no knowledge of that. He is simply relying on what may or may not have been told to him by Mr. Fordham and what his notes are of his actions in light of the directions that he was given" (H. 164). Assistant State Attorney Fordham argued that Gause "responded to my direction, and as he acknowledged in his testimony, the very first time I talked with him about this case and asked him to call Judge Stanley, I had told him it was because of a phone call from Jerry Beck" (H. 165). Mr. Porter's counsel responded that Fordham was the appropriate witness to testify to these facts, not Gause, whose testimony was based entirely on hearsay (Id.). Judge Anderson denied the objection and motion to strike that portion of Gause's testimony (Id.).

The lower court erred in failing to strike this testimony which was clearly hearsay and beyond the scope of knowledge of witness Gause. Through Gause's hearsay testimony, the State was allowed to present evidence allegedly contradictory to that of Jerry Beck -- namely, that Beck contacted the CCR office on a different date from that which he had testified.[40] However, Gause's testimony that he was

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[40]The State's attempts to establish that Mr. Beck first called CCR on March 23 reflects the State's failure to acknowledge the federal magistrate's finding crediting Beck's testimony that he did not contact CCR or the State until March 28, 1997. The State failed to object to the magistrate's findings in federal court.

Further, assuming for the sake of the argument that Gause was correct in testifying that Beck first called on March 23, 1995 (something which Mr. Porter in no way concedes), the State never contacted Mr. Porter's counsel on that date, as it was also established in federal court that Mr. Porter's counsel were first informed of this information when Beck contacted CCR on March 28. Thus, the State's own witness, if he is to be believed, established that the State committed a gross violation of Brady v. Maryland, 373 U.S. 83 (1963), in failing to inform Mr. Porter of Beck's March 23 phone call, if indeed he did call on that date.

Moreover, assuming Gause was correct, again for the sake of this argument

told by Assistant State Attorney Fordham that Beck called on March 23 was inadmissible hearsay. See § 90.801, Fla. Statutes (1997); State v. Baird, 572 So. 2d 904 (Fla. 1991). Gause's testimony that what caused him to call Judge Stanley on March 23 was his being told by Fordham that Beck had called that day is also inadmissible hearsay. This situation is akin to a police officer testifying to hearsay statements in order to explain his "course of conduct" in investigating a particular lead. Such statements are hearsay. EHRHARDT, Florida Evidence § 801.2 (1996 Edition); State v. Baird. Further, the fact that Fordham also testified does not affect the admissibility of his statements to Gause. Wells v. State, 477 So. 2d 26, 27 (Fla. 3d DCA 1985); Blue v. State, 513 So. 2d 754 (Fla. 4th DCA 1987). The lower court erred in failing to strike Gause's testimony on this issue.

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only, that Beck called the State on March 23 and that this phone call caused the State to contact Judge Stanley on March 23, then Judge Stanley lied under oath at the evidentiary hearing when testifying that his first contact with anyone from the State regarding this matter was not until the date of his deposition, which was January 15, 1997 (H. 115).

ARGUMENT IV

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

By order dated November 5, 1996, this Court granted a joint motion filed by Mr. Porter and the State of Florida seeking to reopen the instant case, and remanded this cause to the trial court "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." Mr. Porter thereafter requested that this Court disqualify the Twentieth Judicial Circuit from presiding over the evidentiary hearing under the unique circumstances of the case. Mr. Porter argued:

> The key issue facing the lower in these proceedings is the credibility and lack of impartiality of Judge Richard Stanley at the time of Mr. Porter's trial. During the federal hearing, Glades County Clerk of Court Jerry Beck testified that, prior to the commencement of Raleigh Porter's trial, Clerk Beck and Judge Stanley were having coffee and Clerk Beck asked Judge Stanley why he had changed the venue in the *Porter* case to Glades County. Clerk Beck testified that Judge Stanley told him that he had changed the venue to Glades County because he knew that Glades County had good fair-minded people who would convict the son-of-a-bitch and then he (Judge Stanley) would sentence Raleigh Porter to the electric chair. During the federal hearing, Mr. Porter also presented numerous attorneys who had represented him since his trial and who explained that they had not known of this conversation between Judge Stanley and Clerk Beck prior to being contacted by the undersigned counsel in March of 1995, after the undersigned was contacted by Clerk Beck on the eve of Mr. Porter's then-scheduled execution. The federal court ruled in Mr. Porter's favor, finding that Clerk Beck had not contacted any of Mr. Porter's attorneys about what Judge Stanley had told him and therefore the impartiality issue should be addressed on its merits.
>
> Were any judge in the Twentieth Judicial Circuit to preside over this hearing, that judge would be placed in the position of having to gauge

> the credibility of a former judge of that circuit, Judge Richard Stanley. Moreover, a judge in the Twentieth Judicial Circuit would also have to evaluate the testimony and credibility of Jerry Beck, the active Clerk of Court in Glades County, one of the counties in the Twentieth Judicial Circuit. Further, the lower court judge in the Twentieth Judicial Circuit would be placed in the position of having to evaluate the testimony and gauge the credibility of Judge Thomas Reese, who will also be a witness at the evidentiary hearing. Just prior to contacting the undersigned in March of 1995 about his conversation with Judge Stanley, Clerk Beck contacted then-Chief Judge Reese of the Twentieth Judicial Circuit for advice as to what to do. It was Judge Reese who advised Clerk Beck that if he decided to come forward with the information he possessed, he should contact both Mr. Porter's counsel as well as the State Attorney's Office. Judge Reese's observations of Clerk Beck's demeanor and the substance of his meeting with Clerk Beck are relevant to the issue of the credibility of Clerk Beck. Judge Reese will be a material and necessary witness at the upcoming evidentiary hearing. Were a judge in the Twentieth Judicial Circuit to continue to preside over this matter, that judge would be placed in the untenable position of having to assess the credibility of Judge Reese, a fellow judge and former Chief Judge of the Circuit. The appearance of impropriety under these unique circumstances strongly militates in favor of disqualification of the Twentieth Judicial Circuit and assignment of another judicial circuit to hear this matter.

(Motion to Disqualify Twentieth Judicial Circuit and Request for Assignment of Another Judicial Circuit) (November 7, 1996). On January 16, 1997, this Court denied the motion.

Mr. Porter herein renews his request that the Court reverse the lower court and order a new hearing before a judge in another judicial circuit. It is clear from Judge Anderson's order that he gave great deference to Judge Stanley, to the exclusion of all of evidence supporting Stanley's gross violations of the Canons of Judicial Ethics and the law. Judge Anderson passed off Judge Stanley's unequivocal testimony that he carried a sawed-off machine gun during Mr. Porter's trial as an "idiosyncracy" (PC-R2. 343). Judge Stanley's conduct was not indicative of an idiosyncracy -- it was a

violation of the ethical canons. See Argument I. Despite the fact that Judge Anderson wrote that Judge Stanley's credibility was at issue, Judge Anderson never even attempted to evaluate Stanley's testimony. See Argument I. Judge Anderson also even went so far as to find that Judge Stanley, if he did made the comment about Mr. Porter to Clerk Beck, was "joking" when he said it (PC-R2. 347), notwithstanding all the evidence to the contrary. Finally, Judge Anderson went out of his way to express concern that Mr. Porter's allegations about Stanley's comments to the media and public statements about his desire to shoot death-sentenced defendants himself "would be a patent violation of [Stanley's] First Amendment right to free speech (PC-R2. 345), in total disregard of the law of the case as enunciated by the Eleventh Circuit Court of Appeals. Porter v. Singletary, 49 F. 3d at 1489 n. 12 (discussing Canon 3B(9), which "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").

In sum, Judge Anderson's order expresses his great reluctance to address the heart of the issue on which this Court granted an evidentiary hearing -- the impartiality of a colleague alleged to have violated significant ethical and legal standards. A new hearing in a judicial circuit in no way tied to Mr. Porter's case should be ordered.

ARGUMENT V

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

In finding that Judge Stanley did not lack impartiality, the lower court concluded that the alleged bias urged by the State with respect to the death of Mr. Beck's son was "irrelevant" (PC-R2. 343). Mr. Porter agrees that the issue is irrelevant because Mr. Beck, as the evidence overwhelmingly establishes, harbored no such bias.

However, despite finding the issue irrelevant, Judge Anderson devoted some two and a half pages to a discussion of the court files for the individuals involved in the death of Mr. Beck's son (PC-R2. 341-43). Judge Anderson erred in the manner in which he judicially noticed these materials, and reversal is required.

During the evidentiary hearing, Judge Anderson inquired of the parties as to whether they objected to his taking judicial notice of the court files for the criminal cases arising out of the death of Mr. Beck's son (H. 155). Neither party objected (Id.). At a telephonic status hearing on January 31, 1997, Judge Anderson reiterated that he was "taking judicial notice of the court file from Glades County regarding the death of Mr. Beck's son" (Transcript of 1/31/97 Hearing at 6).

However, in his order, Judge Anderson did not simply take judicial notice of the court file from Glades County; he gleaned inferences from those records 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" (PC-R2. 343).[41] This was improper. Florida statutes permit a court to take judicial notice of only a limited number of matters. See §§ 90.201. 90.202, Florida Statutes (1997). While a court is permitted under § 90.202 (6) to take judicial notice of "[r]ecords of any court in this state," this does not mean that a court is permitted to glean inferences from those records or arrive at conclusions on facts other than those that are either "not subject to dispute because they are generally known within the territorial jurisdiction of the court," § 90.202 (11), or "not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." § 90.202 (13). See Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953) ("The matter judicially noticed must be of common and general knowledge. Moreover, it must be authoritatively settled and free from doubt and uncertainty").

The concept of judicial notice of court records is very simple. "A court record is not subject to dispute: either it is or it is not a record of a court." EHRHARDT, Florida Evidence § 202.6 (1996 Edition). Below, Judge Anderson queried the parties as to whether they objected to his taking judicial notice of the court files. Because there was no question that the records at issue were records of the court, Mr. Porter did not object. However, Judge Anderson violated the requirements of judicial notice by addressing specific facts from the records and gleaning inferences from those

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[41]Notwithstanding the impropriety in taking judicial notice of this alleged bias, the statement that Mr. Beck possesses a bias against the judiciary is simply preposterous. Jerry Beck was the Glades County Clerk of Court for twenty years, until he lost an election in 1996 based on his coming forward with the information about Judge Stanley.

facts which were not contained within the judicially-noticed court record. This was error. Moreover, Mr. Porter's lack of objection to the judicial notice does not mean that Judge Anderson was entitled to go beyond the requirements of the statute. "A stipulation [to judicial notice] does not provide the evidentiary basis for judicial notice of evidence not otherwise properly before the court." Carson v. Gibson, 595 So. 2d 175, 177 (Fla. 2d DCA 1992).

This error was compounded by the fact that Judge Anderson never afforded Mr. Porter the opportunity to litigate the matters improperly noticed, as he was required to do. § 90.204 (1) requires that when a court determines on its own that judicial notice of a matter should be taken, "the court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed." Id. (emphasis added). Here, the lower court went well beyond simply noticing the existence of a court record. It concluded that those records gave rise to "the contention that Beck possesses a general bias against law enforcement, the State Attorney and the judiciary" (PC-R2. 343). Due to the violation of the judicial notice statute, reversal is required. Maradie v. Maradie, 680 So. 2d 538 (Fla. 1st DCA 1996); Rodriguez v. Philip, 413 So. 2d 441 (Fla. 3d DCA 1982). See also Kelley v. Kelley, 75 So. 2d 191, 193 (Fla. 1954) (reversal required because court's "conclusion was based upon circumstances and facts which were not part of the record in the cause then being tried and which the court had no right to consider"); United States Sugar Corp. v. Hayes, 407 So. 2d 1079, 1081 (Fla. 1st DCA 1982) (when court violates judicial notice requirements of §

90.204, the judicially-noticed facts "must be . . . eliminated from consideration").

The lower court also violated the judicial notice statutes by failing to make the judicially-noticed materials part of the record in Mr. Porter's case and to afford Mr. Porter the opportunity to challenge the noticed matters. § 90.204 (3) requires that "[i]f a court resorts to any documentary source of information not received in open court, the court shall make the information and its source a part of the record in the action and shall afford each party reasonable opportunity to challenge such information, and to offer additional information, before judicial notice of the matter is taken." Id. (emphasis added). When this particular statutory provision is violated, reversal is required because "the record on appeal is insufficient to afford [the reviewing court] a basis for reviewing the trial court's order." Teer v. Florida Parole Commission, 15 Fla. L. Weekly D2817 (Fla. 1st DCA 1990).[42] Accord Kelley, 75 So. 2d at 193; Sanders v. Inversiones Varias, S.A., 436 So. 2d 1089, 1090 (Fla. 3d DCA 1983).

Based on the foregoing discussion, Mr. Porter submits that the lower court order is due to be reversed.

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[42]For some reason this opinion is not published in Southern Second reporter.

CONCLUSION

On the basis of the arguments set forth in this Brief, Mr. Porter submits that he is entitled to a new trial and/or a new sentencing proceeding before an impartial tribunal, and any other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 24, 1997.

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ATTACHMENT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

RALEIGH PORTER,

Petitioner,

v. Case No. 95-109-Civ-FtM-17D

HARRY K. SINGLETARY,

Respondent.

REPORT AND RECOMMENDATION

This case is on remand from the United States Court of Appeals for the Eleventh Circuit. Petitioner Porter, a Florida prisoner under sentence of death, filed a successive petition for writ of habeas corpus on March 28, 1995. The District Court denied the petition and Petitioner appealed. The appellate court partially affirmed and partially vacated the District Court's order dismissing Petitioner's successive claims. The appellate court summarized its holding:

> In summary, we reject all of Porter's claims except his new claim challenging the impartiality of his sentencing judge. With respect to that claim, the judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

Porter v. Singletary, 49 F.3d 1483, 1490 (11th Cir. 1995).

The Eleventh Circuit remanded the case to the District Court:

> [f]or 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,[1] or whether Porter or his counsel had other similar knowledge to put them on notice of bias on the part of Judge Stanley.

Porter v. Singletary, 49 F.3d at 1489-90.

The Eleventh Circuit further instructed that:

> [I]f 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.

The appellate court, in a footnote, added:

> [I]f the district court finds on remand that Porter has established cause, the district court must then conduct an evidentiary hearing on Porter's claim that his sentencing judge lacked impartiality. 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 exercise its discretion to stay its proceedings pending a motion to reopen the state proceedings.

Porter v. Singletary, 49 F.3d at 1490 n.16 (emphasis added).

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[1] On March 28, 1995, Clerk Beck informed both the state attorney's office and Petitioner's counsel:

> [t]hat either before or during Porter's trial, the judge presiding over the case, the Honorable Richard M. Stanley, stopped by the Clerk's Office early one morning, and the judge and the Clerk drank coffee together. The judge stated that he had changed the venue in the Porter trial from Charlotte County to Glades County because there had been a lot of publicity and Glades County "had good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then Judge Stanley said, he would send Porter to the chair."

Porter v. Singletary, 49 F.3d at 1487.

On March 27, 1996, a hearing was held before the undersigned Magistrate Judge. The evidence presented at the hearing and the record in the case shows that neither Porter nor his counsel had knowledge that Judge Stanley made the alleged comment to Clerk Beck and that neither Porter nor his counsel had other similar knowledge to put them on notice of bias on the part of Judge Stanley. Therefore, Petitioner has established cause to surmount the abuse of the writ doctrine and the state procedural bar.

Accordingly, in view of the foregoing, it is RECOMMENDED:

1. That, pursuant to the Eleventh Circuit's dicta in footnote 16, the Court direct the parties to file a joint motion to reopen the state proceedings to inquire as to the impartiality of Judge Stanley.[2]

2. That the Court stay and administratively close this case pending the state court's ruling on the motion.

DONE AND ORDERED at Ft. Myers, Florida this 24th day of May, 1996.

George T. Swartz
UNITED STATES MAGISTRATE JUDGE

SA/sm

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the actual findings on appeal. 28 U.S.C. 636(b)(1).

[2] It appears that if the state court grants the motion to reopen the proceedings and subsequently finds that Judge Stanley was biased, then the state court would, as a result of the finding, hold a new sentencing hearing.

Copies: Martin McClain, Esq.
Robert Landry, Esq.

ATTACHMENT 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RALEIGH PORTER,

Petitioner,

vs. Case No: 95-109-Civ-FtM-17D

HARRY K. SINGLETARY, JR.,

Respondent.

O R D E R

THIS CAUSE is before the Court on the Magistrate Judge's report and recommendation that the Court direct the parties to file a joint motion to reopen the state proceedings to inquire as to the impartiality of Judge Stanley pursuant to the Eleventh Circuit's dicta set out in footnote 16,[1] and the recommendation that the Court stay and administratively close this case pending the state court's ruling on the joint motion to reopen the state proceedings.

All parties previously have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to Section 636(b)(1), Title 28, United States Code. No objections have been filed.

Upon consideration of the report and recommendation of the Magistrate Judge and upon this Court's independent examination of the file, it is determined that the Magistrate

[1] See Porter v. Singletary, 49 F.3d 1483, 1490 n.16 (11th Cir. 1995).

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Judge's report and recommendation should be adopted.

Accordingly, the Court orders:

(1) That the Magistrate Judge's report and recommendation is adopted and incorporated by reference in this order of the court.

(2) That the parties file a joint motion to reopen the state proceedings to inquire as to the impartiality of Judge Stanley[2] pursuant to the Eleventh Circuit's dicta set out in footnote 16.

The Clerk is directed to stay and administratively close this case pending the state court's ruling on the parties' joint motion to reopen the state proceedings.

DONE AND ORDERED at Tampa, Florida this 14th day of June, 1996.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

cc: SA/sm

[2] It appears that if the state court grants the motion to reopen the proceedings and subsequently finds that Judge Stanley was biased, then the state court would, as a result of the finding, hold a new sentencing hearing.