IN THE SUPREME COURT OF FLORIDA

CASE NOS. 90,101

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

The unfortunate lengths the State will go to defend this record is epitomized by its attempt to defend the statement made by Judge Stanley which was quoted in the introductory section of Mr. Porter's argument. Mr. Porter cited Judge Stanley's testimony that "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" (IB at 52). The only manner in which the State can defend this statement is to argue that when Stanley made this comment he also discussed being in a German prisoner-of-war camp, and then cites to Barclay v. Florida, 463 U.S. 939 (1983), for the proposition that "no constitutional violation found in trial judge's reference to wartime experience and view of Nazi concentration camps" (AB at 21 n.3). Of course, the citation to Barclay does nothing to address the comment made by Stanley regarding his desire to kill Mr. Porter himself "if he had done that to my family." See, e.g. Fogelman v. State, 648 So. 2d 214, 220 (Fla. 4th DCA 1995) (judge disqualified due to lack of impartiality due to comment that "if she [the victim] were my daughter I would kill him [the defendant]"). This case is not about references to Nazi Germany; it is about a judge whose bias and prejudice caused him to override a life recommendation in a capital case and a judge who should not have been presiding over this case.

In this Reply Brief, Mr. Porter will demonstrate that the overwhelming evidence adduced below, even and particularly that evidence presented by the State, establishes that the lower court's order must be reversed. The lower court's order finds no support in either fact or law, and is devoid of competent, substantial evidence to support it. Each and every point made by the State, as demonstrated below, is contrary to the evidence and/or bankrupt of a legal or factual basis.

1. No Credibility Findings.

The State argues that the lower court made a credibility finding in this case (AB at 18). This is false. The lower court reached a "safe conclusion" that the conversation "probably didn't take place" or that it did take place but "in a joking manner" (PC-R2. 347).[1] Nowhere did the lower court find that Jerry Beck was not credible; certainly, if the conversation "probably" didn't take place, it just as easily, as the evidence established, "probably" did take place. In determining that the conversation "probably didn't take place" or was made "in a joking manner"[2] the lower court, as indicated, "dr[e]w from the evidence presented" this "only safe conclusion" (Id). The

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[1]Under either scenario, Judge Stanley would have to have been recused had trial counsel known of this information at the time of trial, as the State concedes in its brief. See AB at 47 ("a facially sufficient motion to recuse made contemporaneously might have succeeded where no proper vehicle permits the truth of the matter to be discerned at the time"). See also Argument II, infra.

[2]The lower court's finding that the conversation was made "in a joking manner" establishes that the lower court did not make a credibility determination against Jerry Beck.

problem with the lower court's finding is that the court ignored the evidence, not that the court made a credibility finding against Mr. Beck. This Court must conduct a de novo review of this case, for even the ultimate question -- whether the conversation occurred or did not occur -- was not addressed by the lower court.

The State distances itself from the federal court proceedings, arguing only that those proceedings were of a "limited nature" (AB at 20) and that "it matters not whether the state objected to the federal court cause conclusion" (AB at 21). What the State fails to comprehend is that the federal court found Mr. Beck credible, found that Mr. Beck did not come forward with the information until he contacted CCR and the State Attorney's Office on March 28, 1995, and found that none of Mr. Porter's attorneys knew of this information until Beck came forward on that date. The State presented no evidence in the federal proceedings, and failed to object to the federal magistrate's findings. The State's use of Beck's federal testimony as a reason why the conversation between Beck and Judge Stanley did not occur highlights the hypocritical nature of its arguments. It was the same parties litigating the credibility of Jerry Beck and when he contacted Mr. Porter's counsel. Under principles of collateral estoppel and/or res judicata, the federal court's acceptance of Jerry Beck's testimony is binding, just as the federal court's determination that there is no procedural bar to the claim.

2. Nancy Raulerson corroborates Jerry Beck's testimony.

As to the testimony of Nancy Raulerson, the State argues that her testimony contradicts Beck's testimony (AB at 21-23). The State called Raulerson to testify that she accompanied Judge Stanley to Glades County during the Porter trial; however, she admitted that there was one day during the trial that she did not go with Stanley, and she believed the day she did not accompany Judge Stanley to Glades County was a Thursday (H. 145). Beck testified that he believed the conversation he had with Judge Stanley was sometime before the second day of trial and was sure that "it was sometime before any conclusion of the trial" (H. 32-33).

The State seeks comfort in the fact that because Beck testified that he believed the conversation took place on either the first or second day of trial, and Raulerson testified that she believed the day she missed was a Thursday, which was the third day of trial including one day of jury selection, Raulerson contradicted Beck. The State fails to point <u>the most significant fact about Raulerson's testimony</u>. Raulerson, while believing that she missed a Thursday,[3] testified that the guilty verdict

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[3]Raulerson also testified that the trial commenced on a Monday and that the verdict was rendered on Friday (H. 149, 150), when in actuality, as even the State acknowledges in its brief, jury selection did not commence until Tuesday, November 28, and the verdict was rendered on Thursday, November 30 (AB at 22). If the State wants to make an issue out of particular dates, then Raulerson is an unreliable witness. Of course, Raulerson did acknowledge that memory can dim as to specific dates due to the passage of time (H. 150). Regardless of what day she missed and what day the conversation occurred, the salient points are not in

came in after she missed the day going to Glades County with Judge Stanley (H. 151). Thus, Raulerson's testimony is perfectly consistent with Beck's testimony. The guilty verdict was rendered on Thursday, November 30. Raulerson, by her own admission, testified that she was absent on a day prior to the rendering of the verdict, thus making her testimony that it was a Thursday erroneous. If Raulerson was absent on a day prior to the rendering of a verdict (which was on Thursday, November 30, 1978), that would make her absence fall on either the first or second day of trial, which is exactly when Jerry Beck testified the conversation occurred. This glaring inconsistency is not addressed by the State (and certainly not by the lower court, which failed altogether to resolve Raulerson's testimony that she did not accompany Judge Stanley on one day). As noted supra at n.3, the only result that can be gleaned from the testimony of both Raulerson and Beck is that Raulerson did not go to Glades County on either the first or second day of trial, which is exactly when Beck testified he had the conversation with Stanley. These facts, coupled with Raulerson's testimony that on the days she did accompany the judge to Glades County, they routinely had

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dispute. Beck testified that regardless of whether the conversation occurred on the first or second day, "it was sometime before any conclusion of the trial" (H. 32-33). Raulerson testified that the day she missed was prior to the rendering of the verdict and the trial was still ongoing on the day she missed (H. 151). Thus, the only days that Raulerson could have missed by her own testimony was Tuesday or Wednesday. Tuesday and Wednesday were the first and second days of trial, which is when Beck testified the conversation occurred.

coffee together prior to the start of trial, all lead to the inescapable conclusion that Jerry Beck was truthful and credible.[4] It makes perfect sense that the elected Clerk of Court would offer to have a morning coffee with a visiting judge who came to the courthouse to preside over a murder trial.

The lower court ignored all of this evidence, and simply found that Raulerson accompanied Stanley every day but one, and denied that the conversation took place (PC-R. 338). The court undertook no analysis of the facts presented, even those presented by the State.

3. Ron Gause's testimony corroborates Jerry Beck.

As to the testimony of State Attorney investigator Gause, the State insists on falsely asserting that Beck should not be believed because "the triggering device for recall of an incident was a conversation with State Attorney personnel that did not occur" (AB at 24). The State's entire argument is premised on the State's insistence that no State Attorney investigator visited the Clerk's Office. This is simply not true, as the State's own witness testified at the evidentiary hearing below. Gause explicitly testified that he visited the Glades County Courthouse to review files on the Porter case on March 27, 1995 (H. 162). This is perfectly consistent with Beck's testimony that his office was visited by a State Attorney investigator on March 27, 1995, and that he was informed of this by his staff as

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[4]Below, the State asserted that Raulerson was "perhaps the most disinterested person to testify" (PC-R. 420).

he was in Lake Placid, Florida, on that date (H. 26-27). Gause acknowledged that if 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 on that day certainly would have told him who I was" (H. 163) (emphasis added). Gause also testified that he did not speak with Beck on that day because he was not there (H. 163); this is consistent with Beck's testimony that he was not in the office on March 27, but was in Lake Placid (H. 26-27).

The State argues that "[t]he significance of Gause's testimony that he subsequently went to the Glades County Clerk's Office was that it was a response and reaction to Mr. Beck having contacted the prosecutor's office to report the alleged incident with Judge Stanley . . ." (AB at 23-24). The State insists on asserting the reality of an incident that, by its own evidence, never occurred. The State ostensibly called Gause to testify that he contacted Judge Stanley on March 23, 1995, after Jerry Beck allegedly contacted the State Attorney's Office (AB at 8). The State also writes in its brief that Gause "knew that he was asked to contact Stanley on March 23 (AB at 8). In fact, Gause testified that he called Judge Stanley on March 23 (H. 162). However, he acknowledged that he had no direct knowledge that Beck called the State Attorney's Office on March 23, and further conceded that if Judge Stanley had been quoted in a newspaper article appearing on March 23 with comments regarding Mr. Porter's case, that event might have triggered someone to have

Gause contact Stanley on that date (H. 162).[5]

4. The Imaginary March 23 Phone Call.

The State's insistence that Jerry Beck contacted the State Attorney's Office on March 23, which in turn resulted in the State contacting Judge Stanley, is puzzling since such a phone call on March 23 did not occur.

First, this position ignores the finding of the federal courts (a finding not objected to by the State of Florida), that Beck did not come forward until his phone call to Mr. Porter's counsel and the State on March 28, 1995. During the federal proceedings, the State never referred to much less presented evidence on the fact that Beck contacted CCR and the State Attorney's Office on any other date but March 28, 1995. The State should be estopped from making this argument, particularly since it is factually erroneous.

Second, if the State's insistence on this event is well-founded, then the State should explain to this Court, United States District Court Judge Kovachevich, the three-judge panel of the Eleventh Circuit Court of Appeals, and the entire United States Supreme Court, why it never disclosed this information to Mr. Porter or his counsel on March 23.[6] Moreover, the State

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[5]On March 23, the Huff hearing on Mr. Porter's Rule 3.850 motion was conducted. During the hearing, Mr. Porter's counsel alluded to the newspaper article containing Judge Stanley's comments about Mr. Porter's case.

[6]As established by the evidence during the federal evidentiary hearing and the findings of the federal court, Mr. Porter's collateral counsel did not know of the information until Jerry Beck

should explain the good-faith basis during the warrant litigation for its argument that Mr. Porter failed to discover this information with due diligence (an argument which this Court accepted) when it knew of the information allegedly since March 23. Thus, the State's insistence on a non-existent event is troublesome not only because such a phone call from Beck to the State Attorney's Office did not occur until March 28, but also because it establishes that, if he called, the State hid this information from Mr. Porter and then turned around and made a diligence argument knowing it to be disingenuous.[7]

Third, the State's position on this point ignores the stipulation regarding Judge Reese's testimony that before he

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called on March 28, 1995. On March 23, Mr. Porter's counsel were in Ft. Myers conducting the Huff hearing, so it would have been very easy for the State to inform counsel of this startling information. No such contact occurred because the phone call did not occur on March 23.

[7]The only support for its theory that Beck called the State on March 23 was the testimony of Assistant State Attorney, C.L. Fordham. After Gause testified that his knowledge was based only on hearsay from Fordham, Mr. Porter called Fordham to testify. Fordham had no answer for the fact that the parties were in court for a Huff hearing at the time he believed Beck called the State Attorney's Office and professed to not remember the hearing or what it was about (H. 166-67). The only documentary evidence that supported his belief that Beck called on March 23 was "[j]ust in reconstructing it with Ron [Gause] and with entries in our office papers" (H. 168). Fatal to the notion that Beck called on March 23 rather than March 28 was Fordham's recollection that Fordham did not contact CCR because Beck "told me that he had just talked to your office" and said that "Judge Reese had suggested he call us both" (H. 169). Of course, the testimony of Jerry Beck, Dick Blackwell, the stipulated proffer from Judge Reese, the documentary evidence such as the affidavits, and a binding federal court ruling all established that Beck first contacted CCR on March 28, 1995, the day after the visit by Gause to the Clerk's Office.

contacted CCR on March 28, Jerry Beck discussed the matter with Chief Judge Reese of the Twentieth Judicial Circuit (H. 7). The State's position also ignores the testimony and affidavit of Dick Blackwell, the deputy clerk, who corroborated that when Beck came back to the Clerk's Office on March 28 (he had been in Lake Placid on March 27), he informed Beck of the visit by the State Attorney investigators on the previous day (H. 64). At that point, Blackwell testified that Beck "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" (H. 65). During Mr. Porter's proffer, Mr. Porter's counsel explicitly informed the court that "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 certainly about what he should do and when to seek counsel, so to speak, from the chief [judge]" (H. 7). The State stipulated to this, yet oddly fails to mention this in its brief.[8]

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[8]The only reference to Blackwell is the State's assertion that "he did not recall state attorney investigators being in the office looking at files" (AB at 25 n.4). While Blackwell was uncertain whether it was State Attorney investigators or a CCR investigator that came to the courthouse on March 27 to look for records (H. 70), the State's own evidence established that Gause came to the courthouse on that date, not a CCR investigator. Neither the State nor the trial court discussed Blackwell's testimony which corroborated Beck's, and the only argument the State can come up with is that Blackwell "did not testify as to any knowledge regarding the 1978 trial" (AB at 25 n.4). Mr. Porter did not call Blackwell to establish anything about the 1978 trial; Mr. Blackwell was called because he corroborated Jerry Beck. Further, the State's assertion that Blackwell "repeated in hearsay fashion that

Fourth, if the State's uncorroborated version of events is to be believed -- that Beck called the State Attorney's Office on March 23, and the State in turn talked to Judge Stanley on that date -- then Judge Stanley committed perjury during his deposition. During his deposition, when asked about prior contact he had had with the State Attorney's Office, Stanley, under oath, testified that his first contact with anyone from the State Attorney's Office regarding this matter was not until the date of the deposition, which was January 15, 1997 **????** He similarly testified at the evidentiary hearing (H. 115). Thus the theory espoused by the State -- if it is to be believed -- is buttressed on perjurious information. The State apparently does not care, as it continued to assert this theory in its brief despite Mr. Porter's argument that if the State's theory was true Judge Stanley lied (IB at 90-91 n.40).[9]

Beck reported to him in March of 1995 about his alleged conversation years earlier with Judge Stanley" rings more than hollow, since the State relies exclusively on hearsay testimony from Ron Gause as to support its argument about a non-existent telephone call from Beck to the State Attorney's Office on March 23, 1995. See Argument III.

[9]There is further evidence establishing Stanley's lack of honesty on the point of his contact with the State. As noted above, Stanley testified during the deposition that the first contact he had with the State was the day of the deposition, January 15, 1997 (H. 115). However, when Mr. Porter issued a deposition subpoena for Stanley, the State filed a motion to quash, asserting that "Judge Stanley is experiencing severe health problems" (PC-R. 35). Moreover, when Mr. Porter's counsel contacted the State to ascertain Stanley's address so a subpoena could be served, the State informed Mr. Porter's counsel that the subpoena could be served in care of the State Attorney's Office because Stanley did not want to divulge his address to Mr. Porter's

In short, the March 23 phone call did not occur. As the evidence overwhelmingly establishes, Jerry Beck's testimony is corroborated in all significant aspects.

5. Jerry Beck's loss of livelihood.

In its open disdain for a constitutional officer who served his constituents for twenty years as Clerk of Court, the State asserts that the fact that Jerry Beck lost his re-election bid in 1996 after the allegations of his coming forward and the resulting stay of Mr. Porter's execution were made public "may be easily interpreted as a loss of confidence in an official whose version of events . . . 'doesn't add up'" (AB at 24). First, the State ignores that Beck himself testified that he had been informed that he was not re-elected because of his involvement in Mr. Porter's case (H. 21).[10] And significantly, Mr. Beck's failed re-election bid occurred months before the evidentiary hearing when Judge Anderson ruled against Mr. Porter. Oddly, the only court proceedings that had occurred at the time of Mr. Beck's re-election campaign was the federal court proceeding, where Beck was found credible and Mr. Porter prevailed -- facts which were widely reported in the local press.

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lawyers (PC-R. 56). If there had been no contact between Stanley and the State prior to the deposition, then there is no explanation how the State was aware of the judge's alleged health problems and the fact that he did not want Mr. Porter's attorneys to know his address and preferred the State Attorney to accept service.

[10]Mr. Beck did not testify voluntarily at either the federal hearing or the state court hearing; he had to be subpoenaed for both.

6. Jerry Beck's alleged memory problems.

The State chides Mr. Porter's assertion that Beck was credible because "Beck recalls almost nothing other than that Judge Stanley made an outlandish assertion of prejudicial bias to a total stranger" (AB at 24). The State maintains its attack on Jerry Beck because Beck did not know the particulars about Mr. Porter's case, the direct appeal, the subsequent postconviction proceedings, or the names of the attorneys.[11] Yet oddly, the State blindly stands behind Judge Stanley, who did not even know that Mr. Porter, one of the three individuals he sentenced to death as a judge, had obtained a resentencing from this Court; in fact, he did not recall the resentencing proceeding at all (H. 141).[12] Of course, it is the State that ridiculed Mr. Beck

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[11]The State fails to explain how or why the clerk of court in Glades County would have reason to know about the years of litigation in Mr. Porter's case. Even the State Attorney below did not recall the Huff hearing or what was discussed, yet the State Attorney is counsel of record for the State in Mr. Porter's case and the record shows he was present in open court on that day. The State's belief that Mr. Beck's lack of awareness of the proceedings in Mr. Porter's case once the trial concluded is evidence of his lack of credibility is nonsensical.

[12]Furthermore, Judge Stanley did not know who Mr. Porter's trial lawyer was either. When questioned about his lack of recollection of wearing brass knuckles at the sentencing proceeding, the following colloquy occurred:

> Q If there was testimony in the court record from Mr. Winmeyer [sic] recalling that you had them at the time of sentencing, would he be in err[or]?
>
> A Who is Mr. Winmeyer [sic]?

(H. 117). Stanley later said "I don't know him" and "I don't know what he would know" (H. 118).

during cross-examination when he testified that the State Attorney's investigator came to the Glades County Courthouse because according to the State this visit never occurred, see H. 25-27, yet turned around and presented direct evidence from the very investigator who went to the Glades County Courthouse on March 27 to look for files regarding Mr. Porter's case. And it is the State that maintains that a phone call occurred on March 23 when in fact it did not. See supra Section 4.

As to the charge that Stanley's assertions to Beck prior to Mr. Porter's trial are "outlandish," Mr. Porter agrees. What Judge Stanley said to Jerry Beck is outlandish. Deciding to sentence Mr. Porter to the electric chair prior to the close of the trial is outlandish. Referring to Mr. Porter as a "son-of-a-bitch" to the newspapers, as he did to Mr. Beck during Mr. Porter's trial, is outlandish. Carrying an illegal sawed-off machine gun into a courtroom is outlandish. Using brass knuckles during a capital sentencing proceeding is outlandish. Signing a sentencing order before the penalty phase even has commenced it outlandish. And as to the State's query about why Judge Stanley would make this statement "to a total stranger" (AB at 24), one only has to look to the State's own terminology in describing Judge Stanley. In its brief, the State observes Judge Stanley's "lack of squeamishness" (AB at 28). Below, in its post-hearing memorandum, the State aptly observed that "Judge Stanley is not bashful about being candid about the way he feels" (PC-R. 420). Clearly, the greater weight of the evidence falls on Mr. Porter's

side.

6. Judge Stanley's denials.

The State relies heavily on Judge Stanley's denials. However, in reality, Judge Stanley recalled no conversation with Jerry Beck. 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). He 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). Not recalling a conversation is not the same thing as denying that such a conversation ever occurred.

Stanley also exhibited a lack of recall as to important information (information about Mr. Porter's case which he certainly had more reason to know than did the Glades County Clerk of Court). Stanley had "no idea" how many sentencing proceedings Mr. Porter had (H. 116), could not remember if Mr. Porter had a resentencing (H. 116), did not remember who Mr. Porter's trial attorney was (H. 117), did not remember wearing brass knuckles at Mr. Porter's sentencing proceeding (H. 117), did not remember where Mr. Porter's sentencing occurred (H. 118-19), did not remember who the clerk was in the courtroom during the trial (H. 121), did not recall talking to reporters and

denying having made comments to them (H. 122), did not recall telling a reporter about attending and making comments at debates about capital punishment (H. 129), did not recall how many first degree murder cases he presided over (H. 130), and inaccurately recalled how many death sentences he imposed (H. 130).[13] While the State and the lower court were quick to fault Jerry Beck for his lack of knowledge on many of these very points, as he testified there was no reason for him to know who Mr. Porter's lawyers were, or what the subsequent appellate and postconviction proceedings were in the case since the case left Glades County after the trial, neither the State nor the lower court analyzed Stanley's lack of recall and knowledge of important information when standing behind his putative denial of talking to Jerry Beck.

Stanley's lack of recall and/or alleged denials ring hollow in light of Stanley's denials of speaking to reporters and denying the comments he made to the media (AB at 25) (Stanley "testified that some of the things he read in the newspapers that was said he did not say"). Mr. Porter established through the reporters' testimony that each quotation attributed to Stanley was a verbatim accurate quotation from Stanley. These quotations

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[13]Stanley testified that he sentenced two people to death, both override cases (H. 130). Stanley was wrong. He did override two life recommendations, in Mr. Porter's case and in Walsh v. State, 418 So. 2d 1000 (Fla. 1982), wherein this Court reversed Stanley's override. Stanley also imposed death in Lambrix v. State, 494 SO. 2d 1143 (Fla. 1986). Thus Stanley imposed death on three individuals.

significantly impeached Stanley,[14] corroborated Beck's testimony and Mr. Porter's position that Judge Stanley lacked impartiality. See Porter v. Singletary, 49 F. 3d 1483, 1487 (11th Cir. 1995) (evidence of lack of impartiality contained in Beck's affidavit "finds some corroboration in a proffered statement by Judge Stanley to news reporters"). Stanley's lack of recall and/or alleged denials of the conversation with Jerry Beck also ring hollow in light of the fact that the substance of the conversation to which Beck testified Stanley repeated to the press when interviewed. For example, Beck's testimony that Stanley told him -- prior to the close of the trial -- that he would sentence "the son-of-a-bitch to the chair" is corroborated by Stanley's own comment to the media that "When the judgment was brought out by the jury that he was guilty . . . I knew in my own mind what the penalty should be, and I sentenced him to it" (PC-R2. 332). New York Times reporter Alan Judd verified that Judge Stanley made this comment to him. Id. Stanley denied making the comment (H. 102). Stanley also denied telling a reporter from the Miami Herald that he publicly advocated for the death penalty, but then admitted to these very facts at the hearing, when he testified:

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[14]The State does not contest that the media statements were not admissible as impeachment evidence against Stanley, as well as substantive evidence of Stanley's lack of impartiality under § 90.803(3)(a)(1), Fla. Stat. (1997). Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994). The State makes no attempt to argue the statutes and cases discussed in Mr. Porter's brief at p. 68 n.32, and thus concedes these points.

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). 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).[15]

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[15]The State belittles these facts because the statements "were not made in a judicial capacity regarding any pending litigant" (AB at 28). This position ignores 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." Porter v. Singletary, 49 F. 3d at 1489 n.12. Judge Stanley acknowledged that he made these comments numerous times over the years, and felt this way for a long time. The canons of ethics are not violated only when a judge makes reference to a particular litigant. Moreover, the comment Stanley made to Jerry Beck certainly referred to a pending litigant -- Raleigh Porter.

Notably, the State does not address the lower court's

In its defense of Stanley, the State argues that "there would be no reason for Stanley to care in 1996 about [jury's life] recommendation when the Florida Supreme Court had affirmed this judgment and death sentence in 1983" (AB at 6). Stanley, however, certainly had every reason to "care" about the continued validity of Mr. Porter's sentence. He indicated below that he had received cards from friends about Mr. Porter's case. 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). It is patently incredible that Judge Stanley does not "care" about what happens to Raleigh Porter.

7. The Judgment and Sentence Form.

Again, contrary to the evidence, the State insists on

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gratuitous defense of Judge Stanley wherein the court expressed concern about Stanley's First Amendment rights. See Initial Brief at 70).

arguing that Stanley "did not make up his mind and did not sign the sentencing document prior to the jury's recommendation" (AB at 26). The State devotes only a few sentences to the issue of the sentencing order, perhaps reflecting the fact that it has no cogent argument supported by competent evidence. The sentencing order and the testimony below established it was signed on November 30, the day before the penalty phase commenced.[16]

The State's hypotheses about what could have happened with the sentencing order (AB at 26),[17] ignores what did happen -- that Judge Stanley signed it before the penalty phase, and that when he signed it, it was completely filled out with the date, the judgment of guilt, and the death sentence. Judge Stanley himself established this. Stanley testified unequivocally that he would have read the sentencing order before he signed it, and

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[16]The State refers to the Eleventh Circuit's recognition that the sentencing order, by itself, fell short of establishing a claim of bias (AB at 26 n.5). The Court did not hold, however, that the "the date on the judgment form was readily explainable as clerical error" (id.), but rather that the State had explained that it could have been clerical error (a theory which was conclusively disproven by Judge Stanley's testimony at the evidentiary hearing). The Eleventh Circuit remanded for an evidentiary hearing, and nowhere in the Eleventh Circuit opinion does it state that the fact that the judge signed the sentencing order prior to the penalty phase -- as the evidence established -- could not further corroborate the bias of Stanley which was inherent in his statement to Jerry Beck.

[17]The State adduced no evidence to substantiate its hypothetical scenarios about how and when the sentencing order was signed. Only Judge Stanley, the State's witness, testified on this point, and he testified that he signed the order on November 30, 1978 -- the day before the penalty phase -- and that when he signed it, the sentence portion of the form was already filled in. He would not have signed it if it had not been completely filled in.

it would have been filled out "completely" when he signed it:

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). Stanley later reiterated that he sentenced Mr. Porter to death "[b]ased on that judgment, it

would be in 1978, 30th day of November, 1978" (H. 116).

The State cannot stand behind Stanley's putative denials of telling Jerry Beck what he did, and at the same time distance itself from this very explicit and unequivocal testimony. That Stanley decided to sentence Raleigh Porter to death prior to the penalty phase -- which is what he told Jerry Beck he would do -- finds corroboration in this sentencing order signed November 30, 1978, the day the guilty verdict was rendered and one day prior to the commencement of the penalty phase.

8. The Sawed-off Machine Gun and Other Weapons.

The State concedes Judge Stanley's testimony "that he had never walked into a courtroom at the time he was a judge that he did not have a gun" and that he had brass knuckles which "he did not think he had [] in the sentencing proceeding but in his office but in any event never threatened anyone" (AB at 30). It is the position of the State of Florida, however, that such conduct is perfectly fine because "Judge Stanley did not wave or brandish a weapon to or at others in the court" (AB at 32).[18]

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[18]The State reasserts the argument it made about the sentencing order -- that the gun, like the sentencing order, were discussed by the Eleventh Circuit as not demonstrating sufficient bias to warrant a hearing. However, as with the sentencing order, there is nothing in the Eleventh Circuit's opinion indicating that the gun and sentencing order do not indicate any bias, just that on their own they did not give rise to enough to warrant a hearing. The State below never objected to any testimony regarding either the gun or the sentencing order.

Furthermore, until the evidentiary hearing, Mr. Porter was unaware that Judge Stanley carried a sawed-off machine gun into court. On direct appeal, appellate counsel filed an affidavit attesting to the fact that Stanley, at Mr. Porter's sentencing

The attempts to pass of Stanley's use of illegal weaponry as necessary for courtroom security must fail (AB at 32). The fact that there were drug cases pending at the time is not a justification for Stanley to be carrying a sawed-off machine gun and using a handgun and brass knuckles in Mr. Porter's case.[19] That is why there is courtroom security, which was present in

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hearing, had brass knuckles and a handgun visible on the bench. Thus, any reference to the Eleventh Circuit's opinion must consider that the Court, like Mr. Porter, was unaware that a judge was carrying an illegal sawed-off shotgun into a courtroom.

[19]On direct appeal, Mr. Porter's appellate counsel filed an affidavit reflecting trial counsel's observations of Stanley with the gun and brass knuckles. The State moved to strike the affidavit, and the Court granted the request. The affidavits were literally removed from the record on appeal, and counsel cannot find a copy at this time. However, during the federal evidentiary hearing regarding the ineffective assistance of counsel claim, trial counsel Widmeyer explained what he observed on the day of Mr. Porter's sentencing:

> Q Do you vividly remember [the judge sentencing]?
>
> A I remember how I felt. Rereading the transcript told me again the words that were spoken by people, but until I -- I don't have any independent recollection of what was said or done. I remember the circumstances very vividly, however.
>
> Q Can you explain those circumstances?
>
> A Yes. The reason I remember it so vividly is because I was standing there in front of the Judge with Mr. Porter and I noticed that Judge Stanley had a pistol on the bench loosely concealed by a piece of paper. He had -- in one hand he was wearing a set of metal nuts and there were several deputies in the room and as I glanced around, nearly all of them had their hands on the butts of their firearms. I was extremely nervous.

(Testimony of Steven Widmeyer, Porter v. Dugger, Case No. 85-154-Civ-Ft.Myers-17, October 13, 1988, Volume IV, pp. 9-10) (emphasis added).

abundance during Mr. Porter's sentencing, with hands on their weapons. See supra n. 15.[20] As to the prosecutor who was killed, that did not occur in a courtroom, and it did not occur until after Mr. Porter's resentencing proceeding (which Judge Stanley did not even remember). As with all the other evidence, Stanley's use of weaponry corroborates his bias in this case. Even the lower court judge found that without adequate explanation (if there could be one), Judge Stanley's "idiosyncracies" could establish that Stanley "was biased against all criminal defendants" (PC-R2. 343).[21]

9. Judge Stanley's personal animosity toward Raleigh Porter.

The State argues that the testimony from Judge Stanley that he would have killed Mr. Porter himself had he done this crime to a member of his family and the other testimony expressing his animosity to Mr. Porter is "irrelevant, but answered" (AB at 33). The question was answered because the State posed no relevancy objection below, and thus the State cannot be held to complain on appeal about Stanley's personal feelings when no contemporaneous objection was made below. Procedural bars apply to the State as well as to defendants. Cannady v. State, 620

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[20]Moreover, the security argument must fail because it was only at Mr. Porter's sentencing that he had on brass knuckles and a gun was visible on the bench, not during the trial. Of course, there was a hidden sawed-off machine gun on his lap throughout trial.

[21]The State never addresses this particular point made by the lower court.

So. 2d 165 (Fla. 1983). Further, the State argues in a footnote that the questioning of Stanley's animosity toward Mr. Porter was "improper" because a judge's thought process cannot be questioned (AB at 33 n.8). As a preliminary matter, the State failed to object below to the questioning of Judge Stanley, and never raised any "mental process" objection (H. 120). The complaint is now waived as procedurally barred. Cannady. Furthermore, the Eleventh Circuit remanded for a hearing on Judge Stanley's lack of impartiality, finding that the statement made to Beck overcame the presumption of impartiality and regularity that normally shields a judge from inquiry into these issues. Under the State's cramped view of proper inquiry, Mr. Porter could not inquire about the statement from Stanley about deciding to sentence Mr. Porter to death before the trial even concluded, as that constitutes a "mental process in reaching [a] decision" (AB at 33 n.8). Thus not only is the State's complaint procedurally barred, it is contrary to the purpose of the Eleventh Circuit's remand for a hearing on Judge Stanley's lack of impartiality.

The State does not argue that these comments do not establish lack of impartiality, but simply passes them off as "retrospective musings about the correctness of his decision" (AB at 34). As to the cases that are cited by Mr. Porter, the State simply argues that they involve "disqualifying conduct occurring contemporaneously with the judicial duties being performed" (AB at 34). Here, Mr. Porter had established in a federal proceeding that neither he nor his counsel had cause to know of the evidence

of Stanley's comment to Jerry Beck; thus Mr. Porter should be put in a position as if this were a pre-trial proceeding. See Argument II. Notably, the State does not contest that Stanley's animosity about Mr. Porter does not constitute "disqualifying conduct"; rather, it simply argues that the comments were not made contemporaneously with the trial. However, Judge Stanley, whose animosity to Mr. Porter was evident at the evidentiary hearing, where he expressed his "lack of squeamishness" (in the words of the State) toward Mr. Porter, had the absolute duty under Florida law to reveal his bias at the time of trial, whether Mr. Porter was aware of it or not. "Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate *whether challenged or not*. Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (emphasis in original).

10. Other Indicia of Bias.

As to the remaining indicia argued by Mr. Porter pointing to Judge Stanley's lack of impartiality to Mr. Porter, the State essentially argues that individually, they fail to establish that Stanley was not biased. However, these factors, as well as the other evidence presented and discussed above, all corroborate each other and point to the inescapable conclusion that Judge Stanley lacked impartiality. It is the overall picture presented in this case which requires relief.

As to Stanley's Gardner violation,[22] the State simply argues that "Stanley was not the only jurist thought to have committed Gardner error years ago" (AB at 35). This says nothing about Stanley's use of extra-record information in Mr. Porter's case to justify his overriding of two life recommendations. As to Stanley's comments in the sentencing order expressing his sympathy with the victims and his disdain for "the sensibilities of the murderer," the State hypothesizes that they constituted a valid rebuttal to the mercy argument made by Mr. Porter's counsel (AB at 36). However, Stanley's comments mirror those he made at the hearing that he would have killed Mr. Porter himself if he had committed the crime against his own family, and thus are indicative of his animosity to Mr. Porter.

11. The Law.

As to Mr. Porter's argument that he is entitled to a new trial, the State does exactly what the law prevents it from doing -- arguing the correctness of Stanley's rulings (in essence a harmless error argument) without any acknowledgement that a biased judge violates due process no matter what the rulings might have been. 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

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[22]Gardner v. Florida, 430 U.S. 349 (1977). The State labels what occurred as an "apparent violation" of Gardner. There was an actual violation of Gardner by Judge Stanley, thus explaining the reversal by this Court on direct appeal.

of a particular case"). 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"). The State never cites or distinguishes Bracey, Cartalino, or Anderson.

A violation of the fundamental right to an impartial judge is a structural error to which no harmless error analysis is appropriate. "Structural defects . . . compromise the entire trial process." Duest v. Singletary, 997 F. 2d 1336, 1338 n.3 (11th Cir. 1993). Cases are legion for the proposition that the presence of an impartial judge is not subject to the harmless-error rule. Duest, 997 F. 2d at 1338 n.3 (structural error not remedied by harmless error analysis include "deprivation of trial counsel or the presence at trial of a biased judge"); Arizona v. Fulminante, 499 U.S. 279, 308 (1991); Chapman v. California, 386 U.S. 18 (1967); Tumey v. Ohio, 273 U.S. 510 (1927).

The State agrees with Mr. Porter that the only legal basis relied on by Judge Anderson in support of his finding, Dragovich v. State, 492 So. 2d 350 (Fla. 1986), is "distinguishable" from this case (AB at 43). The State defends the court's reliance on

a distinguishable case by arguing that the court's discussion of Dragovich was "mere surplusage and dicta" (AB at 43). The record establishes otherwise. Judge Anderson explicitly relied on Dragovich in finding 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). This is neither surplusage nor dicta; it reflects the lower court's erroneous legal conclusion that the comment by Stanley to Jerry Beck was insufficient as a matter of law to require Stanley's disqualification. Of course, the Eleventh Circuit, which announced the law of the case on this point, disagreed, and notably, the State conceded in its discussion of Argument II that had Mr. Porter alleged the substance of the statement from Stanley to Beck in a motion to disqualify, such a motion "might have succeeded" because a court is not permitted to dispute the facts alleged in a motion to disqualify (AB at 47).

Finally, the State disputes Mr. Porter's argument that should he prevail, he would be entitled to the benefit of his life recommendations (AB at 43-44).[23] The State cites no

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[23]The State argues that Mr. Porter would not be entitled to his life recommendations because this Court on direct appeal found that Tedder had not been satisfied (AB at 44). The State fails to point out that this Court subsequently recognized that Mr. Porter's case was one of a series of cases decided during a time when Tedder was not being properly applied by the Court. In Cochran v. State, 547 So. 2d 928 (Fla. 1989), the Court acknowledged that Mr. Porter's case had been erroneously affirmed on direct appeal. However, the Court decided that Cochran was "an evolutionary refinement in the law, not a jurisprudential upheaval," Cochran, 559 So. 2d at 203,

authority for this proposition, and fails to explain why Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993), and Torres-Arboleda v. Dugger, 636 SO. 2d 1321 (Fla. 1994), do not legally control. Mr. Porter received two life recommendations from his sentencing jury, recommendations to which he is legally entitled. Bullington v. Missouri, 451 U.S. 430 (1991); Arizona v. Rumsey, 467 U.S. 203 (1984); Wright v. State, 586 So. 2d 1024 (Fla. 1991).

ARGUMENT II

The State argues that in Blanco v. State, 702 So. 2d 1250 (Fla. 1997), a procedural bar was imposed (AB at 46). The State's citation to Blanco is mystifying, as the State does not appear to be arguing that Mr. Porter's claim is procedurally barred. Blanco has nothing to do with the instant case, and the State makes no effort to establish otherwise. Notably, in Blanco, the Court found that the judicial disqualification claim was barred because the facts on which the motion was based could and should have been known to counsel. Blanco, 702 So. 2d at 1252. Here, a federal court has found that neither trial counsel nor postconviction counsel knew of the information from Jerry Beck; this was the issue addressed at the cause hearing ordered by the Eleventh Circuit Court of Appeals. There is clearly no procedural problem with this claim. The State raised no

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and went on to conclude that in Mr. Porter's case, "even though the jury override might not be sustained today, it is the law of the case." Id.

procedural problem below, and the lower court did not even address the issue, much less find a procedural problem. Other than obfuscation, there is no logical reason for the citation to Blanco.

The only other argument made by the State, unsupported by any case law, is that by granting relief to Mr. Porter it would "create untold mischief in the criminal justice system" (AB at 47),[24] and that "retroactive disqualification . . . make[s] little sense" (AB at 46). Fatal to its argument, however, is the State's concession that "a facially sufficient motion to recuse made contemporaneously might have succeeded" (AB at 47). In light of this concession, it is the State's argument that "make[s] little sense." If a motion to disqualify "would have succeeded" then Mr. Porter is entitled to relief at this time.

The only reason that Mr. Porter did not make a contemporaneous motion to disqualify at the time of trial was that his counsel, as the federal court found (a finding uncontested by the State) did not have the information. A constitutional officer had the information, and failed to come forward at that time. The State's argument essentially boils down to the notion that while Mr. Porter may have had a right to be tried and sentenced by an impartial judge, that right has

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[24]Apparently, the State defines "mischief" as recognition that Mr. Porter was tried and sentenced by an impartial judge. The Eleventh Circuit Court of Appeals and the United States Supreme Court (which refused to overturn the Eleventh Circuit's ruling) obviously disagreed.

somehow been extinguished over time and even though new information has been discovered (and a federal court has found that it is new information), Mr. Porter is not entitled to the benefits afforded to him by Florida's law regarding judicial disqualification. The State wants to punish Mr. Porter because a constitutional officer -- the Clerk of Court -- failed to come forward with this information at the time of trial. This is not Mr. Porter's fault, as the federal court found (a finding uncontested by the State).

Because of the State's concession that "a facially sufficient motion to recuse made contemporaneously might have succeeded" Mr. Porter is entitled to a new trial. As the State conceded, had trial counsel known of this information and filed a motion to recuse Judge Stanley,[25] such a motion "would have succeeded." Relief is warranted.

ARGUMENT III

The State argues that this claim is barred (AB at 50). This claim is not barred; Mr. Porter's counsel objected below to the admission of Gause's testimony (H. 164). The State fails to distinguish the cases cited by Mr. Porter for the proposition that the fact that Fordham also testified does not affect the admissibility of his statements to Gause. Wells v. State, 477

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[25]Trial and resentencing counsel testified during the federal hearing that had they been aware of Beck's information, they would have filed a motion to recuse Judge Stanley from presiding over Mr. Porter's case. See PC-R2. 193 (Jacobs); 199 (Widmeyer); 208 (Woodard).

So. 2d 26, 27 (Fla. 3d DCA 1985); Blue v. State, 513 So. 2d 754 (Fla. 4th DCA 1987). Error occurred when the trial court failed to strike Gause's hearsay testimony. Reversal is warranted.

ARGUMENT IV

Mr. Porter relies on his Initial Brief to reply to the State's arguments.

ARGUMENT V

The State argues that Mr. Porter "failed to preserve any complaint on appellate review of this matter by objection in the lower court" (AB at 55). The error complained of, however, occurred in the trial court's order denying relief. Was Mr. Porter supposed to presuppose that Judge Anderson would violate the clear directives of Florida statutes with regard to judicial notice?

The State also argues that Mr. Porter "does not identify what in the court files of State v. Avila and State v. McMunn he either disagrees with or would choose to litigate" (AB at 55). First, Mr. Porter did not have access to these files when he filed his brief; they were only recently supplied to counsel following a motion to supplement the record filed by the State. Second, and most important, the State's argument entirely misses the point -- Mr. Porter, not assuming that the trial court would violated the judicial notice statutes, did not have the files below. Mr. Porter does not have to establish what he would have litigated or "disagreed with."

Be that as it may, the files do establish the error in Judge

Anderson's failure to afford Mr. Porter an opportunity to challenge his use of the files in Avila and McMunn. While acknowledging that the file "does not lend itself to an in-depth study of potential bias on the part of Mr. Beck in making these allegations" (PC-R2. 342), the court did "observe two potentially significant facts":

> First, Beck apparently took it upon himself to make witness reimbursement requests on behalf of witnesses who testified for the State. These requests began even before the file was transferred back to Glades County from Lee County and they were directed to Douglas Cheshire, Jr. The requests were apparently ignored for some time and were repeated on at least six different occasions for a total of as many as seven separate requests for reimbursement for mileage and service. Second, the State Attorney, at the insistence of Mr. Beck, was required to file a petition in the criminal court proceeding to determine the rightful possession of property confiscated as evidence by the State. The property which was the subject of the petition was the Chevrolet pickup truck that Gary Beck was driving at the time he was involved in the high speed chase encounter with the Glades County Sheriff's Deputies which resulted in his death.

(PC-R2. 343).

A review of the file itself reveals far less nefarious circumstances as set forth by Judge Anderson. As to Mr. Beck's taking it upon himself to make witness reimbursement payments on behalf of State witnesses, Judge Anderson failed to note when taking "judicial notice" that the letters written by Beck were on Glades County official stationary and were written in Beck's capacity as the Clerk of Court and involved an inquiry about whether it should be a Glades County or a Lee County expense. The letter itself provides:

Dear Sir:

State witnesses appearing in Ft. Myers for trial of the above defendants during the week of October 6, 1980 have called to our attention the fact that they have not been compensated for their services and mileage.

Since the Court Files are still in Ft. Myers we have contacted the Clerk's Office there and learned that they do not have the necessary information for issuing checks to these witnesses. It was suggested that perhaps these witnesses should be paid by this office since eventually it will be a Glades County expense.

Since these witnesses appeared in a trial located in a county other than the county of their residence, and residing more than fifty miles from the location of the trial, it is my opinion that the witnesses are entitled to be paid per diem and travel expenses at the same rate provided for State employees under F.S. 112.061 in lieu of any other witness fee.

This office would appreciate an ORDER of the Court setting forth this as we are required to include a copy of the Court ORDER with our State Witness Payroll. We are also in need of an official listing by you of the names of the witnesses appearing, their mileage, number of days and mailing addresses if available.

Your early attention to this will be very much appreciated.

Sincerely,

/s/
Jerry L. Beck, Clerk

(Second Supp. PC-R. 676) (emphasis added).

When the State Attorney's Office failed to provide the necessary information, Mr. Beck, as Clerk of Court, re-sent his original letter on several occasions, noting at the bottom how many times he had to renew the same request. See Second Supp. PC-R. 676, 678, 679. On January 21, 1981, Mr. Beck, as Clerk of Court on letterhead stationary, wrote to Mr. Cheshire and

informed him again that state witnesses "are continuing to call this office to remind us that they have not been paid for their services" (Second Supp. PC-R. 680), noted that the office was "responsible for seeing to it that all State Witnesses attending Jury Trials are paid promptly" and that "[w]e are unable to prepare a Payroll without your cooperation" (Id.). Mr. Beck again had to write another letter, reminding the State Attorney's Office that the Clerk's Office "is continuing to receive inquiries from State Witnesses" and requesting again that that office "[p]lease forward the necessary payrolls so this Office can go ahead and conclude this matter" (Second Supp. PC-R. 705).

When the actual letters are seen in context, it is clear that there is nothing nefarious about Mr. Beck's requests. As Clerk of Court in charge of a budget, he was simply requesting that the witness fees be processed and that a court order be obtained so that the payroll requirements could be satisfied. The court's suggestion that because Mr. Beck had to request that this be done numerous times is not reflective of anything but that a conscientious Clerk of Court who had to comply with statutory and administrative rules requiring certain information for payroll purposes. If he did not follow up, he would have been negligent in his responsibilities. Had the lower court provided these files to Mr. Porter's counsel, as he was required to do under the judicial notice statute, this information could have been presented below and a totally different picture could have been presented as opposed to the slanted view taken by the

lower court of these routine requests.

As to the request for the return of his son's truck, the file does not reveal that the State was "required" to file a petition at Mr. Beck's "insistence." The lower court added those extra-judicial meanings to the cold record (which is also impermissible under the judicial notice statute). Rather, the file reflects that Mr. Beck wrote to State Attorney Douglas Cheshire asking that he prepare an order so that the Sheriff could be authorized to turn over his son's truck and other items (Second Supp. PC-R. 488). Mr. Cheshire did so, and the court entered an order finding that Mr. Beck "is the person entitled to said truck and Sargent & Son Wrecker Service is directed to return same to him subject to any valid liens" (Second Supp. PC-R. 489). There is nothing improper about Mr. Beck, the surviving heir to his son's belongings, requesting the return of his son's property, nor is there anything improper about his request to the State (which was honored) requesting a court order, which was needed in order to direct the Sheriff to turn over the property, which had been evidence in a criminal prosecution. In fact, the defendants themselves also filed motions requesting that their firearms be returned to them, and they were after obtaining court orders (Second Supp. PC-R. 662, 663).

In a footnote, the State points out Mr. Beck's testimony that he did not recall posting "a document on the wall outside the door of his office that Mr. D'Allesando did not prosecute the case involving his son" (AB at 56). This discussion occurred

during Mr. Beck's cross-examination, when the prosecutor asked Mr. Beck about this "document." Oddly, the State Attorney never showed Mr. Beck the "document." There is no such "document" in the court files of Avila and McMunn. One would imagine that a letter formally declining to prosecute a case would be in the court file of the case. Mr. Beck cannot be faulted for not remembering posting on the wall a document that never existed (and which the State failed to produce before and which is not in the court file of the case).

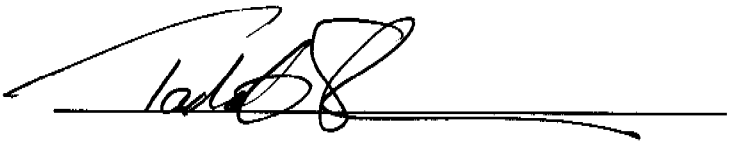
CONCLUSION

This case presents one of the strongest **and clearest** cases of judicial bias imaginable. The Eleventh Circuit's strong opinion and its extraordinary granting of a last-minute stay of execution demonstrate the strenght of this case, not to mention the fact that the United States Supreme Court refused to intervene when the State filed a request to vacate the stay entered by the Eleventh Circuit.

Surely a judge who publicly advocates for personally carrying out executions when the sentencing occurs, surely a judge who sentences a defendant to death before the penalty phase even begins, surely a judge who carrys weapons and brass knuckles into a courtroom, surely a judge who would personally kill the defendant if he had committed the crime against a member of the judge's family, surely such a judge is the epitome of a biased judge. Given the strenght of and the extraordinary stay of execution issued by the Eleventh Circuit, this Court cannot turn a blind eye, notwithstanding the State of Florida's willingness to do so.

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 May 11, 1998.



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