IN THE SUPREME COURT OF FLORIDA

DANIEL EUGENE REMETA,

Appellant,

v. CASE NO. 92,411

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Assistant Attorney General
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This appeal is unauthorized by the Rules *of Appellate* Procedure because it seeks review of a non-final, non-appealable order. The Rules expressly foreclose such an appeal, and dismissal is appropriate for that reason.

STATEMENT OF THE CASE AND FACTS

This 'appeal" is from the February 20, 1998, order of the Marion County Circuit Court denying the motion to withdraw filed by Remeta's attorney on February 18, 1998, and heard on that date. The State does not accept the 'Introduction" to Remeta's brief because it makes numerous assertions that are based upon an out-of-context interpretation of the record and exhibits in this case. The State relies on the following facts, which are those relevant to the issue raised in this appeal. The facts set out in Remeta's brief concerning the *Jones v. McAndrew* civil litigation are essentially irrelevant to this appeal, as are the references to the State ex. *rel Butterworth* v. *Kenny* and *Kenny v. Butterworth* proceedings.

On February 4, 1998, a hearing on Remeta's Chapter 119 requests was scheduled for February 13, 1998. (Appendix A). On February 10, 1998, that hearing was rescheduled for February 18, 1998. (Appendix B). On the morning of February 18, 1998, Remeta's attorney filed a "Motion to Withdraw" as counsel. (Rl-5). The basis for that motion to withdraw was a claimed "conflict of interest" which appears to be based upon questioning of CCRC Peter Kenny at

the February 5, 1998, meeting of the Commission for the Administration of Justice in Capital Cases (hereinafter the Oversight Committee). That questioning concerned various activities of the Capital Collateral Regional Counsel for the Southern Region.[1] (R2-3). The questions at issue primarily involved the Federal litigation in the Jones, et. al. v. *McAndrew* , Case No. 4:97-cv-103-RH (N.D. Fla.) matter which sought to challenge the functioning of the Florida electric chair in a 42 U.S.C. 51983 action. That case was dismissed by the Federal Court on February 20, 1998. See, *Appendix* to *Initial Brief,* at Tab 5. According to Remeta, that questioning created a conflict of interest which was in some way brought about by "agents of the State of Florida." (R2).

Even though Remeta never noticed the Motion to Withdraw for hearing, and even though it was filed on the morning of the scheduled February 18, 1998, hearing, that motion was disposed of prior to the commencement of the already-scheduled public records hearing[2]. At the conclusion of argument by Remeta's attorney, the Circuit Court denied the motion as being legally insufficient,

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[1] Remeta's attorney is employed by CCRC-South.

[2] Remeta was not present at the hearing on the motion to withdraw because his attorney had "waived" his presence. Counsel for Remeta never requested his client's presence at the hearing, and never made any effort to call the court's attention to the fact that Remeta was not being transported to the hearing at the request of his counsel. (R6-7).

pointing out that if the claimed "conflict", which was based upon funding issues, was truly a conflict, the government would cease to function because all judges and public defenders would be subject to the same "conflict," with the result that no criminal case could survive attack. (R12-13).

The record was certified as complete and transmitted on February 23, 1998. (R105). This Court ordered that Remeta file his brief, with service upon counsel for the State, by 12:00 noon on February 27, 1998. In accordance with this Court's order, the State's brief is being filed and served prior to 12:OO noon on March 2, 1998.

SUMMARY OF THE ARGUMENT

This appeal should be dismissed for want of jurisdiction because it is an unauthorized attempt to appeal a non-appealable order. The *Florida Rules of* Appellate Procedure do not provide for an appeal such as this one, and this proceeding should be dismissed.

The motion to withdraw filed by Remeta's CCRC attorney was properly denied because it is predicated upon the false premise that the Oversight Committee "holds the purse strings" for CCRC's budget. The Committee has no such financial authority. Moreover, the purported "conflict of interest" is not a conflict at all -- it is a legally insufficient claim that has no legal or factual basis. There is no conflict of interest, and the motion to withdraw was

properly denied.

ARGUMENT

I. THIS APPEAL IS UNAUTHORIZED

The "appeal" pending before this Court is from the Circuit Court's denial of a motion to withdraw as counsel filed by Remeta's attorney. However, that order is non-appealable, given that it is neither a "final" order nor an appealable non-final order. The *Florida Rules of Appellate Procedure* expressly identify and define the various types of orders that may be appealed, and the order that is the subject of this "appeal" is not contained on that list. *See, Fla. R. App. P.* 9.130; 9.140; *see* also, *State v. Pettis,* 520 So. 2d 250 (Fla. 1988). The trial court's ruling on the motion to withdraw as counsel is not a final order as that term is defined in the *Rules,* nor is that order one which falls within the categories of non-final orders that may be appealed. Because that is so, the "appeal" from the denial of the motion to withdraw should be dismissed as unauthorized and premature.[3]

In defining a "final" order (which is what Remeta claims he is appealing), this Court stated:

> It is well settled that a judgment attains the degree of finality necessary to support an appeal when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment. Gore v.

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[3] Remeta asserts, in his notice of appeal, that he is appealing a "final" order. (R8).

> *Hansen,* 59 So. 2d 538 (Fla. 1952). Final judgments or orders "determine the rights and liabilities of all parties with reference to the matters in controversy and leave nothing of a judicial character to be done." Id. at 539. Further, the "piecemeal review of cases is not favored by an appellate court, and care should be exercised by trial judges to avoid, so far as possible, the necessity for successive appeals." *Sax Enterprises v. David & Dash, 107* So. 2d 612, 613 (Fla. 1958).

McGurn v. *Scott,* 596 So. 2d 1042, 1043-44, (Fla. 1992). Stated in slightly different terms:

> The test employed to determine the finality of an order is "whether the order in question constitutes an end to the judicial labor in the cause and nothing remains to be done to effectuate a termination of the cause as between the parties directly affected." *S.L.T.* Warehouse Co. *v. Webb,* 304 So. 2d 97, 99 (Fla. 1972); see *generally McGurn* **v. Scott,** 596 So. 2d 1042 (Fla.1992). Once a judgment becomes final, the trial court ordinarily loses jurisdiction to entertain further proceedings other than those brought for the limited purposes of enforcement of its order. *See Volume Servs. Div. of Interstate Corp. v. Canteen Corp.,* 369 So. 2d 391, 395 (Fla. 2d DCA 1979).

Port Everglades Authority v. International Longshoremen's Ass'n, Local 1922-1, 652 So.2d 1169 (Fla., 4th DCA, 1995). The denial of counsel's motion to withdraw is not a final order, and the appeal therefrom is no more than piecemeal litigation. This appeal should be dismissed.

II. THE TRIAL COURT PROPERLY **DENIED THE MOTION**

> **"If** this **constitutes a conflict, the whole government would virtually collapse."** Angel, J., on denial of Remeta's motion.

In his brief, Remeta's attorney argues that he has a conflict of interest due to the actions of the Oversight Committee and the

"State of Florida."[4] *Initial Brief* at 13.[5] The basis for that argument is Remeta's claim that the Committee "holds the purse strings" to CCRC-South's budget[6]. The fatal flaw with that argument is that it is not true. The Committee has no financial authority over CCRC's budget under the plain language of the statue itself. §27.709, *Fla. Stat.* That **legally** incorrect position is demonstrated by Remeta's assertion that counsel is placed:

> in a position of divided loyalties -- either continue with his representation of Mr. Remeta in both federal civil litigation and successive state court litigation in the face of the express statements of the Commission, or cease in his representation of Mr. Remeta in order to attempt to salvage the funding for his other CCRC-South clients.

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[4] Many of the assertions contained in Remeta's brief concerning what members of the Committee have said are rebutted by the portions of the Committee hearing quoted in Remeta's brief. A number of the "statements" attributed to the members are taken out of context by Remeta. For example, Remeta asserts that Justice McDonald does not believe that CCRC lawyers are governed by the Rules of Professional Conduct. *Initial Brief* at 16 n. 13. In context, that statement related to whether CCRC's obligation extended to representation beyond the first round of collateral attack litigation. See, Appendix to Initial Brief at 40-41. Likewise, Senator Silver actually said "We have limited resources on the state level and **I guess we can argue that the State Attorneys have unlimited funds** ..." *Id.*, at 43.

[5] Yet another misdeed by the Committee occurred, according to Remeta, when Rep. Heyman stated that the Committee was interested in the victims and in moving the cases along faster. However Remeta may view that comment, Rep. Heyman's statement is fully in accord with the legislative intent behind the creation of CCRC. §27.2001, *Fla. Stat.*

[6] The "committee controls the purse strings" argument appears on virtually every page of Remeta's brief.

Initial Brief at 14.[7] Because the Committee has no financial authority over CCRC-South (or any other CCRC), Remeta's motion to withdraw is based upon a legal theory that is plainly wrong. Because the "conflict" claimed by Remeta simply does not exist, the motion to withdraw is legally insufficient. The Circuit Court's denial of that motion should be affirmed.

The bulk of Remeta's brief consists of no more than histrionic complaints and *ad hominem* abuse directed toward the Oversight Committee (both collectively and individually), the Office of the Attorney General, and any other agency, entity or individual that has ever taken a position contrary to that espoused by CCRC-South. In addition to being based upon a view of the Oversight Committee's authority that the *Florida Statutes* do not support, the motion is legally insufficient because, even putting aside the fact that the Committee has no budgetary authority over CCRC, there simply is no conflict.

In denying the motion to withdraw, the Circuit Court stated:

> If this constitutes a conflict, the whole government would virtually collapse. We will not have a government because there's not a public defender who's not -- doesn't have the same conflict.
>
> We would never have a criminal case in the State of

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[7] This statement by Remeta's counsel, that he intends to represent Remeta in federal civil litigation, is an admission that he intends to violate the express provisions of §27.7001, *Fla. Stat.*, which forbid such representation.

> Florida that could withstand any type of attack. Every public defender would be subject to -- we wouldn't even be able to -- we wouldn't even be able to get a judge -- go to Mars [sic] -- every judge is paid by the same treasury, and I've never seen a judge that would shirk his responsibility, enter orders contrary to the interest of the State just because he got a paycheck paid by the state comptroller.
>
> No judge I know of would let that interfere with his duty as he saw it. I've never let it interfere with mine; certainly, in the course of my history I've entered many orders that were unpleasant to every level of government that stands before me.
>
> And I've never let that influence my decision one way or the other. I just like to call them the way I see them. I presume the public defender would do the same.
>
> And I certainly would presume that you would do the same, and ultimately in -- as a matter of fact, your conduct indicates to the contrary, which is all to your credit, of course. No lawyer would do anything less.

(R12-13). That analysis is imminently logical, and succinctly states why Remeta's motion to withdraw is legally insufficient. The denial of that motion should be affirmed.

The motion was also properly denied because it is based upon the false premise that the Oversight Committee "holds the purse strings for CCRC-South's budget." That statement, which appears in some form on almost every page of Remeta's brief, is untrue. The Committee has no authority over CCRC-South's budget. §27.709, Florida Statutes. While some (but not all) of the members of the Committee are also members of the Florida Legislature, and, in their capacity as legislators, are entitled to vote on the State's budget (which includes CCRC's budget), the committee members have

no such financial authority by virtue of their position on the Oversight Committee. Instead, their purpose is to:

> review the administration of justice in capital collateral cases, receive relevant public input, review the operation **of the capital collateral regional counsel,** and advise and make recommendations to the Governor, Legislature, and Supreme Court.

§27.709(2), *Florida* Statutes. The Committee has no power to approve or reject requests for funding made by CCRC, nor does the Committee have the authority to control any appropriations made for CCRC by the Legislature.[8] Remeta's claim that the Committee is vested with "control of the purse strings" is false.

Further, the questioning of CCRC Kenny concerning litigation that is unauthorized under the CCRC statute hardly seems to be outside the legislative mandate of the Committee. If CCRC has acted outside of their statutory authority, **or** if it appears that they may have done so, that is legitimate ground for inquiry by the Committee[9]. That questioning concerning CCRC-South's participation

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[8] Remeta claims that Rep. Heyman "explicitly threatened not to vote for any further budgetary requests for CCRC-South . . .". *Initial Brief* at 24; 23 n. 21. That assertion is rebutted on page 19 of his brief, where Remeta accurately quotes Rep. Heyman as saying "I'm just not seeing money spent well, **and if I had to make a budget decision right now,** I would not be supportive of something like this." *Id.,* at 19. "This" was the civil litigation in federal court concerning the electric chair. Appendix at 66. Remeta singles Rep. Heyman out for particular attention by accusing her of a violation of the Rules of Professional Conduct. *Initial Brief* at 23, n. 21.

[9] Under §§ 27.7001 and 27.702, *Fla. Stat.* (1997), CCRC is precluded from maintaining the 42 U.S.C. §1983 proceeding that was the

in civil litigation (which is barred by the Statute creating CCRC) is not improper, and has no effect on Remeta's defense.[10] The Serbonian bog that Remeta's attorney has attempted to create simply does not exist. John Milton, *Paradise Lost* bk. ii, 1. 592 ("A gulf profound as that Serbonian bog/Betwixt Damiata and Mount Casius old,/Where armies whole have sunk: the parching air/Burns frore, and cold performs th' effect of fire."). There is no conflict of interest, and the motion to withdraw was properly denied.

In his brief, Remeta also complains because members of the Oversight Committee questioned CCRC Kenny about the filing of successive motions for relief under *Florida Rule of Criminal Procedure 3.850.* Of course, successive motions are disfavored and are subject to tightly circumscribed restrictions upon the occasions when they will be entertained. See generally, Rule 3.850, *Fla. R. Crim. Pro,* Such questioning is, once again, entirely proper. In the context of successive litigation of claims in Federal court, the Eleventh Circuit made the following observation:

> Medina's real problem is with rules or provisions that bar any federal constitutional claim from litigation on

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subject of comment by the Committee. That issue is before this Court in Kenny v. Butterworth, Case No. ____ and State ex *rel. Butterworth v. Kenny,* Case No. 92,343.

[10] Because the Committee is charged with reviewing the administration of justice in capital cases and with reviewing the operation of the regional CCRCs, it is difficult to imagine why that Committee cannot inquire into actions that appear to be directly prohibited by statute.

> the merits in federal court, whether the impediments are procedural default rules or second application bars.

In re Medina, 109 F.3d 1556, 1564 (11th Cir. 1997). The same observation holds true here -- there is no conflict merely because Remeta's present attorney does not approve of the successive motion bar, nor is there a conflict because CCRC Kenny was questioned about filing such motions. See, *Initial Brief* at 16.

Finally, there is no conflict of interest because Remeta's interests are the same as those of all other CCRC-South clients. Obviously, all of CCRC's clients have an interest in avoiding the execution of their sentences of death for as long as possible. See, *Thompson v, Wainwright,* 714 F.2d 1495, 1506 (11th Cir. 1983) ("Each delay, for its span, is a commutation of a death sentence to one of imprisonment"); *Hutchins v. Garrison, 724* F.2d 1425, '430 (4th Cir. 1983) ("[D]elay for whatever reason was almost certainly to his advantage");*Bass v. Estelle, 696* F.2d 1154, 1159 (5th Cir. 1983) ("Understandably, most convicted defendants sentenced to death covet delay, if nothing better can be had . . ."). If that delay can be obtained through the vehicle of an unauthorized civil rights action in which Remeta is a named party, the same benefit (delay in execution) accrues to all CCRC clients. In fact, CCRC Kenny said just that in the Committee hearing that gave rise to this proceeding. Specifically, CCRC Kenny stated "...I think that case *[Jones* v. *McAndrew]* is the kind of case that will, **as I said last**

month, affect everybody, everybody on death row . ..". Appendix to Initial Brief at 56. Rather than being directly adverse to each other, the interests of all of CCRC's clients are the same, insofar as the alleged "conflict" touted as a basis for withdrawal is concerned.

As this Court has repeatedly held:

> We agree with the Fifth Circuit's definition of "conflict of interest" set forth in *Foxworth* v. *Wainwright*, 516 F.2d 1072 (5th Cir. 1975). **A conflict of interest arises when "... one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing."** *516* F.2d at 1076.

Webb v. *State, 433* So. 2d 496, 498 (Fla. 1983) (emphasis added); see also, Barclay v. *Wainwright, 444* So. 2d 956 (Fla. 1984). No CCRC-South client stands to gain at the expense of any other such client, and, quite simply, there is no conflict[11]. The denial of the motion to withdraw should be affirmed in all respects.

On page 29 of his brief, Remeta engages in a remarkably misleading bit of advocacy when he makes the express assertion that the Circuit Court "did not have discretion to go behind the assertions of Mr. Remeta's counsel that a conflict of interest

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[11] The most that can be said against CCRC-South's argument is that nothing can be said for it. However, that does not mean that the claim has merit -- it means that the claim has never been seriously advanced before, and that this Court has never had the occasion to address it. See, e.g., *McKoy v. North Carolina, 494* U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990)(Scalia, J., dissenting).

existed that warranted withdrawal from the case." In support of that statement, Remeta relies on this Court's decision in Guzman v. *State,* 644 So. 2d 996, 999 (Fla. 1994), for the proposition that the Circuit Court had no choice other than to grant the motion to withdraw. Ignoring for the moment Remeta's failure to raise this argument in the Circuit Court, even cursory review of *Guzman* establishes that it does not hold what Remeta claims. In fact, *Guzman states:*

> The law is well established that a public defender should be permitted to withdraw where the public defender certifies to the trial court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. *Babb v. Edwards,* 412 So. 2d 859 (Fla. 1982). Moreover, **once a public defender moves to withdraw** from the representation of a client based on a conflict due to adverse or hostile interests between the two clients, under section 27.53(3), *Florida Statutes* (1991), a trial court must grant separate representation. *Nixon v. Siegel, 626 So.* 2d 1024 (Fla. 3d DCA 1993). As the district court stated in *Nixon,* a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if the representation of one of the adverse clients has been concluded. *Id.* at 1025. Consequently, in this case, once the public defender determined that a conflict existed regarding Guzman, the principles set forth in those cases required the trial judge to grant the motions to withdraw.

Guzman v. State, 644 So. 2d at 999. Likewise, *Hope v. State, 654* So. 2d 639 (Fla. 4th DCA 1995), which is based on *Guzman,* does not support Remeta's position. Both of those cases were decided based upon the application of statute that applies to Public Defenders

engaged in representation of **co-defendants.** That distinction alone is fatal to Remeta's claim. Moreover, despite the length of Remeta's brief, it is particularly oblique insofar as the nature of the "actual conflict" is concerned. When the histrionics of Remeta's brief are stripped away, it is apparent that the interests of all of CCRC-South's clients are, as CCRC Kenny told the Oversight Committee, the same. There is no conflict of any sort, and the efforts to manufacture such a conflict have their genesis in a desire to delay the execution of Remeta's sentence by any means available. Because there is no "conflict of interest" to begin with, the Circuit Court properly denied the motion to withdraw as legally insufficient. That result is correct, and should be affirmed in all respects.

As set out above, Remeta filed the Motion to Withdraw on February 18, 1998, the morning of the day of the hearing on that motion. A Chapter 119 hearing had been scheduled since February 3, 1998, and had been scheduled for February 18 since February 10, 1998. The matters Remeta advances as support for the motion have, **by Remeta's own admission,** existed since February 5, 1998. (R2). Had the motion to withdraw been filed for any good faith reason, it would have been filed shortly after the incidents of February 5, 1998, instead of being held back until the last possible moment before a hearing was scheduled to begin.

As the United States Supreme Court has long recognized, "It is

natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretext." *Lambert* v. *Barrett, 159* U.S. 660, 662 (1895), quoted *in Barefoot v. Estelle, 463* U.S. 880, 888 (1983). While the Circuit Court did not address the issue of Remeta's eleventh-hour filing of the motion, it is apparent, in light of the sequence of events, that the motion was filed solely for purposes of delay. That is not a legitimate basis for the filing of the motion, and supplies yet another basis for affirmance of the Circuit Court's denial of the motion to withdraw.

CONCLUSION

For the reasons set out above, the Circuit Court's denial of the motion to withdraw filed by Remeta's counsel should be affirmed in all respects.

Respectfully submitted,
ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
FLA. BAR #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
FLA. BAR #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been furnished by facsimile at (305) 377-7585 and U.S. Mail to Todd Scher, Capital Collateral Regional Counsel, Southern District, 1444 Biscayne Blvd., Suite 202, Miami, Florida 33232, this 21 day of March, 1998.

Of Counsel

APPENDIX A

IN THE CIRCUIT COURT OF **THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA**

CASE NO. **85-471-CF**

STATE OF FLORIDA,

Plaintiff,

v.

DANIEL EUGENE REMETA,

Defendant.

EMERGENCY HEARING; EXECUTION DATE SCHEDULED

&MENDED NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Notice of Public Records Status regarding non-compliance by the Ocala Police Department, the Orange County Sheriffs Office and the Marion County Sheriff's Office will come on for hearing on Wednesday, February 18, 1998, commencing at 3:00 p.m., before the Honorable Carven D. Angel, Marion County Courthouse, Courtoom 3A, Ocala, Florida. The issue of non-compliance by these agencies will be fully addressed at the hearing and evidence will be taken.

I HEREBY CERTIFY that a true copy of the foregoing notice has been furnished by United States Mail, first class postage prepaid, and by facsimile to all counsel of record on February 10, 1998.

TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCRC
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Defendant

Copies furnished to:

Jim McCune
Reginald Black
Assistant State Attorney
19 N.W. Pine Ave.
Ocala, Florida 34475

Kenneth Nunnelly
Department of Legal Affairs
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118

The Honorable Carven D. Angel
Circuit Court Judge
110 NW First Avenue
Ocala, FL 33175

Marion County Sheriffs Office
P.O. Box 1987
Ocala, FL 34478-1987
Attn: Records Division

Ocala Police Department
P.O. Box 1270
Ocala, FL 34478-1270
Attn: Records Division

Orange County Sheriffs Office
P.O. Box 1440
Orlando, FL 32802
Attn: Tamara Gappen, Esq.

APPENDIX B

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR MARION COUNTY, FLORIDA

CASE NO. **85-471-CF**

STATE OF FLORIDA,

Plaintiff,

v.

EMERGENCY HEARING;
EXECUTION DATE SCHEDULED

DANIEL EUGENE **REMETA,**

Defendant.

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Notice of Public Records Status regarding non-compliance by the Ocala Police Department, the Orange County Sheriffs Office and the Marion County Sheriffs Office will come on for hearing on Friday, February 13, 1998, commencing at 3:00 p.m., before the Honorable Carven D. Angel, Marion County Courthouse, Courtoom 3A, Ocala, Fforida. The issue of **non-compliance** by these agencies will be fully addressed at the hearing and evidence will be taken.

I HEREBY CERTIFY that a true copy of the foregoing notice has been furnished by United States Mail, first class postage prepaid, and by facsimile to all counsel of record on February 4, 1998.

TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCRC
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Defendant

Copies furnished to:

Jim McCune
Reginald Black
Assistant State Attorney
19 N.W. Pine Ave.
Ocala, Florida 34475

Kenneth Nunnelly
Department of Legal Affairs
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118

The Honorable Carven D. Angel
Circuit Court Judge
110 NW First Avenue
Ocala, FL 33175

Marion County Sheriffs Office
P.O. Box 1987
Ocala, FL 34478-1987
Attn: Records Division

Ocala Police Department
P.O. Box 1270
Ocala, FL 34478-1270
Attn: Records Division

Orange County Sheriffs Office
P.O. Box 1440
Orlando, FL 32802
Attn: Tamara Gappen, Esq.