IN THE SUPREME COURT OF FLORIDA

CASE NO. SC92496

RICKEY BERNARD ROBERTS,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

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STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on June 21, 1984, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 84-13010, with committing, on June 4, 1984: (1) the first degree murder of George Napoles, (2) the armed sexual battery of Michelle Rimondi, (3) the armed robbery of Napoles, (4) the armed robbery of Rimondi and (5) the armed kidnapping of Rimondi. (D.A.R. 1-3)[1] Trial of this cause commenced on December 3, 1985. (D.A.R. 7) The jury found Defendant guilty as charge of the murder, the sexual battery and the kidnapping but found Defendant not guilty on both of the armed robberies. (D.A.R. 476-80)

On December 17 and 19, 1985, a sentencing hearing was held before the same jury. (D.A.R. 35-39) After the State and Defendant presented evidence, the jury, by a seven to five vote, returned a recommendation of death for the murder. (D.A.R. 3502) The trial court sentenced Defendant, on December 31, 1985, to death

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[1] In this brief, the parties will be referred to as they stood in the lower court. The symbol "D.A.R." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Case No. 68,296. The symbol "PCR1." will refer to the record on appeal from Defendant's first post conviction motion, Case No. 74,920. The symbol "PCR2." will refer to the record on appeal from the summary denial of the second motion for post conviction relief, Case No. 87,438. The symbols "PCT2-2/20/96." and PCT2-2/21/96." will refer to the separately numbered transcripts for the hearings held on summary denial of the second motion for post conviction relief, Case No. 87,438. The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and the supplemental record on appeal in this appeal, respectively.

for the murder, life for the armed sexual battery and armed kidnapping. (D.A.R. 576-79) The life sentences were ordered to be served consecutively to the death sentence but concurrently with one another. *Id.*

Defendant appealed his convictions and sentences to this Court, raising the following issues:

> I.
> THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AFTER THE PRESENTATION OF ALL THE EVIDENCE WHERE THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH EITHER THE DEFENDANT'S PREMEDITATION OR HIS COMMISSION OF A FELONY-MURDER REQUIRED TO SUPPORT HIS CONVICTION FOR FIRST DEGREE MURDER, THEREBY DENYING HIM HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS.
>
> II.
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS FAILURE TO BE PRESENT AT A VIEW BY THE JURY, THEREBY DENYING THE DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY AND DUE PROCESS OF LAW GUARANTEED BY ARTICLE 1, §16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> III.
> THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S DIRECT EXAMINATION TESTIMONY, THEREBY DENYING THE DEFENDANT HIS RIGHT TO TESTIFY AND HIS RIGHT TO PRESENT A FULL DEFENSE AND CONFRONT THE WITNESSES AGAINST HIS GUARANTEED BY ARTICLE 1, §9 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> IV.
> THE DEFENDANT'S ABSENCE DURING VARIOUS CRITICAL STAGES OF HIS TRIAL PROCEEDINGS, INCLUDING PRE-TRIAL CONFERENCES, A CONFERENCE CONDUCTED TO DETERMINE THE PROPER RESPONSE TO A QUESTION BY THE JURY, AND AT THE JURY VIEW, DENIED THE DEFENDANT HIS RIGHT TO BE PRESENT AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION AS WELL AS ARTICLE 1, §16 OF THE FLORIDA CONSTITUTION.

V.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS-EXAMINE A DEFENSE WITNESS OUTSIDE THE SCOPE OF DIRECT EXAMINATION, THEREBY ELICITING HEARSAY STATEMENTS OF CHIEF PROSECUTION WITNESS RIMONDI WHICH WERE ADDUCED SOLELY AND IMPROPERLY TO REHABILITATE RIMONDI'S DIRECT EXAMINATION TESTIMONY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND COMPULSORY PROCESS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Trial Court's Determination as Justification for the Imposition of the Death Penalty that the Capital Felony was Especially Heinous, Atrocious or Cruel was Erroneous Where Such an Aggravating Circumstance Was Neither Proved Beyond a Reasonable Doubt, Nor Appropriate Under the Circumstances of This Case.

B. The Trial Court Erred in Determining That the Capital Felony Was Committed While the Defendant Was Engaged in the Commission of or the Attempt to Commit a Sexual Battery.

C. The Trial Court Erred in Rejecting Evidence That the Capital Felony Was Committed While the Defendant was Under the Influence of Extreme Mental or Emotional Disturbance and that the Capacity of the Defendant to Appreciate the Criminality of His Conduct or to Conform his Conduct to the Requirements of Law was substantially Impaired in Light of Uncontradicted Expert Testimony Presented By the Defense.

D. The Trial Court Erred in Imposing the Death Penalty Where the Evidence Was Insufficient as a Matter of Law to establish the Defendant's Guilt of First Degree Murder beyond a Reasonable Doubt.

E. The Death Penalty in Florida is

> Unconstitutional Because it Discriminates Based on the Race of the Victim and Because it Discriminates Based on the Sex of the Offender.

On July 2, 1987, this Court affirmed, finding that the evidence was sufficient to support the convictions under either a felony or premeditated murder theory, that the issues regarding presence were waived and not prejudicial, that the trial court had properly excluded evidence regarding Rimondi's alleged prostitution, that the cross examination was proper, that the aggravators were properly found, that the mitigators were properly rejected and that death was a proportionate sentence. *Roberts v. State*, 510 So. 2d 885 (Fla. 1987). On September 3, 1987, rehearing was denied. *Id.* The United States Supreme Court denied certiorari review on March 7, 1988. *Roberts v. Florida*, 485 U.S. 943 (1988).

In affirming Defendant's convictions and sentences, the Court outlined the facts of the case as follows:

> According to the state's key witness, Michelle Rimondi, during the early morning hours of June 4, 1984, she, the murder victim George Napoles, and Rimondi's friend Jammie Campbell were parked on the beach off the Rickenbacker Causeway near Key Biscayne drinking wine. While Campbell slept in the front passenger seat in Napoles' Omni, the appellant, Roberts, drove up to the Omni, got out of his car and asked Napoles and Rimondi what they were doing and for identification. Believing that Roberts was an undercover beach patrol officer, Napoles gave Roberts his driver's license. Roberts first frisked Napoles and then frisked Rimondi. When Roberts touched Rimondi on the breasts and thighs, Napoles became suspicious and asked

Roberts for his identification. Roberts took Napoles to his car to get his identification. Once at the car, Roberts reached into the back seat and pulled out a baseball bat. Roberts then forcibly brought Napoles back to the Omni where he ordered Rimondi to face the interior of the Omni and not to turn around. Looking over her right arm, Rimondi saw Roberts repeatedly hit Napoles in the back of the head with the bat. Rimondi was unable to scream. Roberts then pushed Napoles' body towards the beach. Still holding the bat, he grabbed Rimondi and pulled her near the body and told her that if she did not take her clothes off she "was going to get it just like George or worse." When it appeared that someone might be coming, Roberts told Rimondi to get dressed and forced her into his car where he eventually raped her. Roberts then left the beach with Rimondi. Realizing that he had lost his wallet, Roberts returned to the beach with Rimondi, found the wallet and again left the scene. Roberts raped Rimondi a second time, before taking her to her sister's boyfriend's house where she was staying that weekend. Napoles' body was discovered on the beach later that morning.

Soon after the body was discovered, Rimondi informed the police that a black man wearing a shirt with the name "Rick" on the front had killed Napoles and raped her. After receiving a tip that Roberts was the "Rick" responsible for the murder, detectives questioned Roberts concerning the incident. Rimondi identified both Roberts and his car. Roberts initially denied having been on Key Biscayne in the past two months. However, after he was told his palm print was found on the roof of Napoles' Omni, Roberts admitted being on the Key during the early morning hours of June 4 but maintained that he had merely picked up Rimondi hitchhiking on the causeway. According to Roberts, who testified at the trial, Rimondi told him that she needed a ride home because her friends had passed out from drinking wine. Roberts claims that after Rimondi got into his car she asked him to

> return to her friend's car to get her purse. While Rimondi was getting her purse, Roberts claims to have leaned into the car to look at her friend on the front seat, placing his hand on the roof. According to Roberts after retrieving the purse, he then drove Rimondi home. Roberts claimed he never saw Napoles and never raped Rimondi.
>
> Roberts was indicted for first-degree murder, armed sexual battery, armed kidnapping and two counts of armed robbery. He was found guilty of first-degree murder, armed sexual battery and armed kidnapping and not guilty of either robbery count. In connection with the armed sexual battery and armed kidnapping convictions, Roberts was sentenced to concurrent life sentences. In accordance with the jury's recommendation, the trial court imposed the death penalty finding four aggravating circumstances: (1) the defendant had been previously convicted of a violent felony, section 921.141(5)(b), Florida Statutes; (2) at the time of the commission of the capital felony the defendant was under a sentence of imprisonment, section 921.141(5)(a), Florida Statutes; (3) the capital felony was committed while the defendant was engaged in the commission of or the attempt to commit a sexual battery, section 921.141(5)(d), Florida Statutes; and (4) the capital felony was especially heinous, atrocious or cruel, section 921.141(5)(h), Florida Statutes. The trial judge found no mitigating circumstances.

Roberts, 510 So. 2d at 887-88.

After the Governor had signed a death warrant for Defendant, Defendant filed his first motion for post conviction relief on September 28, 1989. (PCR1. 1-183) In this motion, Defendant claimed, *inter alia*:

IV.

[DEFENDANT'S] RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT

THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT PROHIBITED THE CROSS EXAMINATION OF THE STATE'S KEY WITNESS, MICHELLE RIMONDI, ABOUT HER SEXUAL HISTORY AND WHEN THE DEFENDANT WAS FORECLOSED FROM TESTIFYING ABOUT HER SEXUAL HISTORY.

V.

[DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

* * * *

VII.

[DEFENDANT'S] RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN HE WAS DENIED ACCESS TO THE RAPE TREATMENT COUNSELOR WHO HAD TREATED MICHELLE RIMONDI.

VIII.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

* * * *

XIV.

THE STATE'S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR1. 62, 69, 76, 82, 125) In his *Brady* claim, Defendant did not allege what evidence has allegedly been withheld. (PCR1. 125-26) Subsequently, Defendant filed a supplement to his motion, alleging what information the State had allegedly withheld. (PCR1. 316-28) Defendant also provided an appendix of documents culled from the State's files in support of this claim. (PCR1. 184-284) The State responded that claims IV, V, VII and VIII were all procedurally barred as claims that could have been, should have been or were

raised on direct appeal. (PCR1. 339) The State also asserted that the supplement was procedurally barred because it was not timely filed. (PCR1. 340) The trial court summarily denied the motion on October 25, 1989. (PCR1. 342) At the *Huff* hearing, the trial court indicated that claims IV, V, VII and VIII were procedurally barred. (PCR1. 396) The trial court stated that it was accepting the supplement to claim XIV but denied the claim as meritless. (PCR1. 452)

Concurrently with the filing of the first motion for post conviction relief in the trial court, Defendant also filed a petition for writ of habeas corpus in this Court. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). In this Petition, Defendant contended, *inter alia*:

> CLAIM I
>
> [DEFENDANT'S] RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT PROHIBITED THE CROSS EXAMINATION OF THE STATE'S KEY WITNESS, MICHELLE RIMONDI, ABOUT HER SEXUAL HISTORY AND WHEN THE DEFENDANT WAS FORECLOSED FROM TESTIFYING ABOUT HER SEXUAL HISTORY. OLDEN V. KENTUCKY, 109 S. CT. 480 (1988), ESTABLISHED THAT THIS COURT ERRED IN [DEFENDANT'S] DIRECT APPEAL.
>
> CLAIM II
>
> [DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER BOTH ROCK V. ARKANSAS, 107 S. CT. 2407 (1987); AND OLDEN V. KENTUCKY, 109 S. CT. (1989), THIS COURT ERRED IN [DEFENDANT'S] DIRECT APPEAL.
>
> * * * *
>
> CLAIM IV

> [DEFENDANT WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

Petition for Writ of Habeas Corpus, *Roberts v. Dugger*, Case No. 74,920 (Fla. 1990). In Claims I and II, Defendant did not contend that his appellate counsel was ineffective.

Defendant also appealed the denial of the first motion, raising, *inter alia*:

> I.
> OLDEN V. KENTUCKY IS NEW CASE LAW WHICH ESTABLISHES THAT [DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED CROSS-EXAMINATION OF THE STATE'S WITNESS, MICHELLE RIMONDI, REGARDING HER WORK AS A PROSTITUTE AND HOW THAT LED TO THE VICTIM'S DEATH.
>
> II.
> [DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER TAYLOR V. ILLINOIS, 108 S. CT. 646 (1988); ROCK V. ARKANSAS, 107 S. CT. 2407 (1988); AND OLDEN V. KENTUCKY, 109 S. CT. 480 (1989), ALL OF WHICH ARE DECISIONS SUBSEQUENT TO THE SUBMISSION OF THIS CASE ON DIRECT APPEAL AND ESTABLISH A CHANGE IN LAW IN THAT THIS COURT ERRONEOUSLY RESOLVED THIS ISSUE.
>
> III.
> THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> IV.
> PENNSYLVANIA V. RITCHIE, IS NEW CASE LAW WHICH ESTABLISHES THAT [DEFENDANT'S] RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN THE RAPE TREATMENT COUNSELOR, WHO HAD TREATED MICHELLE RIMONDI AND WAS AN EMPLOYEE OF THE STATE ATTORNEY'S OFFICE, INVOKED PRIVILEGE AND REFUSED TO DISCLOSE WHETHER IN HER CONVERSATIONS WITH MS. RIMONDI

SHE HAD LEARNED ANY EXCULPATORY EVIDENCE.

* * * *

VII.
[DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

Initial Brief of Appellant, *Roberts v. State*, Case No. 74,788 (Fla. 1990).

This Court considered the state habeas petition and the appeal from the denial of the motion for post conviction relief together. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). This Court affirmed the denial of the motion for post conviction relief and denied the petition for writ of habeas corpus. *Id.*

With regard to the motion for post conviction relief, this Court found that Issues I, II, IV and VII were procedurally barred as issues that either were or could have and should have been raised on direct appeal. *Roberts*, 568 So. 2d at 1257-58. This Court also noted that neither *Olden* or *Rock* was such a change in law as to avoid the procedural bar. *Id.* at 1258. This Court rejected Issue III because the claim was insufficient plead and the allegedly withheld information was not material. *Id.* at 1260.

With regard to the state habeas petition, this Court found that Claims I and II were procedurally barred as issues that could have and should have been raised on direct appeal. *Id.* at 1260-61. This Court also found that appellate counsel was not ineffective

with regard to Claim IV, because the issue had not been preserved. *Id.* at 1261.

Defendant then proceeded to federal district court and filed a Petition for Writ of Habeas Corpus. *Roberts v. Singletary*, 794 F. Supp. 1106 (S.D. Fla. 1992). The federal district court ordered an evidentiary hearing regarding Defendant's claims of ineffective assistance of trial counsel and his *Brady* claim.

The federal district court denied the petition. *Id.* During its discussion of the various claims, the court found that the testimony of Ken Lange, Defendant's trial attorney, was unworthy of belief.[2] *Id.* at 1118, 1121. With regard to the claims that evidence of Rimondi's alleged prostitution was improperly excluded, the court found that this evidence was not relevant. *Id.* at 1113-17. The court denied the *Brady* claim, finding that "the alleged 'exculpatory material' was either immaterial, or already in petitioner's possession." *Id.* at 1122. The court also rejected a claim that the State had violated Defendant's rights when a rape treatment counselor refused to answer deposition questions regarding Rimondi's statements to her under the counselor/sexual assault victim privilege. *Id.* at 1122-24. The court found that

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[2] Lange was suspended from the practice of law for one year, *inter alia*, for his conduct in this case. *Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998). In the course of discussing the appropriate discipline for Lange, this Court agreed with the federal court's assessment that Lange's testimony was unworthy of belief. *Id.* at 524.

this claim was procedurally barred. *Id.* In discussing whether Defendant had satisfied the fundamental miscarriage of justice exception to the procedural bar doctrine, the court noted that:

> [F]urther impeachment of Rimondi with more inconsistent statements would not effect the outcome of the trial. It cannot be said that the trial court's denial of disclosure probably resulted in the conviction of an actually innocent man. Here the evidence of defendant's guilt is overwhelming.

Id. at 1124. The court also denied as meritless related claims of ineffective assistance of counsel regarding the alleged failure "to learn of money payments to Rimondi by the state" and the failure "to adequately cross-examine certain State witnesses about charges pending against them." *Id.* at 1121. The court concluded that "the 'money payments' to Rimondi were merely per diem expenses, normally paid to state witnesses, while she was attending a deposition" and that Defendant "was not prejudiced by any failure of defense counsel to further impeach the State's witnesses." *Id.* at 1122.

Defendant appealed the denial of the Petition to the Eleventh Circuit, raising nine issues:

> 1. Whether the application of Florida's Rape Shield Statute violated the Sixth and Fourteenth Amendments where Roberts was precluded from cross-examining a State's witness about her occupation as a prostitute which gave her a potential motive and where he was precluded from testifying about her statement to him concerning her occupation as a prostitute.
>
> 2. Whether the withholding of material exculpatory evidence from the defense violated the Fifth, Sixth, and Fourteenth Amendments.

> 3. Whether the refusal to disclose during a deposition the contents of statements of a State's witness to an agent of the State violated the Fifth, Sixth, and Fourteenth Amendments.
>
> 4. Whether the trial court's ruling that Roberts could not cross-examine several State's witnesses about pending charges violated the Sixth and Fourteenth Amendments.
>
> 5. Whether Roberts was deprived of the effective assistance of counsel at the guilt-innocence phase of his capital trial in violation of the Sixth and Fourteenth Amendments.
>
> 6. Whether Roberts was denied the effective assistance of appellate counsel when counsel failed to raise meritorious issues on appeal.
>
> 7. Whether Roberts was denied the effective assistance of counsel at his capital penalty phase.
>
> 8. Whether Roberts' sentencing jury was inadequately instructed regarding the aggravating circumstances.
>
> 9. Whether Roberts was deprived of his right to have the sentencer consider valid mitigating factors.

Roberts v. Singletary, 29 F.3d 1474, 1477 (11th Cir. 1994). The court affirmed the denial, agreeing with the district court's conclusions and adding no analysis regarding the alleged *Brady* violations. *Id.* at 1477.

With regard to the first issue, the circuit court added to the district court's analysis that this claim was procedurally barred and noted that even if the claim was not barred, it was without merit. *Id.* at 1477-79 & 1478 n.2. In discussing the fact that Defendant could not avail himself of the fundamental miscarriage of justice exemption to the procedural bar, the Court noted that

Rimondi had undergone a "tenacious cross-examination" and that "further impeachment of Rimondi with any inconsistent statements would not have changed the outcome of the trial." *Id.* at 1478-79. The court also noted that the evidence of Defendant's guilt was overwhelming, including that Defendant confessed to Haines, that Defendant changed his appearance after the crime, that Defendant's finger and palm prints were found at the scene, that Defendant had blood in his car and on his clothes and that Defendant had admitted to owning a baseball bat the night before the crime. *Id.* at 1479. As such, the court concluded that Defendant had not shown he was actually innocent, such that the fundamental miscarriage of justice exemption would permit consideration of a procedurally barred claim.

Defendant sought certiorari review of this decision in the United States Supreme Court, which was denied. *Roberts v. Singletary*, 515 U.S. 1133 (1995). The Court denied rehearing on August 11, 1995. *Roberts v. Singletary*, 515 U.S. 1197 (1995).

Defendant then proceeded to make a public record request for access to the State Attorney's files, and when the State Attorney's Office indicated that he could not find its file, Defendant filed a civil complaint for disclosure of public records. Emergency Petition for Writ of Common Law and Attachments, *Office of the State Attorney v. Roberts*, 669 So. 2d 251 (Fla. 1996). Subsequently, the State located the files, and Defendant reviewed

these files on September 5, 1995. *Id.* The State filed a motion to dismiss this independent civil action, claiming that the criminal division that would hear any motion for post conviction relief should hear any public records complaints. *Id.* Defendant sought to depose employees of the State Attorney's Office, and the State Attorney's Office moved to quash these subpoenas. *Id.* The civil court denied the motions to dismiss and to quash the subpoenas. *Id.*

The State Attorney's Office then filed a petition for writ of certiorari in the Third District Court of Appeal, which transferred the matter to this Court. Transfer Order dated January 29, 1996, *Office of the State Attorney v. Roberts*, 669 So. 2d 251 (Fla. 1996). By that time, a second death warrant had been signed. This Court denied the petition and permitted the depositions to proceed but ordered that the public records issue be heard before the criminal division that would hear any motions for post conviction relief. *Office of the State Attorney v. Roberts*, 669 So. 2d 251 (Fla. 1996).

After this Court denied the petition, the depositions of the employees and former employees of the State Attorney's Office were conducted. Among the people deposed were Judge Leonard Glick, who had been the lead prosecutor at the time of Defendant's trial. (PCR2. 294-358) At the beginning of this deposition, which occurred on February 15, 1996, Glick provided Defendant with a number of

documents, including an unsigned copy of the sentencing order. (PCR2. 332-42) Defendant asked no questions about this document during the deposition. (PCR2. 294-311)

When the matter was returned to the criminal division, the State moved to transfer the case back to Judge Solomon. (PCR2. 1-3) On February 20, 1996, Defendant filed a motion to disqualify Judge Solomon. (PCR2. 269-73) This motion was based on an allegation that Judge Solomon had engaged in an *ex parte* communication with the director of the correctional institution at which Defendant had served his prior Maryland sentence. *Id.* No mention was made of a need to speak to Judge Solomon regarding the sentencing order. *Id.*

On February 20, 1996, a hearing, at which Defendant was represented, was held before the administrative judge of the criminal division on the motion to transfer. (PCT2-2/20/96. at 1-17) At the beginning of this hearing, Defendant filed his second motion for post conviction relief. (PCT2-2/20/96. at 4) The administrative judge refused to hear the motion to disqualify and granted the motion to transfer. (PCT2-2/20/96. at 13)

In his second motion for post conviction relief, Defendant asserted:

> CLAIM I
> [DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASES OF [DEFENDANT'S] TRIAL. AS A RESULT, [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH

AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT [DEFENDANT] WAS ERRONEOUSLY CONVICTED.

CLAIM II

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.

CLAIM III

ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM IV

[DEFENDANT] WAS DENIED DUE PROCESS OF LAW WHEN HIS DEATH SENTENCE WAS IMPOSED ON THE BASIS OF INFORMATION WHICH HE HAD NO OPPORTUNITY TO DENY OR REBUT.

CLAIM V

[DEFENDANT'S] DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VI

[DEFENDANT'S] SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR2. 16, 69, 82-83, 86, 90) Claim I was based on allegedly newly discovered evidence that Rhoda Haines had lied at Defendant's trial. (PCR2. 16-69) Claim III pertained, *inter alia*, to certain deposition questions of employees and former employees that had not been answered.

The State responded that Haines' change of testimony did not

constitute newly discovered evidence, as it was refuted by the record and did not show that Defendant was innocent. (PCR2. 274-78) The State also asserted that the remainder of the claims were procedurally barred.

On February 21, 1996, Judge Solomon held a hearing on the motion to disqualify and the second motion for post conviction relief. (PCT2-2/21/96. at 1-69) With regard to the motion to disqualify, the State asserted that the motion was untimely, as it was based on information from 1985. (PCT2-2/21/96. at 7-9) Defendant contended that the motion was timely because it was filed within 10 days of the case being transferred back to Judge Solomon. (PCT2-2/21/96. at 9-10) Judge Solomon denied the motion. (PCT2-2/21/96. at 10)

With regard to the motion for post conviction relief, Defendant asserted that Haines' alleged recantation was sufficient to merit an evidentiary hearing. (PCT2-2/21/96. at 11-21) The State responded that the deposition testimony of Samuel Rabin, the former prosecutor whom Haines alleged induced her allegedly false testimony at the time trial, refuted the claim as Rabin had left the employment of the State Attorney's Office by the time Haines alleged that he assisted her with her own prostitution charges. (PCT2-2/21/96. at 21-24) However, the State also stated that it had offered to hold a limited evidentiary hearing on Haines' credibility if that could be accomplished within the time frame of

the death warrant. (PCT2.-2/21/96. at 21-24)

Defendant responded that he was unwilling to have an evidentiary hearing conducted within that time frame. (PCT2-2/21/96. at 24-28) He alleged that he could not arrange for Haines' presence on such short notice and that he would have to subpoena her and get that subpoena issued in California. *Id.* He also alleged that he needed to do further discovery regarding public records, as the witnesses he had deposed regarding his public records requests from the State Attorney's Office had refused to answer some questions. *Id.*

The State responded that it had been willing to assist Defendant in obtaining Haines' presence but that Defendant had refused to provide the State with an address for her. (PCT2-2/21/96. at 28-29) As to the public records issues, the State contended that Defendant had received all of the State Attorney's records. (PCT2-2/21/96. at 29-33)

Defendant also asked the court to rule on the questions that had been certified in the public records depositions. (PCT2-2/21/96. at 52-54) The State responded that the certified questions did not concern public records and were instead directed to the thought processes of the prosecutors. (PCT2-2/21/96. at 55) The State indicated that the court could review the depositions to make that determination. (PCT2-2/21/96. at 55-56) The State also contended that any public records issue should not be the basis for

a stay, as Defendant could have sought these records at any time since the case became final. (PCT2-2/21/96. at 59-60) In response, Defendant acknowledged that he had had access to the State Attorney's file in 1989. (PCT2-2/21/96. at 60) After listening to these arguments, the court denied the motion for post conviction relief. (PCT2-2/21/96. at 64)

Defendant appealed the denial of his motion for post conviction relief to this Court, asserting:

> ARGUMENT I
>
> [DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASE OF [DEFENDANT'S] TRIAL. AS A RESULT, [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT [DEFENDANT] WAS ERRONEOUSLY CONVICTED.
>
> ARGUMENT II
>
> [DEFENDANT'S] SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.
>
> ARGUMENT III
>
> ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> ARGUMENT IV
>
> [DEFENDANT WAS DENIED A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL BY THE LOWER COURT'S DENIAL OF THE MOTION TO DISQUALIFY.

ARGUMENT V

[DEFENDANT'S] DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND [sic] PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ARGUMENT VI

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.

This Court found the issue with regard to the disqualification of Judge Solomon to be without merit. *Roberts v. State*, 678 So. 2d 1232, 1234-35 (Fla. 1996). However, this Court found that the trial court should have had an evidentiary hearing on the alleged recantation by Haines and should have considered the certified deposition questions before denying the public records claim. *Id.* at 1235-36. This Court ordered the evidentiary hearing to occur within 60 days of the opinion. *Id.* at 1236.

On remand, Defendant again filed a motion to disqualify Judge Solomon on October 16, 1996. (PCR3. 37-44) This motion was again based on an alleged ex parte communication with the director of the prison at which Defendant had served his Maryland sentence, which had been known since the time of Defendant's trial. *Id.* In an attempt to make the request timely, Defendant asserted that Judge Solomon had admitted to engaging in an ex parte communication with a prosecutor who was not associated with this matter in connection with an unrelated case. Defendant also claimed that Judge Solomon must have spoken with unnamed representatives of the State in connection with the evidentiary hearing in this unrelated matter.

Id. Defendant made no allegations regarding the authorship of the sentencing order in these proceedings. *Id.*

On October 24, 1996, a status hearing on the mandate was held before Judge Platzer, the judge who had taken over the division in which Judge Solomon had sat at the time he tried Defendant. (PCR3. 45-49) At that hearing, the State informed Judge Platzer that Judge Solomon had already been assigned to hear the second motion for post conviction relief and that he should be the one hearing this matter. *Id.* Judge Platzer stated that a hearing date would have to be requested from Judge Solomon. (PCR3. 48) No appearance was made on behalf of Defendant at this hearing. (PCR3. 45-49)

On November 12, 1996, Defendant filed a motion for leave to depose Judge Solomon. (PCR3. 50-108) Defendant claimed that he had recently learned that Judge Solomon had allowed the State to draft the sentencing order in an unrelated case and that he wished to inquire regarding the authorship of the sentencing order in this matter. *Id.* In this motion, Defendant admitted that the issue had been raised in the unrelated case because of documents received in the public records process but did not point to any such documents in this matter. *Id.*

That same day, Defendant filed an amended motion to disqualify Judge Solomon. (PCR3. 109-71) This motion was based on the same grounds that were asserted in the October 1996 motion to disqualify. *Id.* Again, the motion made no mention of the

authorship of the sentencing order in this matter. *Id.*

On December 13, 1996, the State noticed the motion to disqualify for hearing and set the matter for December 19, 1996. (PCR3. 172) Defendant requested that the matter be reset until January 1997. (PCR3. 173-74) On January 8, 1997, the State filed a written response to the motion to disqualify, asserting that it was untimely and legally insufficient. (PCR3. 177-81)

On January 9, 1997, a hearing was held on the motion to disqualify. (PCR3. 182-213) At the hearing, Defendant asserted that his motion was timely because it was filed within 10 days of the issuance of mandate and was based on information that had been learned over the summer. (PCR3. 184-86) Defendant asserted that the State had to have engaged in an ex parte communication with the judge in preparation for his testimony in an unrelated post conviction hearing. (PCR3. 186-88) Finally, Defendant asserted that he would like to depose Judge Solomon. (PCR3. 188-89) The State responded that the motion was untimely and that there was only speculation that any ex parte communication had occurred in preparation for the hearing in the other case. (PCR3. 190-93) With regard to the desire to depose the judge, the State asserted that Defendant had not made a sufficient showing to require a deposition, as Defendant had not raised any issue on which the judge's testimony was necessary. (PCR3. 193-95) After listening to argument, the court denied the motion to disqualify. (PCR3. 205)

On February 10, 1997, the court tried to have a hearing on the certified questions from the depositions. (PCR3-SR. 550-53)[3] However, Defendant asserted under Fla. R. Jud. Admin. 2.050(b)(10) that Judge Solomon was not qualified to hear this matter as he had not taken the course on handling capital cases. (PCR3-SR. 553-54) Judge Solomon decided that he was qualified to hear this matter. (PCR3-SR. 561) However, the court decided to give Defendant the opportunity to pursue a motion to disqualify on this grounds. (PCR3-SR. 562-71) Defendant then filed a written motion to disqualify, asserting that Judge Solomon was not qualified to hear this matter. (PCR3. 283-86) That motion was denied. (PCR3. 297)

On April 1, 1997, Defendant filed a memorandum regarding the issuance of a certificate of materiality for Haines. (PCR3-SR. 575-77) In this memo, Defendant acknowledged that the statute on certificates of materiality did not apply to post conviction proceeding expressly. *Id.* The State filed a written response indicating that the statute at issue applied only to criminal proceeding and was inapplicable to post conviction proceedings. (PCR3. 386-87) The court denied this motion. (PCR3-SR. 578)

On May 12, 1997, Defendant moved for a certificate of materiality to compel Haines' attendance at a deposition to

[3] The State has filed a motion to supplement the record with a transcript of the proceeding that actually occurred on February 10, 1997, and the additional documents regarding the certificate of materiality that were not included in the record, concurrently with the filing of this brief.

perpetuate her testimony. (PCR3-SR. 578-81) In this motion, Defendant requested that the lower court issue an order to compel Haines' presence at a deposition in California and that the court compel the county to pay the costs of such a deposition. *Id.* On May 28, 1997, Defendant again moved for a certificate of materiality, claiming that it was necessary to protect Haines from being arrested. (PCR3 405-07) The State filed another response to this motion. (PCR3-SR. 582-86) In this response, the State noted that the lower court had already ruled that the statute did not authorize the issuance of a certificate of materiality for a post conviction proceeding, that Haines had already agreed to appear voluntarily at the evidentiary hearing, that seeking a certificate of materiality would only delay the proceedings and that Haines would not be immune from prosecution for any crime that she might commit in Florida while here to testify. *Id.*

At a hearing on July 2, 1997, Defendant again argued for the certificate but acknowledged that the court had previously denied it. (PCR3. 431-34) The State then indicated that the witness had agreed to voluntarily appear at the hearing. (PCR3. 434) Defendant responded that he needed the certificate to ensure that if the witness did not voluntarily appear, he had a method of compelling her appearance. (PCR3. 434) The lower court again denied the motion. (PCR3. 435)

At the beginning of the evidentiary hearing, Defendant

indicated that Haines would not be present because the court would not issue a certificate of materiality. (PCR3. 456) Bill Howell, one of the prosecutors on the case, responded that he had spoken to Haines in person and on the telephone on numerous occasions between June 1996 and June 1997, and that Haines had always been cooperative and willing to appear without a subpoena. (PCR3. 456-58) However, when he spoke to Haines on the Tuesday before the hearing, Haines stated that she was not coming. (PCR3. 458) When Howell asked why, Haines indicated that Defendant had told her that if she came to Florida, she would be prosecuted for perjury. (PCR3. 458-59)

Defendant's counsel acknowledged that she had told Haines that the State would arrest her if she came to Florida. (PCR3. 459-60) Defendant contended that a subpoena would immunize Haines from perjury charges and that Defendant needed to have Haines under a subpoena to assure her presence. (PCR3. 459-61) Defendant also asserted that the State had lied to Haines by telling her that nothing bad would happen to her and telling the court it would prosecute her for perjury. (PCR3. 460-61)

The State responded that it had no intention of charging Haines with perjury based on her trial testimony because it believed that testimony was truthful and because the statute of limitation had already run. (PCR3. 461) Moreover, the State asserted that no subpoena would protect Haines if she lied on the

stand during the post conviction hearing. (PCR3. 461-62) As Defendant's counsel had undertaken to advise Haines, whom she did not represent, against appearing, the State contended that any failure to produce Haines was attributable to the defense. (PCR3. 462-63)

Defendant replied that he could not rely upon Haines' voluntary appearance. (PCR3. 463-64) Moreover, Defendant contended that the change in the statute of limitation might apply retroactively and permit the State to charge Haines with perjury because of her original trial testimony. (PCR3. 464) Defendant then indicated that he was not offering Haines' affidavit as evidence but that it was in the record. (PCR3. 466) Defendant rested without presenting any witnesses or evidence. (PCR3. 486)

Defendant then stated that he was invoking the witness sequestration rule and objected to Howell's presence, claiming that he was going to be a witness. (PCR3. 466) Howell responded that he was not going to be a witness. (PCR3. 466) Defendant stated that Howell would be a witness to answer certified questions from his public records deposition. (PCR3. 466-67) The State responded that the questions had nothing to do with the merits of the post conviction claim and that Howell would answer the questions that the lower court had determined should have been answered from the deposition. (PCR3. 467-68) Defendant stated he would withdraw his objection to Howell's presence if the State would guarantee that

Howell would not testify at all. (PCR3. 468-69) The State replied that it did not intend to call Howell but that it could not promise that Howell would not be called. (PCR3. 469-71) The State also pointed out that Howell was necessary to the State's presentation, as he had been involved in the prosecution of Defendant from the time of trial and that Defendant should not be entitled to disqualify Howell by calling him as a witness. (PCR3. 469-72) Defendant insisted that Howell should not be allowed to testify at all if he was going to represent the State, and the lower court overruled this objection. (PCR3. 473)

Howell then answered the certified questions from the deposition that the lower court had ordered answered. (PCR3. 474-86) During the course of answering these questions, Howell indicated that he was unaware of whether records regarding payments for witness expenses still existed but that such documents would have been passed through the attorney for approval and then transmitted to the finance department. (PCR3. 484-85)

When the State tried to call its first witness, Harvey Wasserman, Defendant requested a proffer of his testimony. (PCR3. 486-87) Defendant asserted that if Wasserman testified about his interaction with Haines, Defendant would seek to call Howell as a witness. (PCR3. 486-87) Defendant then asserted that Howell would have to be disqualified. (PCR3. 486-87) The State responded that Wasserman would be testifying primarily about a different subject

but that he might testify about his interaction with Haines. (PCR3. 487-91) The lower court permitted the matter to proceed. (PCR3. 491)

Wasserman then testified that he checked the National Criminal Information Center (NCIC) records, FBI records and other computer records to determine if Haines had any arrests in Broward County or else where. (PCR3. 491-94) Wasserman also spoke to officials in Broward County regarding any arrests of Haines. (PCR3. 494) In making these checks, Wasserman also checked for arrest under any of Haines' known aliases. (PCR3. 494) Wasserman also checked with the clerk of courts for Broward County and found four charges from that county. (PCR3. 503-04)

From the review of these records, Wasserman determined that in 1984, Haines has two outstanding charges for prostitution from Broward County of the four charges that had been filed against her. (PCR3. 504-05) The records showed that Haines was arrested by the Fort Lauderdale on October 26, 1982, for procuring prostitution. (PCR3. 505) Haines pled guilty to this charge and was sentenced to credit for time served two days later. (PCR. 506) Haines was again arrested by the Fort Lauderdale police on November 5, 1982, for loitering for prostitution. (PCR3. 507) This charge was not resolved until October 12, 1988, at which time Haines again pled guilty and was sentenced to 9 days credit for time served. (PCR3. 507) Haines was again arrested by the Fort Lauderdale Police on

November 6, 1982, for resisting arrest without violence. (PCR3. 508) This charges was disposed of at the same time and in the same manner as the November 5, 1982 charge. (PCR3. 508-09) Finally, Haines was arrested by the Fort Lauderdale Police on November 29, 1982, for procuring prostitution and resisting by fleeing. (PCR3. 509) At her first appearance the following day, Haines pled guilty and was sentenced to credit for time served. (PCR3. 509)

Leonard Glick testified that he was presently a circuit judge and had been an Assistant State Attorney in Miami from 1972 to 1991. (PCR3. 523) During the time that he was a prosecutor, Judge Glick prosecuted Defendant with Howell. (PCR3. 524) Judge Glick was not originally the prosecutor assigned to this matter but became the lead prosecutor when Sam Rabin left the State Attorney's Office around 1985. (PCR3. 524)

During the course of his work on this case, Judge Glick met Haines, who was a witness at trial and who had been Defendant's girlfriend at the time of the crime. (PCR3. 524-25) Judge Glick learned that Haines had outstanding charges against her from Broward County during a pretrial deposition in this matter. (PCR3. 525) After discussing the matter with Howell, Judge Glick decided to do nothing about Haines' outstanding charges. (PCR3. 525-26) Judge Glick had never provided any assistance to Haines regarding her Broward County charges. (PCR3. 526) By the time of Defendant's trial, Sam Rabin was no longer in the employment of the State

Attorney's Office and had never returned to such employment. (PCR3. 526-27) Neither Rabin nor anyone else had ever solicited Judge Glick's assistance with regard to the disposition of Haines' charges. (PCR3. 527-28) Judge Glick stated that Haines was not threatened or coerced regarding her trial testimony and that nothing was promised to her to obtain her testimony. (PCR3. 530-31)

Sam Rabin testified that he was employed as an Assistant State Attorney in Miami from 1979 to February 1985, and that he had been a criminal defense attorney since that time. (PCR3. 539-40) During his employment with the State Attorney's Office, he was assigned to prosecute Defendant. (PCR3. 540) Rabin first became involved in this matter shortly after the crime was committed, and he assisted in the investigation of the case. (PCR3. 540)

During the investigation, Rabin met Haines and became aware that Haines was Defendant's girlfriend and a potential witness in this matter. (PCR3. 541-52, 547) The police had told Rabin that they believed that Haines was lying, and as a result, Rabin met with Haines and took a sworn statement from her. (PCR3. 542) At the time this statement was taken, Haines was in custody. (PCR3. 544) Haines never requested Rabin's assistance with her Broward County charges, and Rabin never made any attempt to assist her with these charges. (PCR3. 545-46) After Rabin left the State Attorney's Office in February 1985, he ceased working on this

matter and any other matters as a prosecutor. (PCR3. 547-48) As such, he could not, and did not, assist Haines with the disposition of the charges pending against her. (PCR3. 548)

Rabin stated that he would never have requested that Haines tailor her testimony in any fashion. (PCR3. 552) He also denied having ever threatened Haines or having made any promises to her in return for her testimony. (PCR3. 552-53)

After Rabin's testimony, the State rested its case. (PCR3. 573) Defendant then decided to call Howell as a rebuttal witness. (PCR3. 574) Howell testified that he was an Assistant State Attorney from 1981 to 1986 and from 1990 to the present. (PCR3. 575) He was asked by Rabin to act as second chair in this case after the indictment was returned and continued to act as second chair after Rabin left the office. (PCR3. 575-76)

Howell recalled that Haines had changed her testimony and had stated Defendant had made inculpatory statements to her. (PCR3. 576-77) In the third statement that Haines gave, she stated that Defendant had not been home the night of the crime and had returned around 5:30 a.m., the next morning. (PCR3. 577) At that point, she and Defendant went to bed, and when they awoke, Defendant told Haines that he thought he had killed a man the night before. (PCR3. 577-78) After Defendant had been in jail for a period of time, Haines stated that she visited him and that he told her about meeting a Cuban guy and a girl on the beach, doing drugs with them

and hitting the guy with a bat. (PCR3. 578)

Howell stated that after Rabin had left the State Attorney's Office, Haines told Judge Glick about Defendant's having had a gun, knife and a baseball bat. (PCR3. 579) This statement was never made to Rabin. (PCR3. 579) Howell stated that the State first learned that Haines would testify to Defendant's inculpatory statements when she was contacted in preparation for trial. (PCR3. 580)

Howell stated that Haines had moved to Arizona by that time. (PCR3. 580) Howell did not recall how the State knew that Haines had moved out of state. (PCR3. 581) However, he stated that the State was in close contact with the witnesses in this case and that the State was always aware of where they were. (PCR3. 581-82) Howell believed that Haines had returned to Florida to testify voluntarily at the time of Defendant's trial. (PCR3. 582)

On cross examination, Howell stated that he never threatened or coerced Haines regarding her testimony and never made any promises to her in exchange for her testimony. (PCR3. 583) Howell stated that he only learned that Haines allegedly had outstanding prostitution charges when she made a statement regarding them at a pretrial deposition around October 1985. (PCR3. 583) Howell and Judge Glick decided not to assist Haines with these charges and did nothing to assist her. (PCR3. 584) As far as Howell knew, these charges remained outstanding even after Haines had testified.

(PCR3. 584) Howell stated that he had no knowledge of how to make charges "go away." (PCR3. 584)

At the end of the hearing, the parties agreed to submit proposed orders to the lower court. (PCR3. 585-87) Defendant acknowledged that all issues with regard to the certified questions from the public records depositions had been resolved. (PCR3. 587-88)

By order dated August 11, 1997, the lower court denied the motion for post conviction relief. (PCR3. 751-58) The lower court found that Defendant had not shown that the evidence was newly discovered and could not have previously been discovered through the exercise of due diligence. *Id.* The lower court also determined that the failure to present Haines at the evidentiary hearing was attributable to the defense. *Id.* The lower court concluded that Haines' affidavit was refuted by the evidence that the charges that had been pending against her had been resolved by her guilty pled three years after the trial in this matter, that Rabin, Howell and Glick had not interceded on Haines' behalf regarding any charges, that they had not threatened or coerced Haines' regarding her testimony and that they had not made any promises to Haines to secure her testimony. *Id.* Finally, the lower court found that Haines' affidavit would not have sufficiently shown a likelihood of acquittal on retrial even if it had been shown to have been true. *Id.*

On September 11, 1997, Howell appeared at a status hearing before Judge Platzer, the judge assigned to the division in which this matter had been tried, and informed the court that the motion had been denied. (PCR3. 743-47) No appearance was made on behalf of Defendant at this hearing, and Judge Platzer took no action on the case. *Id.*

On November 17, 1997, Defendant filed a motion for rehearing of the denial of his second motion for post conviction relief. (PCR3. 761-74) In this motion, Defendant noted that the order had been signed on August 11, 1997, but had not been filed with the clerk of the court until October 1, 1997. *Id.* Defendant also asserted that he had not be served with a copy of the order and that his counsel had moved offices between the time of the evidentiary hearing and the issuance of the order. *Id.*

In its response to the motion for rehearing, the State indicated that Defendant had learned of the existence of the order but refused to take any immediate action to obtain a copy of this order, waiting 5 days before asking the State to provide a copy. (PCR3. 778-86) The lower court denied the motion for rehearing on January 8, 1998. (PCR3. 787)

Defendant appealed the denial of this motion. (PCR3. 790-91) During the pendency of this appeal, Defendant filed a Motion to Get the Facts. (PCR3-SR. 21-26) In this motion, Defendant asserted that he had recently learned that hearings had been held before

Judge Platzer at which he was not present. *Id.* Defendant asserted that the State must have engaged in ex parte contact with Judge Solomon because it was aware that the motion for post conviction relief had been denied in September 1997, before the order was filed. *Id.* This Court remanded the matter to the lower court for a hearing on this issue. (PCR3-SR. 27)

On remand, Judge Platzer was appointed to hear this matter. (PCR3-SR. 35) Defendant moved to disqualify Judge Platzer, and that motion was granted. (PCR3-SR. 36-43, 49)

After a new judge was assigned to this matter, a hearing was held on the motion to get facts on April 7, 2000. (PCR3-SR. 65-72) At the hearing, Defendant, without prior notice, called Assistant Attorney General Fariba Komeily as a witness. (PCR3-SR. 72) Komeily stated that she received a copy of the order denying the second motion for post conviction relief in October 1997, and that the docket stamp date from the Attorney General's Office corresponded with the date on which a document was signed and not the date on which that document was received. (PCR3-SR. 73-79)

Komeily also stated that she was not notified of hearings before Judge Platzer on September 11, 1997, and October 24, 1996, and did not attend said hearings. (PCR3-SR. 78-80) However, Komeily explained that she had not entered a appearance on this matter in the circuit court. *Id.* On cross, Komeily stated that she had previously reviewed the circuit file regarding this matter

and had found a notice of hearing for the October 24, 1996, which had been sent to Geoffrey Fleck, Defendant's prior attorney. (PCR3-SR. 81-82)

Defendant then called Assistant State Attorney Joel Rosenblatt to testify. (PCR3-SR. 88) Rosenblatt testified that CCR had been representing Defendant for years. (PCR3-SR. 88-89) Rosenblatt stated that he had no involvement with the motion for travel expenses. (PCR3-SR. 89-91)

Rosenblatt stated that he had a vague recollection of having appeared before Judge Platzer at times because this case was assigned to her division and printed on her calendar. (PCR3-SR. 95-96) However, Rosenblatt did not consider these appearances to have been hearings, as the matter was not before Judge Platzer and there was nothing for her to hear. (PCR3-SR. 95-96) Rosenblatt explained that these "hearings" before Judge Platzer were requested by the clerk to assure that the matter did not get lost in the system. (PCR3-SR. 97-98) Rosenblatt did not notify Defendant, as he believed the clerk would do so. (PCR3-SR. 98)

Rosenblatt stated that he received a copy of the order denying the second motion for post conviction relief in the mail on August 12, 1997. (PCR3-SR. 98-99) Rosenblatt later learned that Komeily had not received a copy of the order but never spoke to Judge Solomon about it. (PCR3-SR. 100-01) Rosenblatt stated that he was the one who filed the order with the clerk's office. (PCR3-SR.

101) He stated that he did so when he realized on October 1, 1997, that he had received the only copy. (PCR3-SR. 103-07) When he filed the order, Rosenblatt spoke to the clerk for Judge Platzer's division and reminded him that copies need to be mailed to the parties. (PCR3-SR. 107-08) Rosenblatt testified that he never had any ex parte communication with Judge Solomon in 1997. (PCR3-SR. 109)

Defendant next called Howell, who testified that he did not have a distinct recall of the manner in which the motion for travel costs was handled in this matter. (PCR3-SR. 115-18) However, such motions are generally prepared by his secretary, signed by him, and delivered by Howell's secretary to the judge's secretary. (PCR3-SR. 117-18) The judge's secretary would then present the motion to the judge, who would sign the order, the judge's secretary would then inform Howell's secretary that the order was signed and Howell's secretary would pick up the order. (PCR3-SR. 117-18) Howell stated that he may have taken the motion to Judge Platzer's secretary but that he did not give the motion to the judge directly. (PCR3-SR. 118)

Howell had no independent recollection of the proceeding before Judge Platzer from October 1996. (PCR3-SR. 119) Howell did recall being before Judge Platzer on September 11, 1998, and stated that he knew Judge Solomon had denied the second motion for post conviction relief because he had spoke to Rosenblatt and been

provided with a copy of the order. (PCR3-SR. 120-21) Howell stated that he would have received notice of this proceeding either from Rosenblatt or another employee of the State Attorney's Office. (PCR3-SR. 122-24)

Howell denied having ever had any ex parte communications with Judge Solomon about this case. (PCR3-SR. 121) Howell stated that he had not written the sentencing order in this case. (PCR3-SR. 121-22)

Alberto Rios, a deputy clerk assigned to Judge Platzer's division testified that he was provided with the original order denying the second motion for post conviction relief by Rosenblatt and mailed copies of this order to the individuals indicated in the cc: list on the order. (PCR3-SR. 125-28) Rios was sure he had mailed a copy to Defendant's counsel because Rosenblatt had provided him with an address for CCRC-South on the back of one of Rosenblatt's business cards. (PCR3-SR. 128-29, 131-32)

Defendant then called Judge Solomon, who testified that he had no independent recollection of signing the order denying the second motion for post conviction relief or how that order was mailed or filed. (PCR3-SR. 135-39) Defendant then sought to inquire if the State had written the sentencing order in this matter. (PCR3-SR. 139) The State objected on the grounds that such inquiry was beyond the scope of the issue before the lower court. (PCR3-SR. 139) The lower court originally sustained the objection. (PCR3-SR. 141)

However, the trial court later decided to permit limited questioning in this area. (PCR3-SR. 141-44) Judge Solomon then testified that the State drafted the sentencing order. (PCR3-SR. 144) However, Judge Solomon could not remember which Assistant State Attorney drafted the order and had no specific recollection of receiving a draft of the order for his signature. (PCR3-SR. 144-46)

In May 2000, Defendant filed a third motion for post conviction relief, alleging:

> CLAIM I
> THE SENTENCING JUDGE ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND BY FAILING TO DISCLOSE TO [DEFENDANT] AND/OR HIS COUNSEL THE FACT THAT THE STATE PREPARED THE FINDING IN SUPPORT OF THE DEATH SENTENCE.
>
> CLAIM II
> WHEN JUDGE SOLOMON DENIED [DEFENDANT'S] MOTIONS TO DISQUALIFY AND TO DEPOSE THE JUDGE, [DEFENDANT] WAS DEPRIVED OF DUE PROCESS BECAUSE JUDGE SOLOMON WAS A MATERIAL WITNESS WHO KNEW MATERIAL INFORMATION THAT HE HAD NOT DISCLOSED BUT WAS ON NOTICE THAT [DEFENDANT] SOUGHT TO DISCOVER. JUDGE SOLOMON SHOULD NOT HAVE PRESIDED OVER THE SUBSEQUENT RULE 3.850 PROCEEDING IN 1997 AND HIS RULING MUST BE STRUCK AS NULL AND VOID.

(PCR3-SR. 153-82) After this Court relinquished jurisdiction to the lower court, it held an evidentiary hearing on the third motion for post conviction relief on October 20, 2000. (PCR3-SR. 401-05)

At the hearing, Ken Lange, Defendant's trial attorney, testified that he did not recall having been aware that he or the State had been asked to prepare a draft sentencing order. (PCR3-SR. 405-08) He stated that he was aware of an ex parte

communication between Judge Solomon and the State. (PCR3-SR. 408)

Martin McClain, Defendant's post conviction counsel, testified that he had reviewed records from the State Attorney's file in 1989. (PCR3-SR. 412-13) McClain stated he again received disclosure of the State Attorney's file in 1996. (PCR3-SR. 413-14) McClain did not find a draft of the sentencing order in these records. (PCR3-SR. 414)

McClain stated that became aware in July 1996, that Judge Solomon had testified that the State had prepared the sentencing order in an unrelated case. (PCR3-SR. 415-16) McClain stated that he took no action on this information because this matter was pending on rehearing in this Court. (PCR3-SR. 416) McClain claimed that once jurisdiction returned to the trial court, he moved to disqualify Judge Solomon in order to depose him regarding who wrote the sentencing order. (PCR3-SR. 416-17) McClain stated that he later learned that Judge Solomon had had the State prepare a sentencing order in another unrelated case. (PCR3-SR. 418)

On cross, McClain stated that he had received the last public records from the State in 1996 or 1997. (PCR3-SR. 420-21) McClain admitted that he was aware that the attorney in Riechmann, the first unrelated case in which Judge Solomon admitted that the State had drafted the sentencing order, had raised the issue because he had found an unsigned draft of the sentencing order in the State Attorney's file. (PCR3-SR. 421-22)

The State then called Richard Schiffrin, who testified that he was the chief of the legal division at the State Attorney's Office when this matter was tried. (PCR3-SR. 425-27) In that position, he would have assisted the prosecutors assigned to the case with pretrial and post trial issues. (PCR3-SR. 427) Schiffrin stated that he did not prepare the sentencing order and did not recall having assisted any other prosecutor in having done so. (PCR3-SR. 427-32)

Judge Solomon testified that he believed that the State drafted the sentencing order in this matter. (PCR3-SR. 434) However, he had no recollection of who he asked to do so or how that request was made. (PCR3-SR. 434-35)

Judge Glick testified that the only member of the State Attorney's Office who would have had sufficient knowledge of the case to have prepare the sentencing order would have been himself, Howell or Rabin and that he would have been involved in the drafting if anyone else from the State did it. (PCR3-SR. 438-40) He stated that he did not recall having drafted the sentencing order, been involved in the drafting of the order or being asked to draft the order. (PCR3-SR. 441) After looking at the order, Judge Glick believed that it was too well written to be something he authored. (PCR3-SR. 441-42)

Sam Rabin testified that during the time he was the lead prosecutor on this case, the only other Assistant State Attorneys

who assisted him were John Kastrenakas and Howell. (PCR3-SR. 446-48) After he left the State Attorney's Office, Rabin had nothing to do with the case and did not write the sentencing order. (PCR3-SR. 448-49) Fariba Komeily testified that she had reviewed the records from Defendant's appeals and that the only prosecutors on the case were Howell, Rabin, Schiffrin and Judge Glick. (PCR3-SR. 449-52)

Bill Howell testified that he did not prepare the sentencing order, that he had no conversations with Judge Solomon about preparing the order and that he was not aware of any conversations between Judge Solomon and any other prosecutor regarding the drafting of the order. (PCR3-SR. 454-57) Joel Rosenblatt testified that he did not become involved in this matter until the first post conviction motion was filed and that he did not know from the legal division anyone other than Schiffrin ever having been involved in this matter. (PCR3-SR. 460-61)

After the hearing, the parties submitted written arguments. (PCR3-SR. 461-64) In his memorandum, Defendant asserted that he had proceeded with diligence because he had sought to depose Judge Solomon after learning that the State had prepared the sentencing order in an unrelated case handled by Judge Solomon and that Howell had denied knowledge of who wrote the sentencing order during the April 2000 hearing. (PCR3-SR. 217-43) He asserted that he was entitled to relief based on Judge Solomon's testimony, which was allegedly unrefuted because Judge Glick did not recall whether he

had written the sentencing order or not. *Id.* Defendant contended that the appropriate relief was the imposition of a life sentence and the vacation of the rulings on the second motion for post conviction relief. *Id.*

In the State's memorandum, it asserted that Defendant's claim regarding the authorship of the sentencing order was untimely because Defendant had received an unsigned copy of the sentencing order from Judge Glick during his public records deposition in 1996, and had not pursed the claim at that time. (PCR3-SR. 468-73) The State also contended that Judge Solomon was either mistaken about the authorship of the order or had requested someone without knowledge of the case to prepare the order. *Id.* The State alleged that if the latter was true, Judge Solomon had to have directed the preparation of the order. *Id.*

The lower court granted Defendant a new sentencing hearing, based on Judge Solomon's testimony that the State had prepared the sentencing order. (PCR3-SR. 520-28) The lower court denied the motion to reconsider the rulings regarding the second motion for post conviction relief. *Id.* The State cross appealed the granting of sentencing relief. (PCR3-SR. 547)

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in denying the motion to disqualify, as the motion was untimely filed. Moreover, Defendant did not allege his present basis for disqualification in his motion in the lower court.

The lower court did not abuse its discretion in refusing to grant a certificate of materiality for Haines. Any error in holding the hearing without Haines was invited by Defendant.

There were no improper ex parte communications with Judge Platzer. Judge Platzer never heard the merits of any issue in this matter.

Any issue regarding the disqualification of the prosecutor is unpreserved. Moreover, the trial court would not have abused its discretion in denying such a motion, had one been made.

The lower court properly determined that Defendant was not entitled to relief. The lower court found this claim to be meritless. The prior claims on which Defendant relies have repeatedly found to be procedurally barred and meritless.

The lower court improperly granted the third motion for post conviction relief. Defendant could have been aware of this claim earlier through an exercise of due diligence.

ARGUMENT

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO DISQUALIFY ITSELF, WHERE THE MOTION WAS NOT TIMELY FILED AND DID NOT ASSERT THE GROUNDS NOW RELIED UPON.

Defendant first asserts that Judge Solomon abused his discretion in denying the motion to disqualify him filed on remand. Defendant contends that Judge Solomon should have disqualified himself so that he could be deposed regarding the drafting of the sentencing order in this matter. However, Judge Solomon did not abuse his discretion, as the motion was not timely filed and did not allege the grounds now presented on appeal.

Mandate issued from the appeal from the summary denial of the second motion for post conviction relief on October 4, 1997. Defendant did not file his motion to disqualify Judge Solomon until October 16, 1997. (PCR3. 37-44) This motion asserted, *inter alia*, that Defendant had learned during the summer of 1997, that Judge Solomon had testified on behalf of the State during an evidentiary hearing regarding an unrelated matter that the State had written the sentencing order in that matter. The motion also contended that Judge Solomon must have engaged in ex parte communications with the State in preparing for that hearing. *Id.* In order for a motion to disqualify to be considered timely, it must be filed within ten days of when the information on which it is based was learned. Fla. R. Jud. Admin. 2.160(e); *see also Willacy v. State*,

696 So. 2d 693 (Fla. 1997). Here, Defendant filed the motion more than 10 days after the information on which it was based was learned and more that 10 days after this Court issued its mandate, returning jurisdiction to the lower court. *See HIP Health Plan of Florida v. Griffin*, 757 So. 2d 1272 (Fla. 4th DCA 2000)(motion to disqualify must be filed not simply served within 10 days); *In re Rogers' Estate*, 205 So. 2d 535 (Fla. 4th DCA 1967)(no additional time for mailing when motion must be filed within certain number of days after appellate court action). As such, the lower court did not abuse its discretion in denying this motion.

Moreover, Defendant asserts that the motion should have been granted because he needed to depose Judge Solomon regarding the authorship of the sentencing order. However, this motion made no mention of the need to depose Judge Solomon and no claims related to the authorship of the sentencing order in this case. (PCR3. 37-44) At the hearing on this motion, Defendant stated orally that he would like to depose Judge Solomon. (PCR3. 188-89) However, Defendant did not indicate what he wished to depose Judge Solomon about. *Id.* When the State pointed out that there was no pending issue on which Judge Solomon's testimony was necessary, Defendant responded that he would like to determine the contents of any discussion that Judge Solomon might have had with the State in preparation for the hearing in the other matter. (PCR3. 198-202) As Defendant did not assert the issue he now contends should have

caused Judge Solomon's disqualification as a ground for disqualification below, the lower court did not abuse its discretion in denying the motion. *See Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994)(grounds for disqualification that were available and not raised are waived); *Love v. State*, 569 So. 2d 807 (Fla. 1st DCA 1990)(failure to recuse not reversible error, where not asserted in a motion to disqualify in lower court); *see also* Fla. R. Jud. Admin. 2.160(c)(motion to disqualify must be in writing).

Even if Judge Solomon had improperly denied the motion to disqualify, Defendant would still be entitled to no more relief than he has already received. The reason Defendant presently alleges should have caused Judge Solomon was the need to depose him regarding the authorship of the sentencing order. Defendant has since been afforded this opportunity and has been granted sentencing relief.[4] This Court recently confronted a similar situation in *State v. Mills*, 26 Fla. L. Weekly S400 (Fla. Jun. 8 ,2001). There, Defendant showed that the State had prepared the order that had summarily denied his initial motion for post conviction after an ex parte communication with the judge. The lower court vacated Mills' sentence but not his conviction, asserting that the judge should have been disqualified because of

[4] The State asserts that the granting of relief was erroneous, as the claim was not timely asserted through the exercise of due diligence. *See* Issue VI, *infra*.

the ex parte communication with the State and should not have presided over the evidentiary hearing on the motion for post conviction relief. This Court held that the granting of sentencing relief mooted any issue regarding the conviction. As the same situation exists here, the lower court's order denying the second motion for post conviction relief should be affirmed.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CERTIFICATE OF MATERIALITY FOR HAINES, WHERE THERE WAS NO AUTHORITY TO DO SO AND HAINES' ABSENCE WAS ATTRIBUTED TO DEFENDANT.

Defendant next asserts that the lower court abused its discretion in determining that he was not entitled to a certificate of materiality for Haines. Defendant asserts that because Haines did not appear to testify at the evidentiary hearing on his second motion for post conviction relief, he was denied due process. However, the lower court properly denied the certificate of materiality and any error in the absence of the witness was invited by Defendant.

Defendant asserts that the lower court should have issued a certificate of materiality for Haines. However, Florida's ability to compel the attendance of out of state witnesses are limited by the reciprocal legislation with other states to compel the presence of such witnesses. *See People of the State of New York v. O'Neill*, 359 U.S. 1 (1959) The reciprocal statute that authorizes the issuance of certificate of materiality, the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, is inapplicable to this matter by its own terms. Section 942.03(1), Fla. Stat. (1995), provides:

> If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence

> in this state, is a material witness in **a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence**, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

Here, Haines was not a material witness in a prosecution pending in this State or a grand jury investigation in this State. Instead, Haines' testimony was sought for a hearing on a post conviction motion. As this Court has previously noted, post conviction motions are not steps in a criminal prosecution; they are civil in nature. *State v. White*, 470 So. 2d 1377, 1378 (Fla. 1985); *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964); *accord Murray v. Giarratano*, 492 U.S. 1, 8 (1989). As such, the statute by its very terms does not apply in this matter. *See McQueen v. Commonwealth*, 721 S.W.2d 694, 702 (Ky. 1987)(Uniform Act did not apply to post conviction proceeding); *Gall v. Commonwealth*, 702 S.W.2d 37, 45 (Ky. 1986). As such, the lower court did not abuse its discretion in refusing to issue the certificate of materiality.

Defendant does not assert that the lower court was authorized by any other law to issue the certificate of materiality. Instead, he merely relies on other trial court's that have issued such

certificates. However, the fact that another circuit had misapplied a statute that by its own terms did not apply does not show that the lower court here abused its discretion.

Defendant's additional reliance on *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999), and *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), is also misplaced. The issuance of a certificate of materiality for an out of state witness was not at issue in either of these cases. In both *Provenzano* and *Jones*, this Court found that the lower courts had abused their discretion in refusing to continue hearings until such time as a witness was available. *Provenzano*, 751 So. 2d at 598-601; *Jones*, 695 So. 2d at 680-81. Here, no reasonable length of continuance would have changed the fact that the uniform law did not provide for the issuance of a certificate of materiality. As such, these cases are inapplicable, and the lower court did not abuse its discretion.

Even if the lower court did abuse its discretion in denying the certificate of materiality, this claim should still be rejected as the absence of Haines was invited by Defendant. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). Here, Haines had indicated that she was willing to attend the hearing voluntarily. (PCR3. 456-58) Haines only refused to appear after Defendant's attorney told her that she would have been arrested for having committed perjury

if she attended. (PCR3. 458) However, Haines could not have been arrested for committing perjury at the time of trial. The statute of limitations for such perjury had expired. *Roberts v. State*, 678 So. 2d 1232, 1239 (Fla. 1996)(Wells, J., dissenting). Moreover, as this Court has long recognized, any change in the statute of limitations would not have affected Haines. *State ex rel. Manucy v. Wadsworth*, 293 So. 2d 345 (Fla. 1974)(changes in a statute of limitations may not be applied retroactively). As Haines would have voluntarily appeared but for Defendant's counsel's decision to provide erroneous legal advice to a person whom counsel did not and could not represent, the lower court properly found that Haines' absence was attributable to Defendant. As Defendant invited Haines' absence, he should not now be heard to complain of it. The lower court should be affirmed.

Defendant's reliance on *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994), is also misplaced. There, the lower court summarily denied Defendant's motion for post conviction relief, which included a claim based on 4 affidavits that another person had confessed to the crime. In doing so, the lower court permitted the State to present evidence. *Id.* at 111 n.3. Here, this Court had remanded this matter for an evidentiary hearing. At said hearing, Defendant relied upon an affidavit from Haines. As this motion was not summarily denied, the lower court did not abuse its discretion in permitting the State to present evidence to rebut that

affidavit. As such, *Johnson* is inapplicable.

III. ANY COMMUNICATION WITH JUDGE PLATZER WAS NOT AN IMPROPER EX PARTE COMMUNICATION AS THE MATTER WAS NOT BEFORE HER.

Defendant next contends that the order denying his second motion for post conviction relief should be vacated and that Judge Platzer should be recused based on alleged ex parte proceedings before her. Defendant points to three alleged ex parte communications with Judge Platzer: (1) Judge Platzer's signing of an ex parte order for the cost of travel by Howell and Wasserman; (2) a proceeding before Judge Platzer on October 24, 1996; and (3) a proceeding before Judge Platzer on September 11, 1997. However, this issue is meritless.

Judge Solomon was assigned to hear Defendant's second motion for post conviction relief on February 20, 1996, after a hearing at which Defendant was represented. (PCT2-2/20-96. 1-13) As such, this matter was not before Judge Platzer. As explained at the hearing on the motion to get facts, the matter appeared on Judge Platzer's calendar because Judge Solomon did not have a calendar as a senior judge. As such, the matter was carried on Judge Platzer's calendar to ensure that the matter was removed from the clerk's docketing system. (PCR3-SR. 95-97) While Canon 3(B)(7) of the Code of Judicial Conduct prohibits a judge from having ex parte communications with a party regarding a matter that is or will soon be before him, it does not prohibit communication about a case in which the judge is not involved. As matter was not before Judge

Platzer, she could not have engaged in any ex parte communications with the State.

Defendant asserts that the matter was before Judge Platzer because she granted a motion to transfer the case to Judge Solomon on October 24, 1996, and granted the State's motion for cost of travel. However, this is not true. At the proceeding on October 24, 1996, the State did not move to transfer the matter to Judge Solomon. The State merely informed Judge Platzer that the matter had been transferred to Judge Solomon in February 1996. (PCR3. 45-49) In fact, Judge Platzer could not have ruled on a motion to transfer. Pursuant to Fla. R. Jud. Admin. 2.050 and Administrative Order 96-25 of the Eleventh Judicial Circuit, only the Chief Judge of the circuit or the Administrative Judge of the criminal division could have ruled on such a motion. As Rosenblatt explained at the hearing on the motion to get facts, the matter appeared on Judge Platzer's calendar, and remained there, merely as a convenience for the clerk's office. (PCR3-SR. 95-97) As such, the proceeding on October 24, 1996, does not show that Judge Platzer had the proceeding before her at that time. Thus, the proceeding does not demonstrate that the State engaged in an ex parte contact with the lower court. The lower court should be affirmed.[5]

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[5] The same is true of the proceeding on September 11, 1997. Again, nothing was before Judge Platzer. She was merely informed of the status of the case because it was being carried on her calendar as a convenience for the clerk's office.

With regard to the signing of the motion for travel costs, this provides no basis to have disqualified anyone or reverse the lower court. This Court has held that ex parte discussions regarding purely administrative matters do not provide a basis for recusal. *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000); *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992). As Howell explained at the motion to get facts, the processing of this motion did not involve any personal contact with any judge. (PCR3-SR. 115-18) The motion is merely delivered to the judge's judicial assistant, who presents it to the judge. Moreover, the motion for travel costs did not address the merits of the case. (PCR3. 36) Instead, it merely stated that funds were needed for Howell and Wasserman to travel to Los Angles, California and Phoenix Arizona to interview witnesses, and detailed the type of travel expenses that would be incurred. *Id.* As such, this would be a mere administrative matter, which does not constitute an impressible ex parte communication. Moreover, Judge Platzer had no part in determining the merits of any issue in this matter. When the matter was reassigned to her for the hearing on the motion to get facts, she recused herself. (PCR3-SR. 35-43, 49) As such, the purely administrative communication could not have affected the determination of the merits of any issue here. The lower court should be affirmed.

IV. ANY ISSUE REGARDING THE DISQUALIFICATION OF ASSISTANT STATE ATTORNEY BILL HOWELL IS UNPRESERVED AND MERITLESS.

Defendant next asserts that the lower court should have disqualified Assistant State Attorney Howell from acting as counsel for the State because he served as a witness and allegedly engaged in ex parte communications. However, this issue is unpreserved and without merit.

In the lower court, Defendant never moved to disqualify Howell. In fact, the only objection raised by Defendant below to Howell's participation was when he invoked the rule at the beginning of the evidentiary hearing on the second motion for post conviction relief. (PCR3. 466) Even at that time, Defendant only sought to prevent Howell from testifying and did not seek his disqualification. (PCR3. 466-73) As Defendant did not move to disqualify Howell in the lower court, this issue is not preserved. *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Even if the issue had been preserved, the lower court would still have properly refused to disqualify Howell. In order to disqualify a prosecutor, a defendant must show that he was actually prejudiced by the participation of the prosecutor. *Farina v. State*, 680 So. 2d 392, 395-96 (Fla. 1996)(showing of actual prejudice required to disqualify State Attorney, where prosecutor committed misconduct in having case assigned to division of particular judge in contravention of administrative order); *Farina*

v. State, 679 So. 2d 1151, 1157 (Fla. 1996)(same); *State v. Clausell*, 474 So. 2d 1189 (Fla. 1985)(showing of actual prejudice required); *Nunez v. State*, 665 So. 2d 301, 302 (Fla. 4th DCA 1995); *State v. Christopher*, 623 So. 2d 1228 (Fla. 1993)(same); *Fernandez v. State*, 555 So. 2d 437, 438 (Fla. 3d DCA 1990)(same); *Meggs v. McClure*, 538 So. 2d 518 (Fla. 1st DCA 1989)(same). "Actual prejudice is 'something more than the mere appearance of impropriety.'" *Farina*, 680 So. 2d at 395. An appellate court reviews a lower court's decision on a motion to disqualify an attorney under an abuse of discretion standard, and the factual findings underlying the ruling can only be overturned if they are not supported by competent substantial evidence. *See Shultz v. Shultz*, 783 So. 2d 329, 330 (Fla. 4th DCA 2001); *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196, 205 (Fla. 1st DCA 2000).

With regard to the allegation that Howell should have been disqualified because he acted both as a witness and an advocate for the State, this contention is without merit. In *Scott v. State*, 717 So. 2d 908, 910-11 (Fla. 1998), this Court rejected a similar claim. In *Scott*, the defendant sought to disqualify the original trial prosecutor from acting as counsel for the State at a post conviction hearing on a *Brady* claim. The defendant asserted that the prosecutor would violate R. Regulating Fla. Bar 4-3.7 by acting as an advocate and being called as a witness in the post conviction proceedings.

On appeal, this Court rejected the claim that the lower court had erred by denying the motion to disqualify. This Court stated that the purpose underlying the witness/advocate rule was to prevent an attorney from acting as a witness for his own client because the dual role could prejudice the opposing party and could create a conflict of interest with the client. *Id.* at 910. This Court noted that the prejudice to the opposing party could occur because a jury might give undue weight to the attorney's testimony or might become confused regarding what was argument and what was testimony. *Id.* at 910 n.9. This Court stated that a conflict might arise because the attorney's testimony and the client's testimony were in conflict. *Id.* at 910 n.10. This Court held that "these concerns [were] not implicated in the present case where the state attorney was called as a witness *for the other side* on a *Brady* claim in a postconviction evidentiary hearing before a judge." *Id.* at 910 (emphasis in original). This Court added that "[t]o hold otherwise would bar many trial level prosecutors -- who may be the most qualified advocates for the State -- from representing the State in a *Brady* claim in a subsequent postconviction evidentiary hearing." *Id.* at 910-11.

As was true in *Scott*, Howell was called as a witness by Defendant at the evidentiary hearing on the second post conviction motion. (PCR3. 574) His testimony at this hearing concerned allegations that the State had committed *Brady* and *Giglio*

violations. (PCR3. 574-584) Defendant again called Howell at the remand hearing on "his motion to get facts," and again Howell's testimony concerned alleged improprieties by the State. (PCR3. 115-22) The only time that Howell was called to testify for the State was at the evidentiary hearing on the third motion for post conviction relief. (PCR3-SR. 454-57) However, this testimony was substantially the same as the testimony Defendant elicited from him at the evidentiary hearing on the "motion to get facts."[6] (PCR3-SR. 121-22) Moreover, Howell was the only prosecutor who had been assigned to the case at the time of trial who was still employed by the State Attorney's Office at the time of these hearings. As such, the trial court would not have abused its discretion in denying a motion to disqualify Howell under *Scott* had Defendant made one. This Court should affirm.

With regard to the claim that Howell should be disqualified for allegedly engaging in *ex parte* communications with Judge Platzer, as argued in Issue III, *supra*, this claim is meritless. Moreover, Defendant has not demonstrated actual prejudice from Howell's participation. As such, this issue is meritless. *Farina v. State*, 680 So. 2d 392, 395-96 (Fla. 1996)(showing of actual prejudice required to disqualify State Attorney, where prosecutor

[6] Moreover, Defendant would be hard pressed to complain about Howell's actions at that point, as Defendant had already called his own counsel to testify on his own behalf at that hearing. (PCR3-SR. 412-22)

committed misconduct in having case assigned to division of particular judge in contravention of administrative order); *Farina v. State*, 679 So. 2d 1151, 1157 (Fla. 1996)(same)

V. THE LOWER COURT PROPERLY DETERMINED THAT DEFENDANT WAS NOT ENTITLED TO RELIEF BECAUSE OF ANY CUMULATIVE EFFECT OF THIS CLAIM AND PRIOR CLAIMS.

Defendant next asserts that the lower court erred in denying his second motion for post conviction relief because the lower court did not conduct a proper cumulative error analysis. However, where the alleged errors are either procedurally barred or without merit, a defendant is not entitled to relief by alleging cumulative error. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As the lower court properly determined that the new claims were without merit and the prior claims upon which Defendant relies were also found to be procedurally barred or without merit, this claim was properly denied.

While Defendant asserts that he is entitled to relief based upon the cumulative effect of the claim of Haines' recantation with all of the other claims he has previously raised, the lower court found the claim of Haines' recantation was meritless. This finding was proper. To prove a claim of newly discovered evidence, a defendant must show that the evidence was unknown to defendant, his counsel or the court at the time of trial, that it could not have been learned through the exercise of due diligence, and that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991). In determining whether the evidence would probably produce an acquittal on retrial, the court must consider whether the evidence is credible. *See Jones v.*

State, 709 So. 2d 512, 521-22 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997); *Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995). A lower court's findings in this regard will not be overturned so long as they are supported by competent substantial evidence. *Melendez v. State*,718 So. 2d 746 (Fla. 1998); *Blanco*, 702 So. 2d at 1252. Moreover, in a successive motion for post conviction relief, the defendant must show that the claim was presented within one year of when the evidence could have been discovered through an exercise of due diligence. *Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996)(Defendant's second 3.850 must show "that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based."); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995)(same).

Here, the lower court found that Defendant had not proved that his claim was presented within one year of when this claim based on Haines' recantation could have been discovered through an exercise of due diligence. This finding is supported by competent, substantial evidence and should be affirmed. *Melendez; Blanco*. Defendant presented no evidence at the evidentiary hearing regarding what efforts had been made to locate Haines before 1996. Defendant did not call his investigators or explain why he could not do so. As such, the lower court properly found that Defendant had not proved that the claim was presented within one year of when

it could have been discovered through an exercise of due diligence. As this claim was properly rejected as meritless, there was no need to consider its cumulative effect. *Downs*. Thus, the lower court should be affirmed.

The trial court also rejected this claim, finding that Haines was not a credible witness. Again, this finding is supported by competent, substantial evidence and should be affirmed. *Melendez; Blanco*. The lower court found:

> Even if the recantation affidavit is deemed to be newly discovered evidence, the defendant did not produce the recanting witness, and, contrary to his previous allegations and representations, presented no corroborating or other evidence to establish the trustworthiness of the newly discovered evidence. See, Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996), citing Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994), Walden v. State, 284 So. 2d 440 (Fla. 3d DCA, 1973). The State, however, did present testimony and evidence refuting the recanting witness's statements. In light of the evidence presented, this Court finds the recanting witness's assertions are not credible.
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> * * * *
>
> As noted by the Florida Supreme Court, at the trial of this cause, Ms. Haines testified that the defendant had confessed to killing the victim, and that no promises or threats prompted her trial testimony. Ms. Haines' 1996 affidavit states that the defendant did not confess to her. According to this affidavit, one of the prosecuting attorneys, Mr. Rabin, pressured Haines for a "better" story, suggested facts which she adopted as her trial testimony, and promised to have Haines' outstanding prostitution charges in Broward County "disappear" in return for such testimony. Roberts v. State, 678 So. 2d at 1235.
>
> State witness Wasserman, at the evidentiary hearing, however, presented testimony and documentary evidence which established that the only charges in Broward County, pending against Ms. Haines during the 1984-1985 period (at the time of commission, investigation and trial of the defendant's crimes), were resolved in 1988,

> three (3) years after completion of the defendant's trial. Contrary to Ms. Haines' affidavit, these charges did not "disappear"; instead, Haines pled guilty to these charges in 1988 and received a sentence of time served. Apart from said documentary evidence, the accused prosecutor, Mr. Rabin, also testified that he left the State Attorney's Office and entered private practice in February, 1985, approximately 10 months prior to the commencement of defendant's trial. Mr. Rabin testified that he did not and could not have interceded on Haines' behalf with in Broward County as to her pending charges. Mr. Rabin further stated that he had never asked Ms. Haines to "tailor" her testimony, nor had he ever threatened or promised Haines anything in any effort to get her to alter her statements. The remaining prosecutors in this case, Messrs. Glick and Howell, who actually conducted the trial, likewise testified that when they became aware of Haines' pending charges in Broward County, they decided to do nothing with respect to said charges. As noted by Mr. Howell, the defense at trial took full advantage of that decision, by repeatedly informing the jury that despite pending charges, Haines had been traveling back and forth to Arizona without anyone informing the Broward officials of her presence in Florida.
>
> The Court finds the above stated evidence presented by the State to be credible. Said evidence directly refutes many of the allegation in Ms. Haines' current affidavit, and the lack of any corroborating evidence presented by the defense at the evidentiary hearing, this Court finds Ms. Haines's recantation of her trial testimony to be unreliable and not credible.

(PCR3. 752-55) These findings are amply supported by the testimony of Wasserman, Howell, Glick and Rabin. (PCR3. 491-573, 575-84) As such, they should be affirmed. *Melendez; Blanco*.

Defendant asserts that these findings are flawed because the fact that only two pending charges were found allegedly shows that Haines was telling the truth that Rabin had made her charges "disappear." However, Defendant presented no evidence that these charges ever really existed. Howell's testimony was that he first

learned of the 11 alleged charges when Haines claimed that they existed during her deposition. (PCR3. 584) He stated that he had not taken any action about these charges. (PCR3. 584) Moreover, the evidence showed that the State had checked the criminal histories of its witnesses at the time of trial. (PCR3. 548-52) As the State only learned of these alleged charges at Haines' deposition, this evidence shows that the charges never did exist and does not enhance Haines' credibility. As such, the lower court properly denied this claim, and there was no reason to conduct a cumulative error analysis. *Downs*. The lower court should be affirmed.

Even if the lower court had found merit to this claim, it still would not have improperly determined the alleged cumulative effects of his prior claims. These claims had been found to be procedurally barred and meritless and thus, would not have contributed to a cumulative error analysis. *Downs*.

Defendant first asserts that the Eleventh Circuit had previously rejected a *Brady* claim regarding Rimondi because of Haines' testimony. However, this is not true. The claim was not a *Brady* claim; instead, it concerned the assertion of the rape counselor/sexual assault victim privilege regarding Rimondi. *Roberts v. Singletary*, 29 F.3d 1474, 1477-79 (11th Cir. 1994); *Roberts v. Singletary*, 794 F. Supp. 1106, 1122-24 (S.D. Fla. 1992). This claim was found to be procedurally barred. *Id.* As such, this

claim would not have added to a cumulative error analysis. *Downs*.

Defendant next relies upon an allegation that Rimondi was a prostitute and had received assistance from the State regarding pending charges against her. However, this information was known at the time of trial and did not support a *Brady* claim. Moreover, this fact was excluded under the Rape Shield Law, and that exclusion has been repeatedly found to be proper. *Roberts*, 794 F. Supp. at 1113-17; *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Roberts v. State*, 510 So. 2d 885 (Fla. 1987). The information regarding the pending charges was excluded at the time of trial, and this ruling has again been upheld or found to be procedurally barred. *Roberts*, 794 F. Supp. at 1121; *Roberts*, 568 So. 2d at 1257-58, 1261. As such, these claims would not have supported a cumulative error analysis. *Downs*.

Defendant next relies upon the fact that Rimondi was given money by the State. However, this claim was rejected as an ineffectiveness claim by the federal courts because the payments were nothing more than the payment of per diem expenses for a witness. *Roberts*, 794 F. Supp. at 1121. As such, this claim does not support a cumulative error analysis. *Downs*.

Defendant also relies upon a statement by Dr. Rao that she did not finding Rimondi's statement that she was raped to be credible. However, one witness is not permitted to comment on the credibility of another. *See Feller v. State*, 637 So. 2d 911, 915 (Fla. 1994).

As such, this statement would not support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1 (1995)(inadmissible facts do not support a *Brady* claim). As such, this claim was properly denied as meritless and does not support a cumulative error analysis. *Downs*.

As such, none of the claims that Defendant asserts should have been considered in a cumulative error analysis were properly considered as such. *Downs*. Moreover, Rimondi's eyewitness account and Haines' statement regarding the confession were not the only evidence against Defendant. While Defendant had denied being at the scene of the murder, his prints were found there. Blood semen and possible vaginal aspirate were found on the clothes that Defendant had been wearing on the night of the murder. Blood was also found in the back of Defendant's car. Defendant was seen in the area of the crime scene near the time of the crime by other witnesses. A knife consistent with Rimondi's account was found in Defendant's car, and Defendant had told other witnesses that he owned a baseball bat (the victim was beaten to death with a baseball bat) and was willing to use it. Defendant lied about having not been on Key Biscayne, the scene of the murder, for months. Finally, Defendant changed his appearance immediately after the crime. Under these circumstances, the lower court properly determined that Defendant was not entitled to relief. This Court should affirm.

VI. THE LOWER COURT ERRED IN GRANTING RELIEF ON THE THIRD MOTION FOR POST CONVICTION RELIEF WHERE THE CLAIM COULD HAVE BEEN ASSERTED EARLIER THROUGH AN EXERCISE OF DUE DILIGENCE.

The lower court erred when it granted Defendant's third motion for post conviction relief. The claim was presented in a third motion filed approximately 15 years after Defendant's conviction and sentence became final. While Defendant claimed that the claim was based on facts that could have not been discovered earlier through an exercise of due diligence, this is untrue.

In order to file a claim in a successive motion for post conviction relief, the claim must either be based on newly discovered evidence or a fundamental change of constitutional law that has been held to apply retroactively. Fla. R. Crim. P. 3.850(b) & (f). Moreover, where the claim is based on newly discovered evidence, it must be asserted within one year of when the claim could have been discovered through an exercise of due diligence. *Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996)(Defendant's second 3.850 must show "that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based."); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995)(same). The defendant must also not have been able to have known of the fact through due diligence at the time a prior motion for post conviction relief was filed. *See Davis v. State*, 742 So. 2d 233, 236 (Fla. 1999). Where a claim is based on facts that a defendant could have learned of earlier through public

records requests, the defendant has not shown that he could not have learned of the claim earlier through due diligence. *See Buenoano v. State*, 708 So. 2d 941, 952-52 (Fla. 1998); *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993)(claim barred where information could have been discovered through earlier public records litigation), *cert. denied*, 513 U.S. 830 (1994); *Agan v. State*, 560 So. 2d 222 (Fla. 1990)(same); *Demps v. State*, 515 So. 2d 196 (Fla. 1987)(same).

Here, Defendant did not show such due diligence. Defendant first sought and was granted access to the State Attorney's file in 1989. However, at that time, Defendant did not seek to depose the prosecutors involved in his case. When Defendant again sought access to the State Attorney's file in 1995, he was granted leave to depose the prosecutors in this matter. During the deposition of Judge Glick, Defendant was provided with an unsigned copy of the sentencing order. (PCR2. 332-42) However, Defendant did not question Judge Glick regarding this document. (PCR2. 294-311) After receipt of this document, Defendant filed a second motion for post conviction relief without asserting any claim regarding the authorship of the sentencing order. (PCR2. 4-95)

After Defendant learned that another capital defendant sentenced by Judge Solomon had successfully asserted a claim that Judge Solomon had had the State write the sentencing order in the other defendant's case, he did not seek to depose the prosecutors

regarding this unsigned copy of the sentencing order in this matter. This is true despite the fact that the depositions of the prosecutors remained open at that time, as this Court had ordered the lower court to consider the certified questions from these depositions. *Roberts v. State*, 678 So. 2d 1232, 1235-36 (1996). Moreover, when Defendant moved to disqualify Judge Solomon, he did not assert that he needed to do so in order to depose Judge Solomon regarding the authorship of the sentencing order in this case. *See* Issue I, *supra*. Instead, Defendant waited until May 2, 2000, to file his third motion for post conviction relief asserting this claim. As such, Defendant did not show that he could not have been aware of this claim well earlier through the exercise of due diligence. *See Buenoano*, 708 So. 2d at 952-52; *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993); *Agan v. State*, 560 So. 2d 222 (Fla. 1990); *Demps v. State*, 515 So. 2d 196 (Fla. 1987). Thus, this claim should have been denied, and the lower court's granting of this motion should be reversed.

CONCLUSION

For the foregoing reasons, the denial of the second motion for post conviction relief should be affirmed and the granting of the third motion for post conviction relief should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Martin J. McClain, 9701 Shore Rd., Apt. 1-D, Brooklyn, New York 11209 and CCRC-South, 101 N.E. 3rd Street, Suite 400, Fort Lauderdale, Florida 33301, this day of 9th of July, 2001.

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SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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SANDRA S. JAGGARD
Assistant Attorney General