

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC92496

RICKEY BERNARD ROBERTS,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Roberts' second motion for post-conviction relief.

The circuit court denied Mr. Roberts' claims following an evidentiary hearing. While this appeal was pending, this Court granted Mr. Roberts' request for a remand to get the facts. In those proceedings in circuit court, new information surfaced that required the filing of a third motion for post-conviction relief. This Court granted a relinquishment of jurisdiction to permit consideration of that motion. The circuit court conducted an evidentiary hearing on the third motion. After permitting written closing arguments, the circuit court granted post-conviction relief and ordered a resentencing by a newly impaneled jury. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ____" - Record on appeal to this Court in first direct appeal;

"PC-R1. ____" - Record on appeal to this Court from denial of the first Motion to Vacate Judgment and Sentence;

"PC-R2. ____" - Record on appeal to this Court from 1996 summary denial of the second Motion to Vacate Judgment and Sentence;

"PC-R3. ____" - Record on appeal to this Court from denial of the second Motion to Vacate Judgment and Sentence following remand by this Court for evidentiary hearing;

"SPC-R3. ____" - Supplemental record on appeal following relinquishment of jurisdiction to consider third Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will

otherwise be explained.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

REQUEST FOR ORAL ARGUMENT

This is an appeal from the denial of post-conviction relief in a capital case. Even though the death sentence has been vacated, this Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Roberts, through counsel, respectfully urges the Court to permit oral argument.

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INTRODUCTION

Rickey Bernard Roberts was convicted of first degree murder on the basis of the testimony of Michelle Rimondi, who claimed she witnessed the murder, and the testimony of Rhonda Haines, who claimed Mr. Roberts confessed the murder to her. Mr. Roberts testified at his trial and attempted to refute the testimony of both Ms. Rimondi and Ms. Haines. In closing argument, the trial prosecutor acknowledged that the case came down to whom to believe. (R. 2945) ("Ultimately, you have to decide who is lying and what they have to gain or to lose by coming in this courtroom and lying."). After hearing the testimony of Michelle Rimondi, Rhonda Haines, and Rickey Roberts, the jury deliberated twenty-three hours over three days before convicting Mr. Roberts.

In his first motion for post-conviction relief, Mr. Roberts presented a Brady claim based upon undisclosed impeachment evidence regarding Ms. Rimondi. Mr. Roberts was denied relief because prejudice was not sufficiently established given Ms. Haines' testimony.

Under the pendency of a death warrant in 1996, Mr. Roberts' counsel located Rhonda Haines, who recanted her trial testimony. Ms. Haines signed an affidavit in which she indicated that her trial testimony was false and was the result of pressure and promises by the State. Mr. Roberts filed his second Rule 3.850 motion in circuit court and attached Ms. Haines' affidavit. Mr. Roberts argued State v. Gunsby, 670 So.2d 920 (Fla. 1996), and Kyles v. Whitley, 514 U.S. 419 (1995), required cumulative

consideration of the Rhonda Haines' affidavit along with the previously presented Brady evidence concerning Michelle Rimondi. See Initial Brief in Case No. 87,438 at 44. At an argument on the motion, the State suggested an immediate evidentiary hearing. Collateral counsel responded that Ms. Haines would have to be subpoenaed so that she could take time from her job and make arrangements for child care. (**T. [2/21/96] 44). As a result, collateral counsel argued that a stay was necessary in order to make the proper arrangements. The circuit court summarily denied the Rule 3.850 motion and the request for a stay.

Mr. Roberts appealed to this Court. Collateral counsel repeated his argument that an evidentiary hearing and stay were required because he did not have the ability to force Ms. Haines to return to Florida and testify: a lawful subpoena would be necessary. Initial Brief in Case No. 87,438, at 7 n. 6. This Court stayed Mr. Roberts' execution, and subsequently issued an opinion remanding for an evidentiary hearing, specifically to determine Ms. Haines' credibility. Roberts v. State, 678 So. 2d 1232 (Fla. 1996). Justice Overton, who provided the fourth vote for remanding for an evidentiary hearing, wrote a separate opinion in which he explained: "Whether that testimony would have affected the outcome of the trial is a factual determination that must be made by the trial judge after an evidentiary hearing at which the recanting witness testifies what was the truth and what was a lie." 678 So. 2d at 1236 (emphasis added).

On remand in the circuit court, Mr. Roberts moved to

disqualify Judge Solomon in light of his testimony in State v. Riechmann indicating he had contacted the State on an ex parte basis in order to have the State prepare an order sentencing Mr. Riechmann to death. (PC-R3. 37). Mr. Roberts' also sought to depose Judge Solomon in order to ascertain whether the judge had followed the same procedure in Mr. Roberts' case. (PC-R3. 50). Judge Solomon denied both motions. (PC-R3. 205). However years later, on April 7, 2000, he did testify that he had in fact followed the same procedure in Mr. Roberts' case that he employed in Mr. Riechmann's case and through ex parte contact he had the State write the order sentencing Mr. Roberts to death.¹

On remand, Mr Roberts also sought a certificate of materiality in order to perfect an out of state subpoena for Ms. Haines, who now resides in California. The request was made pursuant to §942.03(1), Fla. Stat.(1996). The State opposed the request saying that those provisions were not available in post-conviction proceedings and that Mr. Roberts had no means of obtaining by compulsory process the presence of Ms. Haines. (PC-R3. 386). The circuit court agreed with the State and refused to issue a certificate of materiality. (PC-R3. 434).

At the hearing on this issue, the prosecuting attorney advised Mr. Roberts' collateral counsel that he intended to

¹On January 12, 2001, a resentencing was ordered in light of Judge Solomon's much delayed testimony revealed that he had followed the same procedure in Mr. Roberts' case that he had employed in State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000), and Maharaj v. State, 25 Fla. L. Weekly S1097 (Fla. Nov. 30, 2000).

pursue perjury charges against Ms. Haines if she took the stand and testified in conformity with her affidavit. In preparing for the evidentiary hearing, collateral counsel spoke to Ms. Haines on a number of occasions in order to prepare her for testifying. In the course of those discussions, collateral counsel advised Ms. Haines of the prosecuting attorney's statement that he intended to charge Ms. Haines with perjury if she took the stand and testified in accordance with her affidavit.² Before calling Ms. Haines as a witness, collateral counsel needed to know how

²Joel Rosenblatt, Assistant State Attorney, repeated his intentions at the commencement of the evidentiary hearing on July 16, 1997:

When I told Your Honor, and what no subpoena from California or any other court is going to protect her from, is from committing perjury on the witness stand in this courtroom when she testifies today or sometime in the future.

That perjury will be prosecuted to the fullest extent of the law. And no subpoena from California, from Florida, or any place else is going to protect her from committing perjury.

Now past perjury is a dead issue. Nobody has ever threatened to prosecute her for that, nor could we ever do so. Because, the statute of limitations and - - like I said, because we believe it to be truthful testimony.

But when she gets up on the stand and lies today, by all means, she will be subject to perjury. So, the issue of the subpoena is a total red herring.

(PC-R3. 601).

Of course, if the question of a subpoena was a red herring, then why did the State oppose issuing a certificate of materiality so that a subpoena could be issued? The State did offer to provide Ms. Haines with a Florida subpoena which of course was of no use in compelling Ms. Haines to travel from California. (PC-R3. 602).

Ms. Haines would respond to that line of cross-examination and whether, in the face of the prosecutor's threat to prosecute, Ms. Haines would maintain that her affidavit was true. And in fact, Ms. Haines did maintain that her affidavit was true, but indicated that she would not come to Florida without a binding subpoena in light of the threat of prosecution. (PC-R3. 603). As a result, Mr. Roberts was unable to compel Ms. Haines' presence at the evidentiary hearing. The evidentiary hearing was conducted before Judge Solomon without the presence of Ms. Haines, the one witness who Justice Overton had indicated was mandatory.

From the denial of relief following the hearing conducted without Ms. Haines, Mr. Roberts has perfected this appeal.

STATEMENT OF THE CASE

a. Procedural History

On June 6, 1984, Mr. Roberts was arrested on first degree murder charges. On June 21, 1984, a Dade County Grand Jury indicted Mr. Roberts for the first degree murder of George Napoles, sexual battery of Michelle Rimondi, and two counts of robbery and kidnapping of Michell Rimondi. (R. 1). On June 26, 1984, Mr. Roberts pled not guilty.

Mr. Roberts was provided court appointed counsel. Before trial, there were a number of changes in counsel due to conflicts and scheduling problems. (PC-R3. 4-7). Thomas Scott was appointed as counsel for Mr. Roberts on July 13, 1984. (PC-R3. 5). He remained counsel until January 30, 1985, when three days

before the then scheduled trial he was forced to withdraw due to conflict arising over the State's last minute disclosure that it had secured inculpatory evidence from Rhonda Haines. (R. 105).³

Subsequently, Kenneth Lange was appointed to represent Mr. Roberts. (PC-R3. 5). On October 18, 1985, Mr. Lange deposed Ms. Haines. During this deposition, she revealed that she had eleven outstanding arrest warrants for prostitution in Broward County. (PC-R3. 706).⁴

Mr. Roberts was tried before a Dade County jury in December of 1985. Michelle Rimondi and Rhonda Haines were among the

³On December 31, 1984, a subpoena was issued by the State for Ms. Haines to appear at Mr. Roberts' trial set for January 28, 1985. On January 25, 1985, prosecutor Rabin first disclosed to the defense that Ms. Haines would testify as to a statement Mr. Roberts supposedly made to Ms. Haines. However, Rule 3.220(a)(1)(iii) provided in 1985 that the prosecutor was required to disclose within fifteen days of a demand "the substance of any oral statements made by the accused. . .together with the name and address of each witness to the statements." Obviously, the Rule was violated; however, Mr. Roberts was given a continuance because his trial lawyer, Thomas Scott, was forced to withdraw because of a conflict arising from this late disclosure. But the record also reveals that: "When defense counsel inquired of the State as to whether the Government could advise where Rhonda Haines was located, the State announced it did not know, that she calls in weekly from an unknown place." (R. 101).

Interestingly, Mr. Rabin was called at the July 1997 evidentiary hearing by the State. Mr. Rabin testified in cross-examination concerning his contact with Ms. Haines in late 1984: "Q. Do you recall ever having her address? A. Again, I don't have an independent recollection of it, but if she left the State of Florida and she is somebody that we wanted to have on the witness list, we certainly would have her address." (PC-R3. 685). He later elaborated: "I don't have any recollection, but as I told you if the State intended on using her as a witness, the State would have kept track where she was." (PC-R3. 687).

⁴This is according to the testimony of Bill Howell at the 1997 evidentiary hearing.

witnesses called by the State. (Rimondi testimony R. 2120-2360) (Haines testimony R. 2368-2467). Mr. Roberts testified in his own behalf. (Roberts testimony R. 2744-2872). In his closing argument, the prosecutor acknowledged that the case was one of credibility: "Ultimately, you have to decide who is lying and what they have to gain or lose by coming in this courtroom and lying." (R. 2945). Once the case had been submitted to the jury, deliberations dragged on. After a considerable passage of time, the jury requested a jury view (R. 3194). Shortly after the jury view, a guilty verdict was returned. All tolled the jury deliberated for twenty three (23) hours over three days before returning a verdict of guilty of first-degree murder, sexual battery, and kidnapping (R. 3206).

In the penalty phase of the trial, mental health experts were called and testified to mental health mitigation. During the penalty phase proceedings, Judge Solomon revealed that he had taken it upon himself to telephone the Director of the Patuxent Correctional Institution where Mr. Roberts had previously been incarcerated and discuss Mr. Roberts with the Director. (R. 3356). No record was made of this ex parte conversation.

The court instructed the jury on several aggravating circumstances. The jury was also instructed regarding the statutory mental health mitigating factors. The jury, by a vote of seven to five (7-5), recommended that Mr. Roberts be sentenced to death for the first-degree murder conviction.

At the December 31, 1985, sentencing hearing, Judge Solomon

allowed the State to present additional evidence. Without objection, the State called the Miami Police Department's lead investigator and presented testimony that he had investigated many homicides in fifteen years, but Mr. Roberts' case was one of the few he believed death was appropriate. (R. 3511). Without objection, the State then called a member of the victim's family to testify that the family "feel[s] that the death penalty is necessary." (R. 3513).

Judge Solomon then listened to Mr. Lange's arguments on Mr. Roberts' behalf seeking a life sentence and Mr. Roberts' personal plea for a life sentence. (R. 3537-40). Judge Solomon without breaking to consider either the arguments or Mr. Roberts' plea for mercy announced he was imposing a sentence of death. Judge Solomon did not make any oral findings as to the aggravating and mitigating factors. He simply indicated on the record that he was signing written findings in support of the death sentence which he was placing in the record. (R. 3541). "They are being placed in the Court records for purposes of appeal. I'm dating it December 31st, 1985, and I'm signing it." Obviously, these lengthy findings had been prepared in advanced of the sentencing hearing. Mr. Lange, defense counsel, was led to believe that the findings of fact in support of the death sentence had been prepared by Judge Solomon. (See Lange testimony of October 20, 2000 **).⁵

⁵On April 7, 2000, Judge Solomon testified that he had contacted the State on an ex parte basis and asked that an order sentencing Mr. Roberts to death be prepared for his signature.

According to the written findings, the aggravating circumstances found were as follows: (1) Mr. Roberts has previously been convicted of a violent felony; (2) Mr. Roberts was under sentence of imprisonment; (3) the murder was committed while Mr. Roberts was engaged in the crime of sexual battery (this aggravator was entirely dependent upon Ms. Rimondi's claim that she was raped); and (4) it was especially heinous, atrocious and cruel (this aggravator was dependent upon the testimony of both Ms. Rimondi and Ms. Haines).

On direct appeal, Mr. Roberts' conviction and sentence of death were affirmed. Roberts v. State, 510 So. 2d 885 (Fla. 1987). On September 28, 1989, while a death warrant was pending, Mr. Roberts timely filed his Rule 3.850 motion. On October 19, 1989, Mr. Roberts supplemented his motion to vacate and included specific Brady allegations regarding the failure to disclose evidence which impeached Michelle Rimondi. On October 25, 1989, the state circuit court ruled that Mr. Roberts' supplementation was proper, but concluded that the motion to vacate should be summarily denied. A notice of appeal was promptly filed. This Court entered a stay of execution. Following briefing and argument, this Court affirmed the summary denial of Rule 3.850 relief, finding as to the Brady claim that Mr. Roberts had failed

(SPC-R3. **). Judge Solomon acknowledged that he had in fact followed the same procedure he used in State v. Riechmann. Prior to April 7, 2000, Judge Solomon had not disclosed this fact to Mr. Roberts' or his counsel, despite Mr. Roberts' request to depose Judge Solomon in order to find out whether Judge Solomon had followed the same procedure he had employed in Riechmann.

to show prejudice given the other evidence of guilt. Roberts v. Dugger, 568 So. 2d 1255 (Fla. 1990).

Mr. Roberts filed a petition for writ of habeas corpus in the federal court. The federal district court conducted an evidentiary hearing and thereafter denied relief. Roberts v. Singletary, 794 F.Supp. 1106 (S.D.Fla. 1992).

On appeal, the Eleventh Circuit affirmed. Roberts v. Singletary, 29 F.3d 1474 (11th Cir. 1994). As the United States Court of Appeals for the Eleventh Circuit noted in Mr. Roberts' case, Ms. Rimondi underwent an effective "tenacious cross-examination" -- so effective that the court found that "further impeachment of Rimondi with any inconsistent statements would not have changed the outcome of the trial." Roberts v. Singletary, 29 F.3d 1474, 1478-79 (11th Cir. 1994). In doing so, the Eleventh Circuit relied upon Mr. "Roberts' girlfriend [who] testified that Roberts told her he killed a man." Id.

On January 25, 1996, Governor Chiles signed a warrant setting Mr. Roberts' execution for the week of February 22, 1996. The prison scheduled the execution for 7:00 a.m., February 23, 1996.

On February 20, 1996, Mr. Roberts filed his second Rule 3.850 motion in circuit court. In this motion, Mr. Roberts presented a Brady claim based upon a newly executed affidavit of Rhonda Haines in which she swore that her trial testimony was false and a product of pressure and promises from the State. Mr. Roberts argued that this affidavit established both a Brady claim

(consideration given Ms. Haines for testimony was not disclosed to Mr. Roberts' counsel) and a claim under Jones v. State, 591 So. 2d 911 (Fla. 1991). Mr. Roberts sought a new trial on the basis of Ms. Haines' affidavit and argued cumulative consideration of the previously presented Brady claim was required under Gunsby and Kyles v. Whitley, 115 S.Ct, 1555 (1995). (**T. [2/21/96] 40-43). Argument on the motion was heard on February 21, 1996. During the argument, the State conceded an evidentiary hearing, but only if it could be held under warrant. Collateral counsel responded that he would need the court's assistance in obtaining Ms. Haines' presence since she would need a subpoena. (**T. [2/21/96] 34, 44). At the conclusion of the arguments of counsel, the circuit summarily denied all relief. Mr. Roberts perfected an appeal to this Court.

This Court ordered expedited briefing and had heard oral argument on the appeal. Thereafter, a stay of execution was entered. Subsequently, this Court reversed and remanded for an evidentiary hearing. Roberts v. State, 678 So. 2d 1232 (Fla. 1996).

On June 13, 1996, while Mr. Roberts' case was still pending in this Court on a motion for rehearing (which was not denied until September 4, 1996), the State filed ex parte a motion for an order authorizing travel expenses so that an assistant state attorney and a state attorney investigator could travel to Los Angeles and interview Rhonda Haines and travel to Phoenix to

interview her mother. (PC-R3. 36). The authorization was obtained in an ex parte proceeding before Judge Platzer.

In July 1996, Judge Solomon was called as a witness for the State in State v. Riechmann. Joel Rosenblatt was one of two Assistant State Attorneys representing the State in that case. Mr. Rosenblatt was also counsel in all state postconviction proceedings in Mr. Roberts' case. Judge Solomon testified in Riechmann that in that case he had asked the trial prosecutor to draft his sentencing findings for him. (Riechmann PC-R. 5716). Subsequently, the prosecutor presented Judge Solomon with a draft and Judge Solomon "made the changes and gave it back to him." (Riechmann PC-R. 5724). The State objected to defense counsel's effort to ask Judge Solomon if he was familiar with the Canons of Judicial Conduct with reference to ex parte communications. (Riechmann PC-R. 5728). After a protracted discussion, the defense withdrew the question. Subsequently in Riechmann, the presiding judge in the 3.850 proceedings found that Judge Solomon and the trial prosecutor had engaged in ex parte proceedings and granted a resentencing.⁶

⁶The State appealed the order granting a resentencing in Riechmann and argued that the fact that ex parte contact was not an uncommon practice in the preparation of capital sentencing orders mitigates against granting a resentencing. See Initial Brief, State v. Riechmann, Case No. 89,564, at 39. This Court affirmed the order granting a resentencing because of the ex parte contact. State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000).

In another case in which Judge Solomon imposed a death sentence, a resentencing was ordered on October 28, 1997, because of the ex parte contact between Judge Solomon and the State which occurred when Judge Solomon sought the preparation of a order imposing the death sentence. This Court subsequently affirmed

On October 16, 1996, following the issuance of this Court's mandate, Mr. Roberts filed a motion to disqualify Judge Solomon in light of the disclosures made at the July, 1996, evidentiary hearing in Dieter Riechmann's case regarding Judge Solomon and his ex parte contact with the State in that case, both at the time of the Riechmann trial and in preparation for his testimony in the 1996 hearing. (PC-R3. 37). Mr. Roberts further asserted that in Riechmann, Judge Solomon testified to his unfamiliarity with the case of Gardner v. Florida. This was significant in light of Judge Solomon's ex parte conversation with the Director of Patuxent Correctional Institute regarding Mr. Roberts.

On October 24, 1996, an ex parte hearing was held in Mr. Roberts' case involving only the State and Judge Platzer who was then acting as the presiding judge in the Roberts case.⁷ (PC-R3. 47-48). The hearing was on the State's request that Judge Platzer transfer the case back to Judge Solomon. Judge Platzer granted the State's ex parte request. The transcript of this ex parte proceeding appears in the record. (PC-R3. 45-48). Mr. Roberts' collateral counsel was not noticed for the hearing. Collateral counsel only learned of this ex parte proceeding when designating the record after the notice of appeal was filed. Collateral counsel did not know that Judge Platzer was the

the order granting a resentencing. Maharaj v. State, 25 Fla. L. Weekly S1097 (Fla. Nov. 30, 2000).

⁷Neither Mr. Roberts nor his counsel knew of the June, 1996, proceedings nor of the October, 1996, proceedings before Judge Platzer in the case of State v. Roberts. No notice was provided to counsel of record.

presiding judge and that Judge Solomon was not and, significantly, that collateral counsel could approach Judge Solomon to ask about his testimony in Riechmann and whether the same thing occurred in Mr. Roberts' case. The State's failure to notice collateral counsel with a transfer request or a notice of hearing insured collateral counsel would not know that Judge Solomon was not the presiding judge.⁸

On November 12, 1996, Mr. Roberts filed a motion seeking to depose Judge Solomon in light of the revelations at the Riechmann hearing regarding his ex parte contact with the State and the State's drafting of the sentencing order in that case. (PC-R3. 50). This motion and the Motion to Disqualify were argued on January 9, 1997. (PC-R3. 182-213). At that time, Judge Solomon announced he would deny the motions. (PC-R3. 205).

Judge Solomon entered an order denying the Motion to Disqualify as "legally insufficient" on February 20, 1997, nunc pro tunc for January 9, 1997. (PC-R3. 295). Meanwhile at a

⁸The disadvantage to Mr. Roberts can be seen in the transcript of the hearing on the Motion to Disqualify, held January 9, 1997. At that time, the State took the position that the Motion to Disqualify Judge Solomon was not timely filed because it was filed on October 16th, more than ten days from the date this Court issued its mandate on October 4th. (PC-R3. 292-93). Collateral counsel responded that the clock did not start ticking until the mandate is received by the circuit court, in this case October 7th. (PC-R3. 300). Collateral counsel did not know that the State was making a completely specious argument because Judge Platzer did not transfer the case back to Judge Solomon at the State's request until October 24, 1996, over a week after the Motion to Disqualify was filed. Equally revealing is the transcript of the October 24th ex parte hearing before Judge Platzer; the State never revealed that a Motion to Disqualify Judge Solomon had been filed. (PC-R3. 45-49).

hearing on February 10, 1997, Judge Solomon revealed that he had not successfully completed the "Handling Capital Cases" course required by Fla. R. Jud. Admin. 2.050(b)(10). Accordingly, a Motion to Disqualify was filed on February 12, 1997, based upon this disclosure. (PC-R3. 283). This motion was denied on February 18, 1997. (PC-R3. 297).

The circuit court set an evidentiary hearing for April 16-18, 1997. Mr. Roberts filed for a continuance due to the pendency of death warrants in the cases of Pedro Medina and Leo Jones, both of whom were being represented by Mr. Roberts' lead attorney. (PC-R3. 306). In addition, collateral counsel orally requested the issuance of a certificate of materiality in order to secure an out of state subpoena compelling Rhonda Haines' presence at the evidentiary hearing.⁹ When the State opposed the issuance of a certificate of materiality, the circuit court directed that collateral counsel submit a memorandum of law in writing explaining the legal basis for Mr. Roberts' request. This memorandum was filed on April 1, 1997. The State filed its Response opposing the issuance of a certificate of materiality on April 9, 1997. (PC-R3. 386). The circuit court orally ruled in favor of the State and refused to issue a certificate of

⁹When issuing a subpoena for an out of state witness, the party seeking the subpoena must first obtain a certificate of materiality which can then be provided to a court of competent jurisdiction in the State in which the witness is located. Once provided to the court where the witness is located, it is then incumbent upon that court to issue the subpoena binding upon the witness who is located within the jurisdiction of that court.

materiality. (PC-R3. 434).¹⁰ Meanwhile, the evidentiary hearing was rescheduled. Prior to the hearing, Mr. Roberts again sought a certificate of materiality. (PC-R3. 433). The circuit court again denied the request for a certificate of materiality. (PC-R3. 434, 446).

On July 16, 1997, the evidentiary hearing was held on Mr. Roberts' Rule 3.850, pursuant to this Court's opinion. But because the circuit court refused to issue a certificate of materiality, Rhonda Haines was not present and did not testify. Mr. Roberts renewed his objection to the circuit court's refusal to issue the certificate of materiality. (PC-R3. 604). Mr. Roberts also objected to the participation of William Howell as an advocate for the State at the hearing because he was listed by the State as a potential witness. (PC-R3. 605). The circuit court overruled the objection. (PC-R3. 612).

Thereupon, the State did call three witnesses to testify at the hearing. These witness were: Harvey Wasserman, the supervisor of investigation for the Dade County State Attorney's Office; Judge Leonard Glick, who was one of the prosecuting attorneys at Mr. Roberts' December 1985 trial; and Samuel Rabin, a former assistant state attorney who had been in charge of the prosecution of Mr. Roberts' case from June of 1984 until February of 1985. In rebuttal, Mr. Roberts called William Howell, who was

¹⁰The transcript of the April 9, 1997, reflecting this was not found, although the parties at July 2, 1997, hearing agreed on the record that the judge had previously on April 9th orally denied the request.

the other trial prosecutor in December of 1985 and who was still employed as an assistant state attorney and was acting as counsel for the State in the 3.850 proceedings.¹¹

The parties were directed to file proposed orders by August 4, 1997. (PC-R3. 759). Judge Solomon signed the State's proposed order without making a single change. The State's proposed order had "August" already typed into the date next to the signature, leaving only the space representing the day to be filled in. On the signed version, the date appearing next to the signature is "August 11, 1997." Again, Judge Solomon only had to write in the "11".

In proceedings upon Mr. Roberts' motion to get the facts, Joel Rosenblatt indicated that he received a copy of the signed order denying relief when he returned from a vacation in August of 1997.¹² (SPC-R3. **). An ex parte hearing was held on September 11, 1997, before Judge Platzer in Mr. Roberts' case. During that ex parte hearing, Assistant State Attorney William Howell advised Judge Platzer that Judge Solomon had signed an

¹¹It was Mr. Howell who obtained the Order authorizing his travel expenses to California in an ex parte proceeding before Judge Platzer on June 13, 1996. (PC-R3. 36). It was Mr. Howell who along with his co-counsel, Mr. Joel Rosenblatt, appeared before Judge Platzer in the ex parte proceeding on October 24, 1996, and requested her to transfer the case back to Judge Solomon. (PC-R3. 47-48). And it was Mr. Howell who appeared before Judge Platzer in an ex parte proceeding on September 11, 1997, and advised Judge Platzer that Judge Solomon had already signed an order denying the 3.850 motion. (PC-R3. 743-48).

¹²These proceedings were conducted on April 7, 2000, following this Court's relinquishment of jurisdiction for the purposes of developing the record as to the sequence of events regarding the entry of the order denying relief.

order denying Rule 3.850 relief. Arguing that the 3.850 motion had been denied and all matters were completely resolved, Mr. Howell advised Judge Platzer the case should be taken off the calendar. (PC-R3. 743-48).

Subsequently, Mr. Rosenblatt discovered that the copy of the order denying relief that he had received was an original and apparently the only copy. On October 1, 1997, Mr. Rosenblatt delivered the order to the clerk's office for filing. (SPC-R3. **). The signed order was in fact filed with the clerk of court on October 1, 1997. The "filed" stamp clearly reflects the date of October 1, 1997. (PC-R3. 751). Mr. Roberts' collateral counsel did not learn that Judge Solomon had signed and entered an order until November 7, 1997. (PC-R3. 761). A motion for rehearing was promptly filed. In responding to the motion for rehearing, the State asserted that:

it was ascertained that a copy of the order was mailed on October 1, 1997 by the Honorable Judge Platzer's judicial clerk, Mr. Alberto Rios, to defense counsel, Mr. McClain, at his Miami address, as designated on the September 17, 1997 Notice of Appearance of Designated Counsel. The evidentiary hearing in the instant case took place in Judge Platzer's courtroom, and her clerk was thus the designated judicial clerk, as this court is on senior status and has no designated judicial clerk or judicial assistant.

(PC-R3. 780).

An order denying the rehearing was entered on January 8, 1998. (PC-R3. 787). Thereupon, Mr. Roberts perfected this appeal.

Prior to filing his initial brief, Mr. Robert's counsel discovered transcripts of various ex parte proceedings before

Judge Platzer which were included in the record on appeal. On April 8, 1999, Mr. Roberts' counsel filed a Motion to Get the Facts regarding these ex parte proceedings. The State filed no opposition to the motion. On May 5, 1999, this Court granted the motion. On May 7, 1999, the State filed a Motion for Rehearing. On November 10, 1999, this Court denied the State's Motion for Rehearing.

In the circuit court, the matter was initially assigned to Judge Platzer, who granted Mr. Roberts' motion to disqualify her. The matter was then assigned to Judge Bagley who held an evidentiary hearing on Mr. Roberts' Motion to Get the Facts on April 7, 2000.

At the April 7th hearing, Mr. Roberts called William Howell as a witness. Mr. Howell had been one of the trial prosecutors. He also participated as counsel for the State in post-conviction proceedings in 1996 and 1997. Mr. Roberts' counsel, asked Mr. Howell whether the State had drafted the sentencing order in Mr. Roberts' case. No objection was registered to the question. Mr. Howell answered that he did not recall. (SPC-R3. **).

The last witness called at the April 7th hearing was Judge Solomon. He testified that he had presided over Mr. Roberts' trial and the post-conviction proceedings, including those in 1996 and 1997. When Mr. Roberts' counsel asked Judge Solomon who had drafted the sentencing order in Mr. Roberts' case, the State strenuously objected. (SPC-R3. **).

Mr. Roberts' counsel responded by explaining that in

paragraph 6 of the Motion to Get the Facts, Mr. Roberts had relied on the proceedings in the Riechmann case as providing in part the basis for the need for a remand to get the facts. (** 4/7/00 transcript at 77). Mr. Roberts' counsel explained that once he learned of Judge Solomon's testimony in the Riechmann case, he began to investigate whether similar conduct had occurred in Mr. Roberts' case. (** 4/7/00 transcript at 78). As soon as jurisdiction over Mr. Roberts' case returned to the circuit court, a motion to disqualify Judge Solomon had been filed. (Id.). Mr. Roberts' counsel noted at the April 7th hearing that he had even sought answers from Assistant State William Howell during his testimony earlier on April 7th.

("Certainly, Mr. Howell testified today he has no memory. I had no means of finding out, other Judge Solomon, and as soon as I learned in the Riechmann case, I found out, I filed a motion to depose Judge Solomon to ask him about these issues." (** 4/7/00 transcript at 79). Mr. Roberts was left without a means of finding out what occurred since the State had not disclosed any public records documenting preparation of the sentencing findings by the State. (See McClain's testimony of October 20, 2000 **).

At the April 7, 2000, hearing and after listening to counsel's argument, this Court overruled the State's objection.

Thereupon, the following occurred:

- . Judge Solomon, do you recall in Mr. Roberts' case also known as Mr. McCullars having the State draft the sentencing order?
- . The State drafted the order.

MR. MCCLAIN: May I have one moment, Your Honor?

THE COURT: Yes.

BY MR. MCCLAIN:

- . Do you recall which prosecutor did that?
- . No.
- . Was that your standard practice?
- . Yes.

(** 4/7/00 transcript at 80). In cross-examination by Mr. Rosenblatt, the following testimony was elicited:

- . Judge Solomon, do you have a specific recollection of any State Attorney drafting an order in this case or are you talking about the Riechmann or Maharaj case?
- . We are on this case.
- . Yes. Do you have a specific recollection of an Assistant State - - of asking any assistant to draft an order in this case?
- . No.
- . So, you are not saying that?
- . I did not draft it.
- . And?
- . The State Attorney's Office did draft it.

(** 4/7/00 at 81).

Thereupon, Mr. Roberts sought leave to file for 3.850 relief on the basis of this testimony. Judge Bagley ruled that this was outside the scope of the order remanding the matter. (SPC-R3. **). On May 2, 2000, Mr. Roberts filed a third motion to vacate relying upon Judge Solomon's testimony at the April 7th hearing. Simultaneously, Mr. Roberts sought an order from this Court

relinquishing jurisdiction so that the circuit court could consider the motion to vacate. On September 5, 2000, this Court granted the relinquishment.

On October 20, 2000, the circuit court conducted an evidentiary hearing on Mr. Roberts' third motion to vacate. At the evidentiary hearing, Mr. Roberts relied upon Judge Solomon's testimony from the April hearing. Mr. Roberts also called his trial attorney, Ken Lange, to testify that he did not know that Judge Solomon had asked the State to prepare the sentencing order.¹³ (SPC-R3. **).

In its case, the State called Judge Solomon back to the witness stand. Judge Solomon steadfastly maintained that the State drafted the findings in support of the death penalty in Mr. Roberts' case. (SPC-R3. **). On cross-examination, he stated that the procedure employed in the Riechmann and Maharaj cases in which the State drafted on the sentencing order on an ex parte basis was the same procedure employed in Mr. Roberts' case. These were the three cases in which he had imposed sentences of death, and he followed the same procedure in all three cases. (See Judge Solomon's October 20, 2000, testimony **).

The State called a number of witnesses to testify that they did not recall drafting the sentencing order in Mr. Roberts' case. However, the most important of these witnesses was Judge Leonard Glick, who at the time of the lead prosecuting attorney.

¹³Mr. Lange learned of the procedure employed by Judge Solomon only after collateral counsel contacted him in the year 2000.

Judge Glick was the prosecutor who argued at the sentencing hearing in favor of a death sentence. (R. 3513-18).¹⁴ On October 20, 2000, Judge Glick testified during direct examination by the State that he did not recall drafting the sentencing order in 1985.¹⁵ (SPC-R3. **). On cross-examination, he acknowledged that he could not give "a solid answer" to the question of whether he had draft the sentencing order for Judge Solomon. (See Judge Glick's October 20, 2000, testimony **).

Subsequently on January 12, 2001, the circuit court granted Mr. Roberts a resentencing in light of Judge Solomon's uncontradicted and unequivocal testimony "that he asked someone from the State to prepare the order because it was his 'practice to ask the prosecutor to prepare a draft sentencing order.'" (SPC-R3. ** Order Granting Relief at 5). The State filed a notice of appeal from that order.

b. Statement of the Facts

On June 4, 1984, George Napoles was beaten to death. At

¹⁴William Howell was the second prosecuting attorney at Mr. Roberts' trial. At the April 7, 2000, hearing he testified that he did not recall drafting the findings in support of the sentence of death and that he did not remember whether anyone at the State Attorney's Office had drafted those findings. (See 4/7/00 transcript at ---). On October 20, 2000, he testified that he was not sure that he had ever seen the findings in support of the death sentence.

¹⁵Interestingly, Judge Glick testified that he had reviewed the sentencing findings in anticipation of his testimony in order to test his recall. Judge Glick indicated that he simply did not recall drafting them. He noted that he did not regard writing as one of his better skills and that he thought the findings seemed written too well for him to have authored them. (See October 20, 2000 testimony of Judge Leonard Glick, SPC-R3. **).

trial, Ms. Rimondi claimed that it was Rickey Roberts who killed Mr. Napoles and raped her at approximately 3:00 a.m. on June 4, 1984.

On the Monday morning of June 4, 1984, Ian Riley called the Miami police to report that Michelle Rimondi had reported the murder of George Napoles to him. Ms. Rimondi had further indicated that she had been raped. According to Mr. Riley's trial testimony, Ms. Rimondi woke Mr. Riley up at about 5:00 a.m. (R. 2029). Ms. Rimondi was a sixteen year old runaway who supported herself through prostitution; however, Mr. Roberts' jury was not apprised of Ms. Rimondi's occupation. Mr. Riley was Joe Ward's roommate; there was evidence which the jury never heard that Joe Ward was Ms. Rimondi's pimp. According to Mr. Riley, Ms. Rimondi indicated a black man had murdered George Napoles in front of her. About forty minutes later after telling Riley of the murder, Ms. Rimondi reportedly revealed that she had also been raped by the black man and that afterwards the assailant drove her to Mr. Ward's home at her request (R. 2030).

Following Mr. Riley's phone call, Ms. Rimondi was transported to the police station. There, she was examined by Dr. Valerie Rao, an associate medical examiner, who provided services at the Rape Treatment Center. In the latter capacity, she saw Ms. Rimondi on June 4, 1984, at 8:20 a.m. (R. 2529-30, 2543-44). According to an undisclosed statement by Dr. Rao which was not heard by the jury, she "didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've

thought -- very cool and collected." (PC-R. **---). Dr. Rao, in fact, found Ms. Rimondi's story so incredible she had to confirm that there had been a homicide with the medical examiner. (PC-R. **---).

Shortly before Mr. Roberts' trial, Ms. Rimondi had been charged with grand theft (R. 664). However, she received pretrial intervention. The defense was precluded from impeaching Ms. Rimondi with the pending charge (R. 665). However, what neither the judge nor the defense knew was that the State had previously placed conditions upon Ms. Rimondi. In an August 28, 1984, letter to her father, the prosecutor stated, "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitments. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action." (PC-R. **---). The State held this threat to take further action over Ms. Rimondi's head. This went undisclosed to the defense and to the jury.

The State also failed to disclose that Ms. Rimondi was frequently calling Mr. Roberts' prosecutor and demanding money. (PC-R. **---). Clearly, such action by Ms. Rimondi reflected her desire for money in return for her testimony. The nondisclosure precluded the presentation of this evidence, even though the jury was instructed to consider money payments to a witness in determining credibility.

The State also failed to disclose Ms. Rimondi's statement

that her last coitus had been on June 3, 1984, at 10:00 a.m., although she was "not sure." This too was inconsistent with Ms. Rimondi's trial testimony.

Another person who was present with Ms. Rimondi at the time of the alleged murder and rape came forward on June 4, 1984. This was Jamie Campbell, also a sixteen-year-old prostitute. However, even though Ms. Campbell was present throughout the time period of the homicide, she saw nothing. She indicated that she had fallen asleep in the front passenger seat of the car she occupied with Ms. Rimondi and Mr. Napoles sometime after their arrival at the Rickenbacker Causeway. When she woke up at 5:00 a.m., she could not find anyone, so she drove the car to a friend's house (R. 1842-47).

In addition to presenting Ms. Rimondi's testimony, the State called Rhonda Haines. Ms. Haines testified that in June of 1984 she had been Mr. Roberts' girlfriend. She related that on June 4th Mr. Roberts told her that he thought he had killed somebody and he thought that it had been a man. (R. 2381). Ms. Haines told the jury that she had initially lied to the police when she first told them that Mr. Roberts had been with her the entire night of June 3rd-4th. (R. 2382). After providing this alibi, she was arrested as an accessory to the murder. When she was told that the charges would be dropped if she would say that she did not know where Mr. Roberts was the night of June 3-4, she told the assistant state attorney that she had been sick and had fallen asleep. (R. 2424). Ms. Haines said that as a result she

did not know at what time Mr. Roberts had left their bed and at what time he had returned. (R. 2384). The accessory charges were then in fact dropped. (R. 2440).

At trial, Ms. Haines also said she had originally lied to the State about the number of pending prostitution charges. She had only acknowledged two when in fact there were eleven outstanding prostitution charges. (R. 2428, 2439). She did advise the jury that there were eleven outstanding charges in Broward County.

Rhonda Haines told the jury in December of 1984 while living in Arizona, she had told the assistant state attorney that Mr. Roberts had admitted the killing. (R. 2453). According to her trial testimony, Mr. Roberts at one point had told her that he had gone to the Rickenbacker Causeway and had come across a Cuban male and two girls, one of whom was sleeping in the back of a car. Supposedly, Mr. Roberts related that he and the Cuban male were using cocaine and sharing the girl sexually. (R. 2388). An argument ensued, and Mr. Roberts hit the man in the head with a baseball bat. (R. 2389). Ms. Haines testified that no promises had been made by the State in exchange for her testimony. (R. 2392).¹⁶

Mr. Roberts testified in his own behalf and denied the charges, although admitting he had picked up a hitchhiking Ms.

¹⁶In her 1996 affidavit, Ms. Haines swore that her trial testimony was false. Mr. Roberts never confessed to her, and the State pressured her and promised to take care of the Broward charges.

Rimondi on the night on the murder. Mr. Roberts' defense was that Ms. Rimondi, a prostitute, either alone or with one or more of her male protectors (Joe Ward and/or Manny Cebey), killed Mr. Naples, Ms. Rimondi's client, and then framed Mr. Roberts for the murder. However, the defense was precluded from presenting any evidence of Ms. Rimondi's activities as a prostitute because the trial court ruled that the Rape Shield Law prohibited its introduction of a murder trial. The jury deliberated for twenty-three (23) hours before convicting.

In the affidavit that Ms. Haines signed in 1996, she stated under oath that, in 1984 after her release from jail on accessory charges, she worked as a prostitute. She "had many pending charges in Broward County." (Appendix 1, para. 5, 1996 3.850 motion, PC-R2. **). As a result in late 1984, she "was only working in Dade." The police in Dade "knew who [she] was and [her] connection to Rick's case." They frequently arrested her. Mr. Rabin, the prosecutor on Mr. Roberts' case at the time, learned of the pending Broward charges and "told [Rhonda] that he could have them taken care of if [Rhonda] would cooperate with him on Rick's case." Ms. Haines became pregnant. At Thanksgiving, she went to her mother's home in Arizona in order to get away from the "constant police pressure." "Mr. Rabin started calling [her] mother's house and pressuring [Rhonda] again." Finally:

I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying 'I know you know more.' I knew he would take care of the prostitution charges,

and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted. So over time I would add to the story whenever Mr. Rabin would say 'I know you know more.' He would suggest things that I would then say I remembered and add to the story.

(Appendix 1, para. 6, 1996 3.850, PC-R2. **). Rhonda Haines swore that she testified falsely at Mr. Roberts' trial in 1985. She swore that she was promised that the Broward County charges would go away. After her false testimony, she discovered that "the Broward County charges [had] disappeared." (Appendix 1, para. 8, 1996 Motion to Vacate, PC-R2. **).

At the July 1997 evidentiary hearing, the State called Harvey Wasserman, a supervisor of investigation at the Dade County State Attorney's Office. Mr. Wasserman testified to his reading of computer generated printouts that were produced in 1996 of Rhonda Haines' criminal history. He indicated that the records he had obtained reflected that "in 1985, 1984, 1985, she had two pending prostitution-related cases in Broward County." (PC-R3. 643). According to Mr. Wasserman, these two charges were not disposed of until 1988. (PC-R3. 640-43). He was unable to find documentation of the eleven outstanding charges that Ms. Haines testified at trial were pending in Broward County at that time. (PC-R3. 642) ("Q. Okay. So, were there any other cases that she had from Broward County according to the records that you reviewed? A. No, sir, not from anything that we have.").

William Howell, co-counsel at trial for the State and co-counsel in the 3.850 proceedings, was called by Mr. Roberts in rebuttal to establish whether at the time of trial Ms. Haines had

eleven outstanding charges in Broward County. Mr. Howell

testified:

Q. Do you recall when the first time that you learned about her allegation of outstanding charges in Broward County?

A. Very vividly. I probably recall that as much as anything else about this case.

Q. And when was that?

A. That was in her deposition and I think it was October. I may not be correct on this, but October of 1985, immediately prior to the trial is when I first learned of the allegations of eleven outstanding prostitution warrants or charges or something like that in Broward.

Q. And, did you discuss that with anybody in the State Attorney's Office?

A. That I'm having a little witness trouble with - - I'm sure I did. I don't have a specific recollection of the discussion, but I would have discussed that with Mr. Glick.

Q. As a result of your knowledge and your discussion, what did you do regarding those eleven prostitution warrants?

A. Regrettably, nothing, nothing. We just left them. We decided that she was going to have to take care of them herself, and we did nothing. And, and I say regrettably.

Q. You didn't make them go away for her?

A. Absolutely not. We'd made - - absolutely, Mr. Glick, nor I made no effort to do anything with those charges. In fact, they were still pending at the time of trial. They were still pending when we put her on the airplane to go home and Mr. Lange pointed that out over and over during the course of the trial.

Q. Did you ever tell her that you would make them go away?

A. No, I did not, no. I couldn't. I don't know how. I mean, honestly, today, I don't know how to make them go away.

(PC-R3. 705-07).

Judge Leonard Glick, the lead prosecutor for the State at trial offered similar testimony:

Q. Were you at the time of trial aware that she had some outstanding cases or at least that she had some outstanding cases in Broward County?

A. At the time of the trial, yes.

Q. Do you recall when you became aware of that fact?

A. The best of my recollection, I became aware of the fact after a depo was taken but before the actual trial itself.

Q. Would that have been the deposition of Rhonda Haines or - -

A. Yes.

Q. And, to the best of your knowledge, was there a discussion between you and any other person about what the - - how to handle those outstanding cases that she said alleged existed in Broward?

A. The only other person I would have discussed it with would be you.

Q. And, do you recall whether or not we had such a discussion?

A. I believe we did.

Q. Okay. And, do you recall how it was that we decided to handle those outstanding charges?

A. Well, ultimately, we decided to do nothing and did nothing.

(PC-R3. 656).

Sam Rabin was also called by the State. He was the lead prosecutor on Mr. Roberts' case from the time of the arrest until February of 1985. Mr. Rabin was asked if Ms. Haines ever asked him for assistance in disposing of her Broward County charges.

He responded: "Not that I recall." (PC-R3. 673). He was also asked if he "ever contacted anyone in Broward County, whether it be the prosecuting agencies or the police agencies or anyone else in making an attempt to resolve any cases that Ms. Haines had in Broward County." (PC-R3. 673). Mr. Rabin responded:

To the best of my knowledge, no, and if I could qualify that answer. I was aware both through the motions that were filed in this case to the depositions that were taken by the office of CCR, that that was an issue. And so I attempted to go back and look through any notes I might have to refresh my recollection to see if something like that might have occurred that I didn't know.

But I wanted to be comfortable in my answer that, rather than just not recall that it did not occur, and I found nothing anywhere to indicate that that ever occurred.

(PC-R3. 673-74). On cross-examination, Mr. Rabin explained that the file that he had reviewed only had "the indictment. I may have had a press clipping or two." (PC-R3. 689). He was asked to locate that file since it had not previously been disclosed to Mr. Roberts and agreed to advise Mr. Roberts' counsel of its contents. (PC-R3. 694). That very day he wrote a letter to collateral counsel and placed it in the court file indicating that "I looked through my files and I could find no file on the Roberts case." (PC-R3. 725).¹⁷

SUMMARY OF ARGUMENT

1. Judge Solomon erroneously denied Mr. Roberts' motion to

¹⁷Thus, he had had no file and no notes to review despite his testimony that he had sought to review notes in his file and could find "nothing anywhere to indicate that that ever occurred." (PC-R3. 674).

disqualify and his motion to depose Judge Solomon. When Judge Solomon was called by the State as a State's witness in State v. Riechmann, Judge Solomon admitted under oath in the summer of 1996 that he had engaged in ex parte contact with the State in sentencing Dieter Riechmann to death. Judge Solomon had on an ex parte basis asked the State to prepare the sentencing order in State v. Riechmann. Sentencing relief was granted to Mr. Riechmann on the basis of Judge Solomon's action. In Mr. Roberts' case, Judge Solomon had engaged in exactly the same conduct. However, neither Mr. Roberts nor his various counsel knew.

Given Judge Solomon's testimony in Riechmann, collateral counsel became concerned and sought to learn whether Judge Solomon had engaged in the same conduct in Mr. Roberts' case. Collateral counsel had not been advised by the State that such ex parte contact had occurred. Collateral counsel had no other means to learn of the ex parte contact. Given that ex parte contact had in fact occurred and Judge Solomon knew that it had occurred, Judge Solomon was obligated to disqualify himself and disclose the ex parte contact as soon as Mr. Roberts raised the question, if not before. He should have granted the motion to disqualify so that he could have been deposed and called as a witness.

2. This Court reversed and remanded the summary denial of Mr. Roberts' successor Rule 3.850 motion. Roberts v. State, 678 So. 2d 1232 (Fla. 1996). This Court ordered Judge Solomon to

hold an evidentiary hearing on the motion in order to hear the testimony of Rhonda Haines and determine whether her recantation of her trial testimony warranted a new trial.

Rhonda Haines is a resident of California and not subject to the subpoena power of a Florida court. In order to obtain a California subpoena requiring Ms. Haines appearance in court in Florida, Mr. Roberts sought on remand a certificate of materiality from Judge Solomon. At the State's urging, Judge Solomon refused to issue a certificate of materiality. This refusal precluded Mr. Roberts from obtaining a lawful and binding subpoena on Ms. Haines compelling her to appear in the circuit court and to testify. Judge Solomon's refusal to issue a certificate of materiality was a violation of Mr. Roberts' rights to due process and equal protection. It denied him access to the courts in order to vindicate his trial rights under the Sixth Amendment and to prove his entitlement to relief under Florida law. A reversal is required.

3. Mr. Roberts was deprived of his right to due process in the Rule 3.850 proceeding when the State repeatedly engaged in ex parte contact with the circuit court. Judge Solomon's assignment to the case was obtained through an ex parte request to reassign Mr. Roberts' case from Judge Platzer to Judge Solomon. This ex parte proceeding occurred after Mr. Roberts filed a motion to disqualify Judge Solomon. The State did not advise the presiding judge, Judge Platzer, of the pending motion when it called up its request to reassign the case at an ex parte hearing which was

held without notice to Mr. Roberts and without providing him an opportunity to be heard.

Due process was further violated by the State's appearance at another ex parte proceeding before Judge Platzer in which the State advised Judge Platzer of Judge Solomon's denial of Rule 3.850 relief some twenty days before the order denying was provided to the clerk's office and served on the parties. Such ex parte contact regarding the merits of the case violated Mr. Roberts' right to due process and denied him an equal opportunity to appear and discuss (and/or argue) the merits of the case.

4. William Howell, Assistant State Attorney, should have been disqualified from acting as counsel for the State in the proceedings below. Mr. Howell was one of the trial prosecutors. He also acted as one of the two assistant state attorneys assigned to the proceedings below. Yet he was listed on the State's witness list. Mr. Howell had not acted as counsel in the Rule 3.850 proceedings in 1989. There was no real justification for the State's insistence that Mr. Howell act as both a witness and an advocate. In addition, Mr. Howell repeatedly engaged in ex parte contact with both Judge Platzer and Judge Solomon.

5. Mr. Roberts' claim which arose from the the affidavit of Rhonda Haines requires cumulative consideration of the information she revealed in her affidavit with the previously presented claims presented by Mr. Roberts in order to determine whether confidence in the reliability of the result of Mr. Roberts' trial has been undermined. Judge Solomon in denying Mr.

Robert's second motion to vacate engaged in no cumulative analysis and completely ignored the previously presented Brady claim as to Michelle Rimondi. In fact, Judge Solomon relied on Michelle Rimondi's trial testimony to reject Mr. Roberts' claim as to Rhonda Haines, just as previously Rhonda Haines' trial testimony has been relied upon to reject Mr. Roberts' Brady claim as to Michelle Rimondi. This was error under Lightbourne v. State, 742 So.2d 238 (Fla. 1999).

ARGUMENT I

JUDGE SOLOMON ERRED WHEN HE DENIED MR. ROBERTS' MOTION TO DISQUALIFY. JUDGE SOLOMON WAS A MATERIAL WITNESS AND SHOULD NOT HAVE PRESIDED OVER THE RULE 3.850 PROCEEDINGS.

A. Factual Background

In July of 1996, Judge Solomon was called as a witness for the State in State v. Riechmann. Judge Solomon testified in Riechmann that in that case he had asked the trial prosecutor to draft his sentencing findings for him, although "he could not remember what he told the prosecutor." Riechmann, 25 Fla. L. Weekly at S165.¹⁸

In his post-conviction proceedings, Mr. Riechmann was represented by privately retained counsel, not CCR. Mr. Roberts learned of the testimony in Riechmann during a discussion with Mr. Riechmann's counsel at a death penalty seminar in August of 1996. (See October 20, 2000 testimony of Mr. Roberts' collateral

¹⁸The Riechmann sentencing occurred before Judge Solomon on November 4, 1988.

counsel, Martin McClain, SPC-R3. **).

At the time that Mr. Roberts' collateral counsel learned of Judge Solomon's testimony in Riechmann, Mr. Roberts case was pending in this Court. On June 6, 1996, this Court had issued an opinion ordering an evidentiary hearing on Mr. Roberts' Rule 3.850 motion filed in early 1996. Roberts v. State, 678 So.2d 1232 (Fla. 1996). A motion for rehearing had been filed and was pending in the Florida Supreme Court.

On October 16, 1996, after the rehearing motion was denied and the mandate issued, Mr. Roberts filed a motion to disqualify Judge Solomon on the basis disclosures made in the July, 1996, evidentiary hearing in Riechmann regarding Judge Solomon and his ex parte contact with the State in that case, both at the time of the Riechmann trial and in preparation for his testimony in the 1996 hearing. (PC-R3. 37).¹⁹

On November 4, 1996, an order was entered in Riechmann finding that Judge Solomon had ex parte contact with the State and had failed to conduct an independent evaluation of the aggravating and mitigating circumstances. In Riechmann, the presiding judge in the 3.850 proceedings concluded that the evidence established that the prosecutor and not Judge Solomon "had prepared the draft order at the ex parte request of the trial judge following the conclusion of the penalty phase of the

¹⁹Joel Rosenblatt had been acting as counsel for the State during Mr. Roberts' post-conviction proceedings. Mr. Rosenblatt had been the State's representative at the Riechmann evidentiary hearing. At that evidentiary hearing, the State had called Judge Solomon as a State's witness.

trial." Id. As a result, "Riechmann was denied an independent weighing of aggravating and mitigating circumstances." Id. The 3.850 court, therefore concluded that a resentencing was required.

On November 12, 1996, Mr. Roberts filed an amended motion to disqualify in light of the Riechmann order granting relief because of his ex parte contact with the State and the State's drafting of the sentencing order in that case. (PC-R3. 50). Mr. Roberts simultaneously filed a Motion for Leave to Depose Trial Judge. (PC-R3. 50). In this Motion, Mr. Roberts stated:

Judge Gold's findings [in Riechmann] also put Mr. Roberts on notice that, in at least one other capital case, Judge Solomon engaged in ex parte communication with the State and allowed the State to draft the sentencing order without any instruction regarding findings of fact or conclusions of law from Judge Solomon. Moreover, Judge Solomon failed to disclose his misconduct in the Riechmann case. It only came to light because evidence of the ex parte contact appeared in a file the State disclosed to Mr. Riechmann pursuant to Chapter 119. It is incumbent upon Mr. Roberts to investigate Judge Solomon's conduct of Mr. Roberts' trial and postconviction proceedings to determine whether Judge Solomon engaged in ex parte communications with the State and/or abdicated his independent judicial role and allowed the State to write the findings of fact and conclusions of law sentencing Mr. Roberts to death.

(PC-R3. 51).

The Motion for Leave to Depose and the Amended Motion to Disqualify were orally argued on January 9, 1997. (PC-R3. 182-213). At that time, Judge Solomon announced he would deny the motions as "legally insufficient." (PC-R3. 205). Judge Solomon entered an order denying the Motion to Disqualify as "legally insufficient" on February 20, 1997, nunc pro tunc for January 9,

1997.

At no time during these proceedings did either Judge Solomon or the State disclose to Mr. Roberts or his counsel that the State had drafted the sentencing order in Mr. Roberts' case, just as it had in the Riechmann case. In fact, Judge Solomon testified that prior to April 7, 2000, he had not told any of Mr. Roberts' attorneys that the State had prepared the finding in support of the death sentence. (See Judge Solomon's October 20, 2000, testimony, SPC-R3. **).

B. Legal Analysis

Mr. Roberts was entitled to full and fair Rule 3.850 proceedings. Jones v. State, 740 So.2d 520 (Fla. 1999); Holland v. State, 503 So.2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994). Post-conviction litigants are entitled to due process. Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996). Due process guarantees litigants the fair determination of the issues by a neutral, detached judge. Porter v. State, 723 So.2d 191, 197 (Fla. 1998). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Chastine v. Broome, 629 So.2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id. This principal applies in Rule 3.850 proceedings wherein a

capital defendant is challenging his conviction and sentence of death. Rogers v. State, 630 So.2d 513 (Fla. 1993); Suarez v. Dugger, 527 So.2d 191 (Fla. 1988).

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.140(d)(1) & (2).

Florida courts have repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Suarez v. Dugger, 527 So.2d 191 (Fla. 1988) (emphasis added).

To establish a basis for relief a movant:

need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So.695, 697- 98 (1938). See also Hayslip v. Douglas, 400 So.2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983) (emphasis

added); Rogers v. State, 630 So.2d at 515 (quoting Livingston). The Fourth District Court of Appeals recently emphasized that, in a capital case like Mr. Roberts', judges "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So.2d at 293.

The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).

* * * *

The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So.2d 398 (Fla. 3d DCA 1977).

In State v. Lewis, 656 So.2d 1248 (Fla. 1995), this Court ruled that a capital post-conviction litigant was entitled to

depose the sentencing judge "when the testimony of the presiding judge is absolutely necessary to establish factual circumstances not in the record." 656 So.2d at 1250. "The need to have a trial judge testify is very limited in scope and particularly applies only to factual matters that are outside the record." 656 So.2d at 1250 n.3. This Court implicitly recognized that when it was established that a deposition was warranted, disqualification was required. This recognition is apparent in the Court's observation that requesting such a deposition "should not be utilized as a technique to disqualify the original trial judge from further hearings in the case." Id.²⁰

Specifically, Canon 3(E)(1)(a), indicates that a "judge shall disqualify himself...where...the judge has...personal knowledge of disputed evidentiary facts." Here, Judge Solomon was asked to disqualify's himself so that he could be deposed regarding whether he had the State draft the sentencing order as he had done in Riechmann. In that case, he was called by the State as a State's witness. Judge Solomon's testimony in Riechmann established that he had engaged in ex parte contact in asking the prosecutor to provide written findings in support of a

²⁰It should be apparent that it was absolutely necessary for Mr. Roberts to depose Judge Solomon because no one else disclosed that Judge Solomon had ex parte contact with the State in obtaining a draft of the order sentencing Mr. Roberts to death. Based upon Judge Solomon's testimony that circuit court found in January 12, 2001, order: "the post-conviction testimony of the sentencing judge conclusively shows that he completely abdicated and delegated his statutory duty to conduct an independent and comprehensive evaluation of the applicable aggravating and mitigating circumstances." (Order at 7, SPC-R3. **).

death sentence in violation of the Code of Judicial Conduct. It raised a red flag that warranted investigation in Mr. Roberts' case. And in doing so made Judge Solomon a material witness as to that issue in Mr. Roberts' case. It warranted his recusal because he had personal knowledge of facts that were at issue in Mr. Roberts' case given the State's action in calling him to the witness stand in Riechmann and given his testimony that he engaged in ex parte contact with the State in Riechmann.

Judge Solomon through the motions to disqualify and deposed was placed on notice of the effect of his conduct in Riechmann (a resentencing was ordered) and advised that Mr. Roberts sought to learn whether the same conduct had occurred in his case. Judge Solomon denied the motions and refused to disclose the relevant and pertinent facts that Mr. Roberts clearly sought to uncover.

On April 7, 2000, Judge Solomon answered the question first asked four years before in 1996. The revelation that Judge Solomon and the State engaged in exactly the same conduct as in Riechmann establishes that in 1996-97 Judge Solomon was engaged in covering up the facts which give rise to this claim and establish impropriety on his part. This precluded Mr. Roberts from discovering the factual basis for his claim.²¹ The subsequent order entered by Judge Solomon in 1997 denying Rule

²¹In fact based upon Judge Solomon's testimony in 2000, the circuit court has found: "Judge Solomon stated unequivocally that he asked someone from the State to prepare the order because it was his 'practice to ask the prosecutor to prepare a draft sentencing order.' In fact, he unabashedly admitted this practice was applied in three highly notable death penalty cases reviewed by the Supreme Court." (Order at 5, SPC-R3. **).

3.850 relief, must be vacated.

Judge Solomon denied Mr. Roberts due process by not disclosing the facts when pointedly asked in the Motion for Leave to Depose. This is similar to the situation in Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993), where this Court held that its prior remand for Chapter 119 disclosures which had been erroneously denied was "designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested." The October 1, 1997, order, along with all of Judge Solomon's rulings following the filing of the Motion for Leave to Depose must be vacated and new proceedings on Mr. Roberts' claims that were pending at that time.

In Suarez v. Dugger, 527 So.2d at 191, the presiding judge was presented with a motion to disqualify which was filed with a 3.850 motion for post-conviction relief. The judge denied the motion to disqualify and conducted a four day evidentiary hearing under the exigencies of a death warrant. On appeal, this Court found the presiding judge erroneously denied the motion to disqualify. This Court vacated the denial of 3.850 relief and remanded "with directions to conduct a new proceeding." 527 So.2d at 192. This clearly was an effort to put Mr. Suarez back in the position he would have been in had the motion to disqualify not been erroneously denied.

Similarly, Mr. Roberts should be put back in the position he would have been in had Judge Solomon disclosed the ex parte contact with the State in obtaining a draft of the order

sentencing Mr. Roberts to death when Mr. Roberts first raised the matter in 1996. Had Judge Solomon disclosed this in 1996 when Mr. Roberts asked, Judge Solomon would have had to disqualify himself.

Specifically, Canon 3(E)(1)(a), indicates that a "judge shall disqualify himself...where...the judge has...personal knowledge of disputed evidentiary facts." Here, Judge Solomon had personal knowledge of the ex parte contact which created a valid 3.850 claim. When Judge Solomon's testimony in the Riechmann hearing revealed the totally unexpected, Mr. Roberts sought to learn from Judge Solomon whether the same illicit conduct had occurred in his case.

In Riechmann, Judge Solomon was called by the State as a State's witness. Judge Solomon's testimony established that he had engaged in ex parte contact in asking the prosecutor to provide written findings in support of a death sentence in violation of the Code of Judicial Conduct. It raised a red flag that warranted investigation in Mr. Roberts' case. In doing so, the State made Judge Solomon a material witness as to that issue in Mr. Roberts' case. It warranted his recusal because he had personal knowledge of facts that were at issue in Mr. Roberts' case given the State's action in calling him to the witness stand in Riechmann and given his testimony that he engaged in ex parte contact with the State in Riechmann.

Judge Solomon erred in denying the motions to disqualify and

to depose.²² Mr. Roberts should be put back in the position he would have been in had Judge Solomon disqualified himself when the matter was first raised in October of 1996. See Suarez v. Dugger.

ARGUMENT II

MR. ROBERTS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AND DENIED ACCESS TO THE COURTS WHEN THE CIRCUIT COURT REFUSED TO ISSUE A CERTIFICATE OF MATERIALITY SO THAT MR. ROBERTS COULD OBTAIN AN OUT-OF-STATE SUBPEONA REQUIRING RHONDA HAINES APPEARANCE AS A WITNESS.

A. Introduction

In 1996, Mr. Roberts presented the following affidavit from Ms. Haines:

1. My name is Rhonda Williams but I used to go by the name Rhonda Haines. In early 1984, I was living in Miami with Less McCullars, who I knew as Rick. In June of that year, Rick was arrested for a murder that happened on the Rickenbacker causeway. I was questioned by the police about his whereabouts during the time of the crime. I told the police that Rick had been with me throughout the night that the murder happened, but they didn't believe me and so I was arrested. The police charged me with accessory after the fact to murder and put me in jail.

2. After keeping me in jail for about three weeks, I was taken to see Sam Rabin, the lawyer

²²Again, Judge Solomon was in fact a necessary witness whose testimony established a valid 3.850 claim that was otherwise unavailable, as subsequent proceedings clearly demonstrated. Judge Solomon's denial of the motion to disqualify delayed disclosure of the basis for the valid 3.850 claim for over three years.

who was prosecuting Rick. Mr. Rabin told me that there was no reason for me to be in jail and that if I just told him what I knew he would let me go. He also made it clear that if I cooperated with him, he could help me with some outstanding charges I had against me for prostitution. In fact, up until my arrest, I had been working as a prostitute to support myself.

3. I then admitted to Mr. Rabin that I did not know whether or not Rick was at home with me through the whole night that the murder happened. I explained to him how Rick was there with me when I went to sleep around 9 p.m. and that he was in bed with me when I woke up about 5:00 am. Mr. Rabin said that I would have to give him a sworn statement with this information in order to be released from jail and I did so. Mr. Rabin also told me that I would have to testify at Rick's trial. He also made it clear that he could and would put me in jail again and prosecute me, too, if I didn't cooperate with him.

4. After Mr. Rabin had me released, I began visiting Rick at the jail. I also met with his defense attorneys and answered all their questions. I told them the truth. On the night of the murder, Rick was at home when I went to sleep at 9 p.m. and he was also there in bed with me when I woke up at 5:00 am. Rick never told me that he killed anyone.

5. I continued to work the streets up until around Thanksgiving 1984. Because I had many pending charges in Broward County, I was only working in Dade. The police knew who I was and my connection to Rick's case. They constantly harassed me. I was arrested many times and then told by Sam Rabin that he would make things better for me if I would just help him. Mr. Rabin also found out about my outstanding charges in Broward and told me that he could have them taken care of if I would cooperate with him on Rick's case. Mr. Rabin seemed convinced that I knew more about Rick's case than I did. At this time I was also doing way too much cocaine and I was pregnant. By Thanksgiving I was several months along.

6. All of this constant police pressure got to me and I left Florida and went to my mother's in Arizona. Mr. Rabin starting calling my mother's house and pressuring me again. I lied at trial and said Rick had called me in Arizona. In fact, Rick never called me in Arizona. I told my mother what Mr. Rabin was calling about and all the pressure he was putting on me. Her advice was to tell him something to get him off my back. I finally just took her advice. I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying "I know you know more." I knew he would take care of all the prostitution charges, and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted. So over time I would add to the story whenever Mr. Rabin would say "I know you know more." He would suggest things that I would then say I remembered and add to the story.

7. In 1985, I testified at a deposition and at Rick's trial. My testimony was false. I testified the way that I did because Mr. Rabin would not leave me alone and because he said he could take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

8. Mr. Rabin was good on his word. After I testified, the Broward County charges disappeared. However, I was so guilt ridden when I got back to Arizona that I started doing cocaine again big time. I really fell apart. I just wanted to forget about what I had done. I put Rick out of my mind and avoided all contact with my past in Florida. I even stopped using the name Rhonda Haines.

9. I have recently had the chance to review the sworn statement that I made to Sam Rabin on June 26, 1984 and it is true and correct. I answered all of his questions truthfully in that statement.

(Appendix 1, 1996 3.850 motion, PC-R2. **).

Mr. Roberts argued that this affidavit either alone or certainly in conjunction with a previously presented Brady claim warranted a new trial under Gunsby and Kyles. It established both a violation Brady and a basis for relief under Jones v. State.

The State agreed that an evidentiary hearing was warranted, but only if Mr. Roberts could immediately obtain the voluntary presence of Ms. Haines to testify at a hearing held under warrant. Mr. Roberts argued that a stay was warranted if an evidentiary hearing was warranted so that he could get the court's assistance in obtaining Ms. Haines' presence.

This Court stayed the execution and ordered an evidentiary hearing by a vote of 4-3. Justice Overton wrote a separate concurring opinion explaining his rationale and his view of what the evidentiary hearing would entail:

Whether that testimony would have affected the outcome of the trial is a factual determination that must be made by the trial judge after an evidentiary hearing at which the recanting witness testified what was the truth and what was a lie.

Roberts v. State, 678 So. 2d at 1236.

This court's determination that an evidentiary hearing was required is the law of the case. The question now presented is whether Mr. Roberts got the hearing that this Court determined was necessary when he was denied a certificate of materiality which was necessary to obtain a lawful and binding subpoena requiring Ms. Haines' appearance at the evidentiary hearing in Miami (PC-R3 446). See Provenzano v. State, 750 So.2d 597, 601

(Fla. 1999) ("Because Dr. Fleming never testified, the purpose of our previous remand was never realized.").

B. The Parties' Positions Below

Mr. Roberts orally sought a certificate of materiality from the circuit court to compel the attendance of Rhonda Haines, an out of state witness for the evidentiary hearing ordered by this Court. (PC-R3. 433). The State objected, citing to Chapter 942, Florida Statutes (1996), which governs interstate extradition of witnesses. (PC-R3. 386-87). Chapter 942 provides in pertinent part:

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 such 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.

§ 942.03(1) (1996).

Judge Solomon directed Mr. Roberts' collateral counsel to submit a memorandum of law on the issue of whether a certificate of materiality could and should issue. First, Mr. Roberts relied upon Chapter 942 and its failure to specifically exclude postconviction proceedings in a criminal prosecution. Chapter 942 does not specify that a defendant in postconviction proceedings may not seek a certificate of materiality to compel attendance of an out of state witness. Second, he argued due process was applicable to postconviction proceedings in Florida.

Postconviction proceedings must comport with due process. See Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996).

The State argued that Mr. Roberts' post-conviction proceedings are neither a criminal prosecution nor grand jury proceedings, therefore Mr. Roberts could not avail himself of the compulsory process provisions of Chapter 942. The State also argued that because Rule 3.850 proceedings are considered civil in nature, "'criminal trial rights' set out in the Fifth and Sixth Amendments to the United States Constitution and/ or corresponding state constitutions are not applicable to proceedings subsequent to conviction." (PC-R3. 386-87).

At the State's urging, Judge Solomon denied Mr. Roberts' application for a certificate of materiality as to Rhonda Haines (PC-R3. 446). Mr. Roberts was therefore unable to obtain Ms. Haines' presence for the evidentiary hearing which this Court had ordered on the basis of her affidavit.

C. The Law

Mr. Roberts must be allowed to compel the attendance of an out of state witness in order to prove his claim. Rule 3.850 was adopted by this Court in order to provide those convicted in a criminal prosecution with a means of vindicating their constitutional rights. Rule 3.850 is part of the rules of criminal procedure. The motion to vacate filed pursuant to Rule 3.850 is filed in the criminal prosecution. The case number is the case number for the criminal prosecution. To accept the State's argument and conclude that a post-conviction petitioner

is not able to obtain a certificate of materiality in order to insure the attendance of an out of state witness, would deny post-conviction petitioners a full and fair post-conviction hearing and the opportunity to vindicate their rights at a criminal trial through postconviction proceedings.

Post-conviction proceedings in Florida are governed by the principles of due process no less than trial or sentencing proceedings. This court has long recognized that a 3.850 petitioner is entitled to due process. State v. Reynolds, 238 So. 2d 598, 600 (Fla. 1970) ("due process requires that [pro se] petitioner be produced so that he may confront all of the witnesses, interrogate his own witnesses and cross-examine those of the State") (Emphasis added). Eby v. State, 306 So. 2d 602, 603 (Fla. 1975) ("the presence of the petitioner is not always required, nevertheless it is a matter within the discretion of the trial court which must be exercised in the light of other applicable principles of law including the requirements of due process") (emphasis added); Clark v. State, 491 So. 2d 545, 546 (Fla. 1986) (in a capital case arising from a pro se 3.850 this Court noted there must be "a judicious regard for the constitutional rights of criminal defendants" when dealing with pro se motions because prisoners in 3.850 proceedings were entitled to due process) (emphasis added); Rose v. State, 601 So. 2d 1181, 1182 (Fla. 1992) (order denying 3.850 vacated on petitioner's claim "he was denied due process of law because the trial court without a hearing and as a result of ex parte

communication adopted the State's proposed order denying relief") (emphasis added); Huff v. State, 622 So. 2d 982, 983 (Fla. 1993) ("we agree with Huff that his due process rights were violated") (emphasis added); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996) ("While it is within the trial court's discretion to determine whether or not a prisoner should be present at a postconviction relief hearing, this discretion must be exercised with regard to the prisoner's right to due process") (emphasis added); Smith v. State, 708 So. 2d 253, 255 (Fla. 1998) ("We reject the State's argument that Smith's due process rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed order.") (emphasis added); Jones v. State, 740 So.2d 520 (Fla. 1999) ("We conclude that the twelve-year delay undisputedly not due to appellant, the lack of psychological testing contemporaneous to trial, and the State's own evidence that a retroactive competency determination is not possible establish the inability to provide appellant a meaningful retrospective competency determination that complies with due process.") (emphasis added).

In Johnson v. Singletary, 647 So. 2d 106, 111 n. 3 (Fla. 1994), the defendant appealed the denial of his motion to vacate his conviction, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had confessed to the crime for which Mr. Johnson was convicted

and sentenced to death. This Court remanded for an evidentiary hearing because the circuit court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the circuit court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights.²³ This Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n.3.

Justice Overton in his concurring opinion noted that Mr. Johnson must be given an opportunity to present evidence corroborating the affidavits. Justice Overton explained: "This is especially true given that the trial court allowed the State to present evidence that the affidavits were unreliable but did

²³These are the identical circumstances presented here. Mr. Roberts was unable to get a certificate of materiality which was necessary to obtain Ms. Haines' presence. Yet, the State presented evidence to challenge the reliability of Ms. Haines' affidavit.

Of course, Mr. Roberts called the trial prosecutor in rebuttal to establish that the State's evidence in fact corroborated Ms. Haines' affidavit. The trial prosecutor very clearly testified that at the time of Mr. Roberts' trial Ms. Haines did have eleven pending charges in Broward County. This in conjunction with the State's evidence that now only two charges can be found documented corroborates Ms. Haines sworn affidavit that the charges were taken care in return for her testimony against Mr. Roberts.

not afford Johnson the same evidentiary hearing opportunity.” Id. at 111. Justice Kogan, also concurring, agreed that “[s]ince the trial court effectively had commenced an evidentiary hearing, it was obligated to grant Johnson’s request to present evidence of his own in rebuttal.” Id. at 112. See also Jones v. Butterworth, 695 So. 2d 679, 681 (Fla. 1997) (ordering the circuit court to reopen the evidentiary hearing after denying the petitioner the opportunity to present his expert witnesses); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (reversing conviction because defendant’s due process rights were violated when he was deprived opportunity to rebut State’s scientific evidence).

In Scull v. State, 569 So. 2d 1251 (Fla. 1990), this Court recognized the particular importance of affording due process in a death case:

The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term “due process” embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Id. at 1252.

Certainly, the most basic principles of due process are notice and opportunity to be heard. The opportunity to be heard must include the right to compel the presence of the witness

necessary to make out the claim upon which this Court ordered the evidentiary hearing. This is not a novel proposition.

Certificates of materiality have routinely issued in other Rule 3.850 cases upon the application of the petitioner. This Court has seen appeals in several capital post-conviction cases in which certificates of materiality were issued. For example, in the case of State v. Ian Lightbourne, Case No. 81-170-CF-A, 5th Judicial Circuit (Marion County), Judge Angel issued a certificate of materiality in order to secure the presence of a witness at an evidentiary hearing in a successor 3.850 proceeding. In the case of State v. George Trepal, Case No. 90-1569, 10th Judicial Circuit (Polk County), Judge Bentley issued a certificate of materiality in order to secure the presence of a witness at an evidentiary hearing on a 3.850 motion. Similarly in State v. Charles Kight, Case No. 83-2598-CFB, 4th Judicial Circuit (Duval County), Judge Carithers issued a certificate of materiality in order to obtain the presence at an evidentiary hearing of an out of state witness who had signed an affidavit which was submitted as the basis for a successor 3.850 motion.

There are also cases in which the capital post-conviction petitioner has sought and received the circuit court's assistance in obtaining the presence of a witness incarcerated in prison in another jurisdiction. In State v. Leo Jones, Case No. ---, the circuit court issued the proper paperwork in order to get a federal court to order the presence of a federal prisoner to be available to testify on behalf of Mr. Jones. Similarly in State

v. Marvin Johnson, Case No. ---, following this Court's remand for an evidentiary hearing, the circuit court assisted Mr. Johnson in obtaining the testimony of out state prisoners by authorizing depositions that the circuit judge attended. These other cases demonstrate what process is due to a 3.850 petitioner; he is entitled to the court's assistance in obtaining the testimony of witnesses necessary to prove his claims.

On the other hand, this Court was critical of the 3.850 petitioner's failure to do "little to secure the testimony of these [out of state] witnesses until the eve of the evidentiary hearing." Scott v. State, 717 So. 2d 908, 912 (Fla. 1998). There, the failure to seek a certificate of materiality for out of state witnesses was successfully cited by the State as a waiver of the petitioner's right to call the witnesses.²⁴

These cases establish what process is due to a capital post-conviction petitioner.²⁵ To deny Mr. Roberts a right that has

²⁴In fact, undersigned counsel's experience in the Scott directly led to the request for a certificate of materiality in Mr. Roberts' case. Having been criticized by the State in Scott for a failing to seek to compel the presence of out of state witnesses, undersigned counsel specifically invoked the provisions of Chapter 942 as soon as the evidentiary hearing was scheduled.

²⁵Circumstances similar to the one presented here arose in Provenzano v. State, 750 So.2d 597, 601 (Fla. 1999). There, this Court had directed an evidentiary hearing on Mr. Provenzano's competency to be executed. The basis for this Court's concern was "expert reports from both parties, 'created questions of fact on this issue.'" 750 So.2d at 601. However, one of the experts who had indicated that Mr. Provenzano was incompetent was unavailable during the short time period before the scheduled execution. The circuit court denied a continuance in order to hear the expert's testimony. This Court reversed saying "Because Dr. Fleming never testified, the purpose of our previous remand

been extended to other identically situated 3.850 petitioners would constitute an equal protection violation, as well as a violation of due process. Judge Solomon erred in denying Mr. Roberts' application for a certificate of materiality to secure the attendance of an out-of-State witness. This Court must reverse and remand for evidentiary hearing at which Mr. Roberts is provided the tools necessary to obtain the testimony of a material out-of-State witness.

ARGUMENT III

MR. ROBERTS WAS DENIED HIS RIGHT TO DUE PROCESS IN RULE 3.850 PROCEEDINGS WHEN THE STATE OBTAINED THE ASSIGNMENT OF JUDGE SOLOMON IN AN EX PARTE PROCEEDING WITHOUT NOTICE TO MR. ROBERTS OR AN OPPORTUNITY FOR MR. ROBERTS TO BE HEARD AND WHEN THE STATE THROUGH EX PARTE CONTACT ON THE MERITS OF THE CASE LEARNED OF JUDGE SOLOMON'S RULING TWENTY DAYS BEFORE IT WAS FILED WITH THE CLERK'S OFFICE AND SERVED ON THE PARTIES.

In this case, the record reflects that Mr. Howell as the State's representative repeatedly engaged in ex parte contact with the presiding judge. On June 13, 1996, Mr. Howell obtained an Order authorizing his travel expenses to California in an ex parte proceeding. (PC-R3. 36). On October 24, 1996, Mr. Howell along with his co-counsel, Joel Rosenblatt appeared before Judge Platzer in an ex parte proceeding to request on behalf of the State that the case be transferred to Judge Solomon. (PC-R3. 47-48). During the proceeding, the State failed to disclosed to

was never realized." 750 So.2d at 601.

Judge Platzer that there was a pending motion to disqualify Judge Solomon which had been filed on October 16, 1996. And then on September 11, 1997, Mr. Howell again appeared in an ex parte proceeding before Judge Platzer and indicated that Judge Solomon had denied the pending Rule 3.850 motion. This hearing was held some twenty days before the order denying was filed with the clerk's office and served on the parties (PC-R3. 761).

Certainly, this Court remanded Mr. Roberts' case intending that he receive a full and fair evidentiary hearing on the above-stated matters, and that during this hearing Mr. Roberts receive due process. However, the evidentiary hearing envisioned by this Court did not occur as explained in the previous argument. In addition the record of the proceedings in Mr. Roberts' case is rife with ex parte proceedings. The ex parte proceedings denied Mr. Roberts his right to due process and the full and fair hearing of his claims.

Post-conviction proceedings in Florida are governed by the principles of due process no less than trial or sentencing proceedings. See, e.g., Huff v. State, 622 So. 2d 982 (Fla. 1993); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996); Johnson v. Singletary, 647 So. 2d 106, 111 n.3 (Fla. 1994).

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Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Id. at 1252.

However, Mr. Roberts received neither notice nor an opportunity to be heard regarding the State's request that Judge Platzer transfer Mr. Roberts' case back to Judge Solomon. The October 24, 1996, hearing was conducted without notice to Mr. Roberts or his counsel, despite the fact that Mr. Roberts had filed on October 16, 1996, a Motion to Disqualify Judge Solomon from presiding over Mr. Roberts' case. The transcript of the October 24th hearing demonstrates that the State never advised Judge Platzer of the pendency of Mr. Roberts' Motion to Disqualify. (PC-R3. 45-49). Further neither Judge Platzer nor the two assistant state attorneys appearing on behalf of the State addressed the fact that neither Mr. Roberts nor his counsel were present for this hearing. The State's request was heard ex parte without any adversarial process whatsoever.

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4) (emphasis supplied). As Justice Overton once explained for this Court:

[C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of

government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communication except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).

The trier of fact cannot have ex parte communications with a party. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); McKenzie v. Risley, 915 F.2d 1396 (9th Cir. 1990). This prohibition of ex parte proceedings applies in the Rule 3.850 process. This Court has specifically denounced ex parte communications in the course of 3.850 proceedings. Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992):

Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.

* * *

We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect of the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Thus, this Court specifically rejected any notion that proof of prejudice was prerequisite to establishing a due process violation arising from ex parte contact.

Again recently, this Court found that a Rule 3.850 litigant's due process rights were violated by ex parte contact between the prosecutor and the judge during the pendency of the Rule 3.850 motion. Smith v. State, 708 So. 2d 253 (Fla. 1998).

This Court "conclude[d] that the 'impartiality of the tribunal' was compromised and the ex parte communications were improper." Smith v. State, 708 So. 2d at 255. As a result, the matter was remanded for new proceedings before a new judge.

Thus, this Court has presumed judicial partiality where the record establishes ex parte contact on the merits of an issue before the circuit court. Certainly, the order of October 24, 1996, transferring the case to Judge Solomon must be declared null and void because it was a ruling on the merits of a pending motion filed by the State which was heard and decided ex parte in clear violation of due process and the laws of this State. What Judge Platzer would have ruled had Mr. Roberts had notice and an opportunity to be heard is simply not relevant under this Court's precedent. The ex parte contact compromised the impartiality of the tribunal, rendering its decision unconstitutional. The parties must be returned to the position they were in before the State and Judge Platzer engaged in ex parte contact. In addition, Judge Platzer must be disqualified from the case.

Though more is not necessary to establish that Mr. Roberts' due process rights were violated, more is in fact present in this record. On September 11, 1997, Assistant State Attorney Howell again appeared before Judge Platzer on an ex parte basis. The transcript of this ex parte hearing is in the record and demonstrates that Judge Platzer was again presiding over Mr. Roberts' case. (PC-R3. 743-47). Judge Platzer was conducting an inquiry as to the case status. This inquiry was conducted on the

record, but ex parte. In this proceeding, Mr. Howell stated: "We had the evidentiary hearing in July. Judge Solomon, who was the trial judge in 1985, once again denied the defendant's relief. I assume that he is going to appeal that finding." (PC-R3. 745-46). Neither Mr. Roberts nor his counsel were present for this proceeding.

The significance of this is that Mr. Howell appeared on behalf of the State in an ex parte hearing against Mr. Roberts and never once objected, pointed out opposing counsel was not present, or did anything to try and cure the obvious problem. His behavior was that of a person who saw no problem with proceeding in the matter ex parte.

On this point, the record reveals two other times that Mr. Howell appeared before Judge Platzer in an ex parte proceeding in the case of State v. Roberts. On June 13, 1996, the State appeared before Judge Platzer ex parte seeking an order authorizing travel to Los Angeles. (PC-R3. 36). The motion was heard by Judge Platzer in her capacity as the presiding judge in State v. Roberts. Judge Platzer signed the order prepared by the State granting the authorization. Neither Mr. Roberts nor his counsel was given notice of this proceeding before Judge Platzer in State v. Roberts, Case No. 84-13010.

On October 24, 1996, Mr. Howell appeared ex parte before Judge Platzer again in State v. Roberts, Case No. 84-13010. At that hearing in Mr. Roberts' case, Judge Platzer inquired of the State: "Are you here to send it [the case] back to him [Judge

Solomon].” (PC-R3. 47). Mr. Howell responded: “Yes.” (PC-R3. 48). Judge Platzer was not apprised of Mr. Roberts’ pending motion to disqualify Judge Solomon. The State did not object to proceeding without counsel for Mr. Roberts. Neither Mr. Roberts nor his counsel were given notice and opportunity to be heard.

So, the record clearly establishes that Mr. Howell on three occasions in State v. Roberts appeared before Judge Platzer on an ex parte basis. Certainly, this reflects upon Mr. Howell’s understanding of the propriety of ex parte proceedings.

The proceedings before Judge Solomon resulting in an order denying 3.850 relief must be vacated as they flowed from ex parte contact. The State obtained a transfer of the case to Judge Solomon through ex parte contact with Judge Platzer. The order denying must be vacated and the matter remanded for a new hearing before an impartial judge.

ARGUMENT IV

THE CIRCUIT COURT ERRONEOUSLY DENIED MR. ROBERTS’ MOTION TO DISQUALIFY ASSISTANT STATE ATTORNEY WILLIAM HOWELL FROM ACTING AS BOTH A WITNESS AND AN ADVOCATE IN THE PROCEEDINGS BELOW. FURTHERMORE, MR. HOWELL’S REPEATED EX PARTE BEHAVIOR WHICH DEPRIVED MR. ROBERTS OF DUE PROCESS WARRANTS MR. HOWELL’S DISQUALIFICATION FROM FUTURE PROCEEDINGS UPON REMAND.

The Florida Rules of Professional Responsibility envisioned the impermissible conflict created when a lawyer plays the dual role of advocate and witness at trial. Rule 4-3.7 of Rules of Professional Conduct, clearly states:

(a) **When a Lawyer May Testify.** A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of the legal services rendered in the case; or,

(4) disqualification would work a substantial hardship on the client.

Rule 4-3.7 (emphasis added).

In Mr. Roberts' case, Mr. Howell's testimony did not relate to an uncontested issue; it did not relate solely to a matter of formality; it did not relate to the nature and value of legal services; nor would disqualification have worked a substantial hardship upon the State.

The Eleventh Circuit Court of Appeals has explained that "a prosecutor must not act as both prosecutor and witness." United States v. Hosford, 782 F.2d 936, 938 (11th Cir. 1986). The Eleventh Circuit explained:

The policy concerns that preclude a prosecutor from also appearing as a witness were well stated by the United States Court of Appeals for the Seventh Circuit:

First, the rule eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government. Second, there is fear that the prestige or prominence of a government prosecutor's office will artificially enhance his credibility as a witness. Third, the performance of dual roles by a prosecutor might create confusion

on the part of the trier of fact as to whether the prosecutor is speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier according testimonial credit to the prosecutor's closing argument. Fourth, the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that "justice must satisfy the appearance of justice." This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government. (footnote omitted).

United States v. Johnston, 690 F.2d 638, 643 (7th Cir. 1982).

Hosford, 782 F.2d at 938-39.

Florida state courts have recognized the conflict inherent in a situation where, as in Mr. Roberts' case, a lawyer plays the dual role of prosecutor and witness. In State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), it was stated:

We recognize that the functions of a witness and a prosecuting attorney must be kept separate and distinct and that "the practice of acting as both a prosecutor and a witness is not to be approved and should be indulged in only under exceptional circumstances." Shargaa v. State, 102 So.2d 809, 813 (1958), cert. denied 358 U.S. 873, 79 S.Ct. 114, 3 L.Ed. 2d 104 (1958). See also Clausell v. State, 455 So.2d at 1051 n.1

Id., at 1229. In Christopher, disqualification was not required only because there was no indication that the prosecutor would in fact be called as a witness.

There have been a number of cases which have held that the disqualification required by this rule does not require disqualification of the entire state attorney's office. In State v. Clausell, 474 So. 2d 1189 (Fla. 1985), this Court found that, where the Assistant State Attorneys who would be witnesses were

not the assigned attorneys representing the State in the matter, disqualification of the entire office was not warranted absent actual prejudice. The opinion implicitly recognizes that the "advocate-witness" rule precluded a prosecutor who was a witness in a case from also acting as prosecutor. Similarly, in Meggs v. McClure, 538 So. 2d 518 (1st DCA 1989), the individual who was the witness was not acting as the prosecutor in the case. The court refused to order disqualification of the entire office absent actual prejudice.

Here, Mr. Howell was listed as a witness by the State. Mr. Howell had not been counsel for the State in Mr. Roberts' 1989 motion to vacate. So there can be no showing of any particular need for Mr. Howell to act as an advocate and a witness. And given his repeated ex parte contact with the judges in this case, his disqualification was warranted and should have been granted.

ARGUMENT V

IN DENYING MR. ROBERTS' 3.850 IN 1997, JUDGE SOLOMON ERRONEOUSLY FAILED TO CONDUCT A CUMULATIVE ANALYSIS OF MR. ROBERTS' BRADY/GUNSBY CLAIM ARISING FROM RHONDA HAINES' 1996 AFFIDAVIT ALONG WITH THE BRADY CLAIMS PRESENTED IN 1989 PRIMARILY REGARDING MICHELLE RIMONDI.

The State's case against Mr. Roberts was based upon testimony of Ms. Haines and Ms. Rimondi. Without Ms. Haines' testimony, the State's case would depend upon Ms. Rimondi's thoroughly impeached testimony. Even with Ms. Haines' testimony, Mr. Roberts' jury deliberated for three

days before finally convicting Mr. Roberts. A review of the State's closing argument reveals the significance the State gave to Ms. Haines' testimony. The State devoted a large portion of its argument to discussing the importance of Ms. Haines' testimony and why the jury should believe her testimony. (R. 2940-96).

As the United States Court of Appeals for the Eleventh Circuit noted in Mr. Roberts' case, Ms. Rimondi underwent an effective "tenacious cross-examination" -- so effective that the court found that "further impeachment of Rimondi with any inconsistent statements would not have changed the outcome of the trial." Roberts v. Singletary, 29 F.3d 1474, 1478-79 (11th Cir. 1994). In doing so, the Court relied upon Mr. "Roberts' girlfriend [who] testified that Roberts told her he killed a man." Id. Even in light of eyewitness Rimondi's testimony, without Ms. Haines' testimony that Mr. Roberts confessed and was in possession of the alleged weapons, confidence is undermined in the outcome.

Yet, Judge Solomon's order denying 3.850 relief completely failed to acknowledge the previously presented Brady claims regarding Ms. Rimondi which had been denied by relying upon the trial testimony of Ms. Haines.²⁶ No

²⁶Again, the order denying 3.850 relief signed by Judge Solomon on August 11, 1997, and mailed to Assistant State Attorney Joel Rosenblatt, who neglected to file it on the judge's

cumulative consideration was given to the claim arising from Ms. Haines' affidavit and those previously presented. In fact, the order specifically relied upon the trial testimony of Michelle Rimondi, saying "the instant case involves an eyewitness to the murder, Ms. Rimondi, whose original trial testimony stands." (PC-R3. 756). Thus, the analysis violates Kyles v. Whitley, 115 S. Ct 1555 (1995); Lightbourne v. State, 742 So.2d 238, 247 (Fla. 1999).

Moreover, Ms. Haines' 1996 affidavit alleges more than a mere recantation -- it sets forth clear and convincing evidence of State misconduct involving the wrongful withholding of exculpatory evidence, Brady v. Maryland, 373 U.S. 83, 87 (1963), and the presentation of knowingly false testimony. Giglio v. United States, 405 U.S. 150, 154 (1972). Yet, the order denying relief written by the State and signed by Judge Solomon completely neglects to acknowledge that Mr. Roberts' claim is premised upon violations of Brady and Giglio.

Ms. Haines' sworn affidavit makes clear the following additional facts involving outrageous State misconduct: 1) that her false testimony came to fruition because of

behalf until October 1, 1997, had been prepared by the State and was signed by Judge Solomon without a single change.

pressure from the State;²⁷ 2) that the State promised her assistance with pending charges in exchange for her testimony;²⁸ 3) that the State knew of the pressure and promises when they asked her at trial if anyone had "threatened you or promised you anything for you to tell what Rick said to you about what happened;" (R. 1691-92) 4) that the State purposely elicited Ms. Haines' false response that she had not been threatened or promised anything in exchange for her testimony;²⁹ and 5) that the State came

²⁷Ms. Haines recently stated:

I told my mother what Mr. Rabin was calling about and all the pressure he was putting on me. Her advice was to tell him something to get him off my back. I finally just took her advice. I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying "I know you know more." . . . So over time I would add to the story whenever Mr. Rabin would say "I know you know more." He would suggest things that I would then say I remembered and add to the story.

(PC-R. 102).

²⁸

I testified the way that I did because Mr. Rabin would not leave me alone and because he said he could take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

(PC-R. 102).

²⁹Ms. Haines has sworn:

I knew he would take care of all the prostitution charges, and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted.

through with the promised assistance to Ms. Haines after Mr. Roberts trial and disposed of all pending charges against her.³⁰

Ms. Haines stated in her affidavit that Sam Rabin in December of 1984 promised her consideration for any testimony favorable to the State. Ms. Haines further stated that after giving her testimony against Mr. Roberts, the eleven pending Broward County charges disappeared.

At the July 1997 evidentiary hearing, the State called Harvey Wasserman, a supervisor of investigation at the Dade County State Attorney's Office. Mr. Wasserman testified to his reading of computer generated printouts that were produced in 1996 of Rhonda Haines' criminal history. He indicated that the records he had obtained reflected that "in 1985, 1984, 1985, she had two pending prostitution-related cases in Broward County." (PC-R3. 643). According to Mr. Wasserman, these two charges were not disposed of until 1988. (PC-R3. 640-43). He was unable to find documentation of the eleven outstanding charges that Ms. Haines testified at trial were pending in Broward County at that time. (PC-R3. 642) ("Q. Okay. So, were there any other cases

(PC-R2. 102).

³⁰Ms. Haines has sworn:

Mr. Rabin was good on his word. After I testified, the Broward County charges disappeared.

(PC-R. 102).

that she had from Broward County according to the records that you reviewed? A. No, sir, not from anything that we have.”). So as of July of 1997, the State conceded the eleven charges of prostitution against Rhonda Haines were untraceable.

Yet, the trial prosecutor acknowledged that at the time of trial the eleven charges in fact existed and were problematic. William Howell, co-counsel at trial for the State and co-counsel in the 3.850 proceedings, was called by Mr. Roberts in rebuttal to establish whether at the time of trial Ms. Haines had eleven outstanding charges in Broward County. Mr. Howell testified:

Q. Do you recall when the first time that you learned about her allegation of outstanding charges in Broward County?

A. Very vividly. I probably recall that as much as anything else about this case.

Q. And when was that?

A. That was in her deposition and I think it was October. I may not be correct on this, but October of 1985, immediately prior to the trial is when I first learned of the allegations of eleven outstanding prostitution warrants or charges or something like that in Broward.

Q. And, did you discuss that with anybody in the State Attorney's Office?

A. That I'm having a little witness trouble with - - I'm sure I did. I don't have a specific recollection of the discussion, but I would have discussed that with Mr. Glick.

(PC-R3. 705-06). Mr. Howell was adamant that the eleven charges “were still pending at the time of trial.” (PC-R3. 707). Thus, Rhonda Haines' claim that the eleven prostitution charges disappeared after her testimony for the State at Mr. Roberts'

trial was confirmed.

In the State's closing argument at trial, Rhonda Haines was relied upon to argue for a guilty verdict. (R. 2949, 2960, 2961, 2985, 2989, 2990, 2991, 2992, 2993, 3093, 3094, 3096, 3107, 3108, 3116). In his closing, the prosecutor argued:

Ultimately, you have to decide who is lying and what they have to gain or lose by coming in this courtroom and lying.

* * * *

Because if somebody has something to gain, then they may be coloring their testimony.

(R. 2945).

According to Rhonda Haines' affidavit, the State possessed exculpatory evidence which was not disclosed to the defense. The State promised Rhonda Haines consideration for her testimony, and the record now establishes that she received the consideration. The nondisclosure of this evidence violated the Eighth and Fourteenth Amendments of the United States Constitution and Rule 3.220 of the Florida Rules of Criminal Procedure. Gorham v. State, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988).

In analyzing the prejudicial impact of Ms. Haines' false testimony, consideration must be given to the Brady and ineffective assistance of counsel claims previously pled

in this Court in 1989.³¹ Since Mr. Roberts was denied relief on the basis that the previously pled nondisclosures and deficient performance did not undermine confidence in

³¹In support of his Brady claim regarding Michelle Rimondi, Mr. Roberts previously presented notes from the State Attorney's Roberts file which were disclosed to Mr. Roberts during post-conviction proceedings. Several of these exhibits reflected Michelle Rimondi's desire for money from Mr. Roberts' prosecutor, Sam Rabin. One note provided: "Sam call Michelle 271-9855 (Money)." Another note included a phone message to "Sam" from "Michelle Rimondi" "Re: money." A third note provided: "Michelle Rimondi -- Holiday Inn 324-0800 -- I'll tell her to be here @ 10:00 a.m. I have to give her money."

Additionally, Mr. Roberts' previously presented an undisclosed letter to Ms. Rimondi's parents threatening to take action regarding Michelle. There was, and is, no question that Ms. Rimondi was supporting herself at the time of Mr. Napoles' death through prostitution and that she was actively trying to recruit other teenage girls to the business (R. 670). She also testified at trial that she was engaged in the use of illegal drugs (R. 2238-44). Certainly this establishes a substantial criminal history for a sixteen year old. Yet despite Mr. Rabin's warning in his letter "to take further action" if Ms. Rimondi did not maintain contact with him twice weekly and otherwise abide by his conditions, when Ms. Rimondi was subsequently charged with grand theft, she simply received pretrial intervention.

When she was arrested for grand theft in November of 1985, she immediately wanted to talk to Mr. Roberts' prosecuting attorney (PC-R. 263). Whatever the prosecutor's mental state as to his intent to help her, the important thing was what she wanted. She wanted to use her trump. She wanted help in her criminal case, and she viewed the prosecutor in Mr. Roberts' case as a person who would help her. This was a specific example of her willingness to use her testimony to help herself. This information along with Mr. Rabin's letter would have been important for the jury to know in analyzing Ms. Rimondi's motivations and credibility.

Finally, there was Dr. Rao, who was the State's rape treatment doctor who examined Miss Rimondi after the alleged rape. An undisclosed note in the prosecution's possession provided: "Dr. Rao ... - didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and collected." Another undisclosed note provided: "Dr. Valerie Rao ... Got story for Michelle abt what happened -- didn't believe homic. and confirmed at M.E.'s ofc." "Last coitus 6-3-84 = 10A Manny not sure."

the outcome because Rhonda Haines had testified that Mr. Roberts confessed to her, those matters must be revisited. The State hid exculpatory evidence. Mr. Roberts must be put in the position he would have been in had the evidence been disclosed. To do otherwise would reward the State for suppressing exculpatory evidence.

The United States Supreme Court recently recognized that, though a Brady violation may be comprised of individual instances of nondisclosure, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures. Kyles v. Whitley, 514 U.S. 419 (1995). The reason for this as explained by the United States Supreme Court is in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. Thus, the proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known.

In Kyles v. Whitley, the Supreme Court explained the appropriate standard of review of a Brady claim:

The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.

Kyles, 514 U.S. at 436.

The result reached by the Fifth Circuit majority is

compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by Bagley, as the ensuing discussions will show.

Kyles, 514 U.S. at 441.

In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 514 U.S. at 449 n.19 (citations omitted).

Moreover, this Court in Jones v. State, 709 So. 2d 512 (Fla.

1998), and reaffirmed in Lightbourne, made it clear that the cumulative analysis discussed in Gunsby is in fact the legally required analysis where a Brady claim, an ineffective assistance claim, and/or a newly discovered evidence claim are presented in a 3.850 motion. In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence of innocence using the following analysis:

Gunsby raises a number of issues in which he contends that he is entitled to a new trial, two of which we find to be dispositive. First, he argues that the State's erroneous withholding of exculpatory evidence entitles him to a new trial. Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit and to hide the true identity of the murderer.

* * *

Nevertheless, when we consider the cumulative effect of the testimony presented at the 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995) (cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995) (same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996) (emphasis added). See Young v. State, 739 So. 2d 553 (Fla. 1999). This means Mr. Roberts' claims requires cumulative consideration of all previously pleaded claims that Mr. Roberts did not receive an

adequate adversarial testing because his jury did not hear favorable and exculpatory evidence. The claims presented previously must be evaluated cumulatively with the evidence presented herein. Way v. State, 760 So. 2d 903 (Fla. 2000). If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State; Kyles v. Whitley.

This Court held in Lightbourne v. State, 742 So.2d at 247 that a cumulative analysis of Mr. Lightbourne's Brady claim and his newly discovered evidence was required. This was true even though this Court noted that Mr. Lightbourne had first presented a Brady claim years before. See Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989). In fact in Lightbourne, the Brady claim presented in 1989 was "based on the State's failure to disclose that police had engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne." 742 So. 2d at 242. The Brady claim presented in 1994 was supported by evidence not previously available ("the State committed a Brady violation in withholding evidence that Chavers' and Carson's testimony was false and elicited in violation of Henry". 742 So. 2d at 247.

Mr. Roberts previously presented a Brady claim, an ineffective assistance claim, and a newly discovered evidence of innocence claim. He has now located witnesses and evidence not previously available to him which proves his claims which without the new evidence was previously rejected. This is nearly identical to the situation in Lightbourne. In Lightbourne, this

Court reversed a circuit court decision that failed to conduct the required cumulative consideration ("This cumulative analysis must be conducted so that the trial court has a 'total picture' of the case."). The order drafted by the State and signed by Judge Solomon denying 3.850 relief failed to conduct the requisite cumulative analysis and must be reversed.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Roberts respectfully urges the Court to reverse the lower court's denial of 3.850 relief as to the claims arising from Rhonda Haines' affidavit and remand Mr. Roberts' case to the circuit court with direction that Mr. Roberts receive a full and fair evidentiary hearing on these claims. Mr. Roberts respectfully requests that this Court order that William Howell, Assistant State Attorney be disqualified from any further prosecution of Mr. Roberts' case.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February ____, 2001.

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