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 MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY/CROSS ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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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 Mr. Roberts' 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.

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REPLY TO STATEMENT OF THE CASE AND FACTS

Rule 9.210 of the Florida Rules of Appellate Procedure provides that: "The answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." The Statement of the Case and Facts in the Answer Brief is forty-four pages long. Nowhere does it clearly specify areas of disagreement with the Statement of the Case contained in the Initial Brief.

Herein, Mr. Roberts will endeavor to specifically identify omissions and/or inaccuracies in the State's Answer/Cross-Initial Brief. Starting at the bottom of page 15 of the State's brief is a discussion of the February 15, 1996, deposition of Judge Leonard Glick, who had been the lead prosecutor at Mr. Roberts' trial. Judge Glick arrived at the deposition with materials estimated to be a "quarter of an inch" in a file titled "charging document" (PC-R2. 296). Judge Glick was asked by the State's representative to "read into the record each item" contained in the file (PC-R2. 296). Judge Glick explained that the file was a "packet" kept "for [his] own reference, including but not limited to a copy of the final disposition sheet, which is the page that you are looking at, that was required to be filled out and signed when the case was completed" (PC-R2. 297). Judge Glick then identified each document in addition to the final disposition

sheet being provided: 1) "a copy of the indictment," 2) "a copy of the medical examiner's initial on-scene report," 3) "a copy of the grand jury memorandum," 4) "duplicate photos that were in the file," and 4) two actual duplicate photographs from the original police photograph group" (PC-R2. 297). When he concluded, he indicated that he had described the "complete package." The materials from the file were then introduced as Exhibit 1 and given to the court reporter. Arrangements were made for copying the material at the conclusion of the deposition. The materials turned over, Exhibit 1, appear in the record (PC-R2. 313-350).

The State points out that an unsigned sentencing order appears in the record as an attachment to that deposition. In sequence, the unsigned sentencing order follows the medical examiner's report, but appears before the final disposition sheet that, in turn, precedes the copies of photographs. The State in its Answer/Cross Initial Brief does not acknowledge that when the attachments were inventoried during the deposition, there was no reference made to an unsigned sentencing order as being included in the materials being provided to the court reporter by Judge Glick.[1]

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1. The State's heavy reliance on an unsigned sentencing order being attached to the February 15th deposition is in sharp contrast to the State's position when arguing State v. Mills, Case No. SC01-879, on June 6, 2001. There, the State's representative argued that the presence of an unsigned draft order in the State Attorney's files did not mean anything untoward had happened. In order to have a claim upon which relief will be granted, a witness must testify regarding whether the State drafted and submitted the sentencing order to the judge on an ex parte basis.

Further, the State fails to acknowledge that no past or present prosecutor has ever informed Mr. Roberts or his counsel that the State drafted the sentencing order.[2] In fact, no one including Judge Solomon advised either Mr. Roberts or his counsel prior to April 7, 2000, that the judge had contacted the State on an ex parte basis and asked that an order sentencing Mr. Roberts to death be prepared for his signature (SPC-R3. 144, 437).

At page 20 of the State's brief, it is stated that on February 21, 1996, "Defendant acknowledged that he had had access to the State Attorney's file in 1989." Of course, all that Mr. Roberts' counsel acknowledged and all that he could acknowledge was that he had access to the files in 1989 that were provided to him by the State.[3]

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[2]In fact, the trial prosecutors testified at the October 20, 2000, evidentiary hearing and each denied any memory of drafting the sentencing order (SPC-R3. 441, 454-57). Interestingly, Judge Glick, Mr. Roberts' trial prosecutor who apparently produced the unsigned sentencing order at his February 15, 1996, deposition, testified in October of 2000 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 (SPC-R3. 441-42).

[3]Since the State asserted below that Judge Solomon was mistaken and that no one from the State Attorney's Office drafted the sentencing order, it has never asserted that an unsigned sentencing order was in the State Attorney's file that was given to Mr. Roberts' counsel in 1989. In fact, the State called Mr. Howell at the October 20, 2000, hearing to testify that despite his search of all of the State Attorney's files, he could not

At page 21 of its brief, the State says "[i]n an attempt to make the request timely, Defendant asserted that Judge Solomon had admitted to engaging in an ex parte communication with a prosecutor who was not associated with this matter in connection with an unrelated case." The State omits reference to the name of the "unrelated case" and the date of the hearing at which Judge Solomon testified. The case was State v. Riechmann. And the evidentiary hearing was held in July of 1996. Judge Solomon was called as a witness for the State.[4] The date of the hearing is significant because it was after the February, 1996, denial of Mr. Roberts' motion to vacate, but before the issuance of the mandate in October of 1996 by this Court following its decision reversing and remanding for an evidentiary hearing.

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find a draft order in the possession of the Office of the State Attorney (SPC-R3. 456-57).

[4]Joel Rosenblatt, who represented the State below in Mr. Roberts' case was one of two Assistant State Attorneys representing 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. (Riechmann PC-R. 5716). Thereafter, the prosecutor presented Judge Solomon with a draft and Judge Solomon "made the changes and gave it back to him." (Riechmann PC-R. 5724). Subsequently on November 4, 1996, the presiding judge in the Riechmann proceedings found that Judge Solomon and the trial prosecutor had engaged in ex parte contact and granted a resentencing. This Court affirmed that decision on appeal. State v. Riechmann, 777 So.2d 342 (Fla. 2000). Interestingly, the State never includes reference to that decision anywhere in its brief. See Table of Citation of the Answer Brief.

At page 22 of its brief, the State while discussing the October 24, 1996, proceedings in Mr. Roberts' case before Judge Platzer neglects to acknowledge that the proceedings were conducted on an ex parte basis.

Also on page 22 of its brief, the State acknowledges that Mr. Roberts sought to depose Judge Solomon in a motion filed on November 12, 1996. However, the State omits reference to the matter on which Mr. Roberts sought to depose Judge Solomon. Mr. Roberts sought to question Judge Solomon in light of the November 4, 1996, ruling in Riechmann finding that Judge Solomon engaged in his ex parte contact with the State and had the State draft the sentencing order in that case (PC-R3. 50). Mr. Roberts stated in his motion that he needed to depose Judge Solomon in order "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)(emphasis added).[5]

At page 23 of its brief, the State asserts that at the January 9, 1997, hearing on the motion to depose and the motion

[5]Coincidently, this motion to depose Judge Solomon was filed less than one year after the Judge Glick's February 15th deposition and indicated that Mr. Roberts wanted to inquire as to whether the State wrote the findings in support of the sentence of death.

to disqualify, the State argued that "Defendant had not raised any issue on which the judge's testimony was necessary." However, in addition to the specific area of inquiry described in the motion itself, Mr. Roberts' counsel at the January 9th hearing stated:

> I do not mean to be disrespectful, but in terms of filing a motion to disqualify, the factual allegations are supposed to be taken as true, and at this point in time, that testimony indicates that Your Honor, at the time of the Riechman proceeding, had ex parte contact with the State.
>
> I believe the attorney was Mr. DiGregory (phonetic) - - I don't remember his first name - - who also testified in the Riechmann matter; and based on that testimony, my understanding is the Judge, the presiding judge in Riechmann, granted Mr. Riechmann a resentencing because of that contact among other reasons.
>
> * * *
>
> There were two matters that had been at issue in the Roberts case forever and that were barred out because it was presumed that you followed and knew the law.
>
> The testimony in the Riechmann case was that Your Honor was unfamiliar with Gardner versus Florida.
>
> This is new information that warrants my investigation to determine whether or not to present a new claim based on this new fact, and that's simply what I am trying to do.
>
> * * *
>
> I am not privy - - because, obviously, I was not there - - as to the contact that Your Honor had with Mr. Rosenblatt who I believe represented the State in the Riechmann matter and the meetings and/or ex parte discussions that would have occurred with reference to

> the issue in Riechmann and/or other similar - situated cases; and as is in the history of this case, Mr. Roberts' case, issues have arisen regarding the case of Gardner versus Florida - - G-A-R-D-N-E-R, Gardner versus Florida - - and **whether Your Honor violated Gardner in considering ex parte materials regarding Mr. Roberts.**
>
> The testimony in the Riechmann hearing was that Your Honor was not familiar with Gardner. I believe that was Your Honor's testimony.
>
> At this point in time, I am in the position where I want to be able to depose Your Honor very much like in the situation of what happened in State versus Lewis where . . . .
>
> In this instance, I would like to able to depose Your Honor in order to obtain testimony; but, Your Honor, while you are presiding on this case, you cannot be the presiding judge and the witness, of course, and for that reason, I also believe that Your Honor should disqualify himself so that that deposition can occur.

(PC-R3. 187, 200, 201-02)(emphasis added).

At page 26 of its brief, the State asserts "Defendant's counsel acknowledged that she had told Haines that the State would arrest her if she came to Florida." In fact, Mr. Roberts' counsel stated:

> Now, Mr. Howell has told some interesting stories [in] what he said to Ms. Haines. He's also been telling Ms. Haines some interesting things [about] what he would do for her when she came to Florida. I can help you see your daughter. Don't worry. Nothing bad is going to happen.
>
> Now, Mr. Rosenblatt is telling the Court and me during the hearing that he plans to charge her with perjury.

(PC-R3. 600).[6] She simply told Ms. Haines what Mr. Rosenblatt had said in court and what may come up during the cross-examination.[7]

And in fact, Mr. Rosenblatt thereupon repeated his previous pronouncement:

> 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.

(PC-R3. 601).[8]

Also on page 26 of its brief, the State claims that "Defendant contended that a subpoena would immunize Haines from perjury charges." Jennifer Corey, Mr. Roberts' counsel never

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[6]For some unknown reason, the record before this Court includes two copies of the transcript of the July 16, 1997, hearing. One copy appears in the record commencing on page 451, and the other begins on page 593. The version appearing on pages 451-592 was left out of the copy of the record provided to defense counsel. Given that it was duplicate transcription of what defense counsel had commencing on page 593, undersigned counsel did not seek and obtain those pages of the record. In preparing Mr. Roberts' initial brief, undersigned counsel used the transcript beginning on page 593 for citation purposes. The State in its brief has used the record cites for the transcript beginning on page 451.

[7]Usually, it is considered good witness preparation to discuss with a witness what the opposing party may bring up in cross-examination.

[8]Given that statement, can there be any doubt that the State would cross-examine Ms. Haines regarding potential perjury charges.

claimed that a subpoena would immunize Haines from perjury charges. According to Ms. Corey, the bottom line was:

> I cannot be in a position as Mr. Roberts' attorney of relying on her good graces, trusting the fact that she will get on the plane and be here when I ask to be here.
>
> **It is my obligation to make sure she is here under a court order so that if she doesn't show up, I have some kind of remedy. That's what we tried to do. That's what the State objected [to], though. That's what you refused. So here we are without Ms. Haines.**
>
> Furthermore, in terms of the perjury, she is going to get up on the stand and tell the truth that her statement in the trial in 1989 was a lie and the legislature has just recently changed the law, so there is no statute of limitation on perjury.
>
> So, we have no case law whether that's retroactive. Since it's new law, we have no precedent. But it wouldn't surprise me at all if the State seek[s] to charge her with perjury, should Your Honor find her present statement is true and former is false.
>
> **Be that as it may, perjury, notwithstanding, the woman does not have to be here without a subpoena. She is not coming without a subpoena, and that's where we are.**

(PC-R3. 603-04)(emphasis added).

In its brief at page 27, the State asserts, "Defendant's counsel had undertaken to advise Haines, whom she did not represent, against appearing." Ms. Corey, Mr. Roberts' counsel at the July 16, 1997, hearing never indicated that she had advised Ms. Haines against appearing. In witness preparation of a witness that would be called on Mr. Roberts' behalf, Ms. Corey advised Ms. Haines that contrary to what Mr. Howell had stated to

Ms. Haines, the State had stated in open court that Ms. Haines would be charged with perjury if she testified in conformity with her affidavit and contradicted her trial testimony (PC-R3. 599).[9]

The State fails to acknowledge in its brief that Ms. Haines was not under subpoena because the State had successfully opposed the issuance of a certificate of materiality, necessary for the issuance of a out-of-state subpoena.

At page 27 of its brief, the State asserts, "Defendant then indicated that he was not offering Haines' affidavit as evidence but that it was in the record." Actually, what Ms. Corey indicated is "the only thing we have that we wanted to present today was Rhonda Haines and in lieu of the live testimony, I submit her affidavit which is already in the record" (PC-R3. 604). Thereafter, Ms. Corey attempted to make it clear that she did not want the submission of the affidavit to constitute a waiver of the submission of live testimony from Ms. Haines: "But, I'm not waiving Mr. Roberts' right to get her here live. I want her here live" (PC-R3. 604-05).

At page 27 of its brief, the State asserts, "Defendant rested without presenting any witnesses or evidence." This

[9]When Mr. Rosenblatt accused Ms. Corey of "interference" with a witness, Ms. Corey responded "Good heavens', Your Honor, she is my witness. How can I interfere with my own witness?" (PC-R3. 602).

simply isn't true.[10] In circuit court, the State understood that Mr. Roberts had submitted the affidavit because it then called four responsive witnesses.[11] These witness included the prosecutors who dealt with Ms. Haines and the supervisor of investigation for the State Attorney who conducted a records search regarding Ms. Haines' criminal history.

At page 30 of its brief, the State notes that Harvey Wasserman testimony regarding his search of Ms. Haines' criminal record and during his search, he "determined that in 1984, Haines ha[d] two outstanding charges for prostitution from Broward County, of the four charges that had been filed against her." The State omits mention of Ms. Haines pre-trial deposition of October 18, 1985, in which Ms. Haines testified under oath as follows:

> A. See, I have eleven warrants out for my arrest in Fort Lauderdale.
>
> Q. You have eleven arrest warrants?
>
> A. Um-hum.
>
> Q. Out for you in Fort Lauderdale?

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[10]In fact, subsequently in its brief the State maintains, "Here, this Court had remanded this matter for an evidentiary hearing. At said hearing, Defendant relied upon an affidavit from Haines." Answer/Cross Initial Brief at 53.

[11]If the State's assertion that "Defendant rested without presenting any witnesses or evidence" was correct, why did the State in the circuit court feel the need to present these four witnesses.

A. Um-hum.

Q. And is that exactly eleven? Or twelve or - -

A. It could be maybe a couple less than eleven, but I know its around eleven.

Q. Could be a couple of more than eleven?

A. I don't know.

Q. Eleven is your best guess. Active arrest warrants you have in Fort Lauderdale?

A. Yes.

(PC-R2. 466-67). The State also failed to mention that at trial, Ms. Haines testified that she had eleven fugitive warrants in Fort Lauderdale (R. 2435). She admitted that she lied when she had in 1984 originally advised the police, at the time that she refused to give evidence against Mr. Roberts, that she had only two arrests warrants outstanding(R. 2439).

At page 30 of its brief, the State acknowledges, "Judge Glick learned that Haines had outstanding charges against her from Broward County during deposition in this matter." In fact, Judge Glick's testimony was that "I became aware of the fact after a depo was taken but before the actual trial" (PC-R3. 656). Judge Glick indicated that the deposition in question was the one taken of Rhonda Haines.

At the October 15th deposition of Rhonda Haines, William Howell represented the State. Mr. Howell who was called as a

witness by Mr. Roberts in rebuttal at July 16, 1997, hearing testified that he "very vividly" recalled learning of the eleven outstanding warrants (PC-R3. 706). Interestingly when Mr. Howell questioned Judge Glick at the evidentiary hearing below regarding the eleven outstanding warrants, the following exchange occurred:

> 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 [sic] 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). Strangely, when Mr. Howell was on the witness stand minutes later, he had trouble remembering the discussion with Judge Glick:

> 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. 706). Mr. Howell then testified that "[r]egrettably" nothing was done about the outstanding arrest warrants. "We just left them." (PC-R3. 706).

The State omits from its brief any reference to the simple fact that neither Judge Glick nor Mr. Howell stood up and indicated that Ms. Haines testimony was false when Ms. Haines testified at trial and in her deposition that she had eleven outstanding arrest warrants. Presumably, the reason that neither prosecutor indicated that the testimony was false was the fact that it was true; there were in fact eleven outstanding arrest warrants against Ms. Haines at the time of Mr. Roberts' trial.[12]

At page 34 of its brief, the State describes the findings of the circuit court in the August 11, 1997, order denying Rule 3.850 relief. Nowhere in its recitation does the State acknowledge that Judge Solomon signed the State's draft order

[12] Oddly, in Argument V of the its brief, the State asserts, "this evidence [that there is no record of these arrest warrants now] shows that the charges never did exist and does not enhance Haines' credibility." Answer/Cross Initial Brief at 66. Of course, this contention if true means that the prosecutor's knowingly presented false testimony at Mr. Roberts' trial and violated Napue v. Illinois, 360 U.S. 264, 269 (1959). And Mr. Howell testified in 1997 that Mr. Roberts' counsel made the outstanding warrants a feature of the defense's case: "In fact, they [the eleven charges] 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." (PC-R2. 706).

without making a single change and that the signed order was provided by the State and the State alone (PC-R3. 759).

At page 35 of its brief, the State cites to its response to a rehearing filed in circuit court as establishing that "Defendant had learned of the existence of the order but refused to take any immediate action to obtain a copy of this order, waiting 5 days before asking the State to provide a copy." Not that the State's point is particularly pertinent to any issue in the case, but the response below identified the date that Mr. Roberts' counsel learned that an order had been issued as November 7, 1997, which a 1997 calendar reveals was a Friday (PC-R3. 779).[13] November 8th and 9th constituted the weekend before Tuesday, November 11th, Veterans Day. And that very weekend, undersigned counsel was moving from Tallahassee to Miami because the Florida legislature had divided the CCR office (PC-R3. 776). So really November 12th, the day a copy of the order was requested was the very next working day. Be that as it may, the State below withdrew any objection to the timeliness of the rehearing in light of the chaos created by the legislation as outlined in the reply to the rehearing response that Mr. Roberts filed below which split CCR into three separate entities.

[13]According to the response below, a copy of the order was requested on November 12, 1997 (PC-R3. 779).

At page 37 of its brief, the State notes the testimony of Fariba Komeily that she "had found a notice of hearing for the October 24, 1996, [hearing] which had been sent to Geoffrey Fleck, Defendant's prior attorney." The State omits the fact that Mr. Fleck last represented Mr. Roberts' during his direct appeal in this Court, decided in 1987, nine years before the October 24th hearing (SPC-R3. 82).

At page 40 of its brief, the State begins a four page discussion of the testimony at the October 20, 2000, evidentiary hearing. In the course of this discussion, the State omits reference to the fact that not one single witness was asked about the draft sentencing order found attached to the Glick deposition given on February 15, 1996.

At page 41 of its brief, the State asserts "McClain did not find a draft of the sentencing order in these records." The State omits reference to the fact that the State was permitted cross-examination of Mr. McClain and did not ask a single question about the document attached to the Glick deposition.

In fact, no one was asked about it. William Howell, one of the assigned Assistant State Attorney, testified in direct examination by Joel Rosenblatt as follows:

> Q. Were you able to ascertain whether or not there are any records of a draft order in the State Attorney's Office with regards to this case?
>
> A. I did. There are no records of a draft order.

(SPC-R3. 456).

Mr. Howell, subsequently elaborated:

> Q. In terms of the orders, the question was if you had any knowledge of anybody else in the State Attorney's Office drafting a sentencing order and I believe the answer was you don't recall.
>
> I mean - -
>
> A. Let me clarify that if I could, please.
>
> Two people would have prepared the sentencing order and only two, if the State prepared it, Lenny Glick or me. I did not prepare the sentencing order. I was never asked to prepare the sentencing order. I never saw the sentencing order prior to its - - prior to its signature by Judge Solomon.
>
> I'm not so sure I saw the sentencing order prior to the preparation for this hearing. I don't believe I have ever signed [seen] that sentencing order before the year 2000.

(SPC-R3. 458).[14]

At the evidentiary hearing, Mr. McClain sought to inquire of Fariba Komeily, the Assistant Attorney General assigned to Mr. Roberts' case between the years of 1993 and 2000, as follows:

> Q. During that time, prior to April 7th of the year 2000, was there anything in the record that you saw to alert an attorney like myself regarding the drafting of the sentencing order by the State on an ex parte basis?

[14]Bill Howell's testimony would indicate that the draft of the sentencing order attached to Judge Glick's deposition was not in possession of the State Attorney's Office and was unknown to Mr. Howell at the time of his testimony.

A. I'm not sure I understand the question.

Q. Well, the question is, you raised in a pleading that you filed the question of whether or not I had been diligent in looking at this issue.

Prior to April of the year 2000, was there anything in the records that you can point to that should have alerted me to this issue?

MR. HOWELL: Judge, I'm going to object to the relevance of it.

THE COURT: Sustained.

(SPC-R3. 453).[15]

As his testimony indicated, Mr. McClain did not know of the attachment to the Judge Glick's deposition. As the deposition clearly shows, Mr. McClain did not take the deposition. On the date the deposition was taken, Mr. McClain was in Maryland representing Mr. Roberts in state court proceedings there. Peter Mills, an Assistant CCR, covered the deposition on behalf of Mr. McClain. In the deposition, there is no reference to the draft order (PC-R2. 294-311). No testimony occurred concerning it and its origins at all. Other documents attached to the deposition were inventoried and noted as being provided by Judge Glick from his personal files. Since Mr. Mills had all the attached documents inventoried for the record, the failure to list the draft order would suggest he did not see it. Mr. McClain never

[15]The question was only irrelevant if the State had abandoned its claim of a lack of diligence.

learned that a document had been provided the court reporter that was not inventoried or discussed in the deposition (SPC-R3. 513). Certainly, Mr. McClain would not have asked the question he asked Ms. Komeily on October 20, 2000, if he had known such a document was provided the court reporter at Judge Glick's deposition. And in fact, Mr. McClain testified on cross-examination that he was unaware of a draft sentencing order in this case (SPC-R3 422 "Q. But certainly there was no draft sentencing order in this case? A. There was no draft sentencing order that I was provided in this case.").

After the attempt to inquire of Ms. Komeily,[16] Mr. McClain asked no further questions regarding what documents or evidence existed which should have put Mr. McClain on notice of the potential claim prior to July of 1996 when he learned of the testimony of Judge Solomon at the Dieter Riechmann evidentiary hearing. The reason such questions were not asked was because the State maintained that such questions were irrelevant, and Judge Bagley sustained the State's objection.

[16]For example, Fariba Komeily testified before Bill Howell. Given the objection during her testimony, no clarifying questions on cross-examination concerning his testimony that there were no records of a draft order in the State Attorney's Office. In context, it was clear at the hearing that the State was relying upon the absence of a draft sentencing order as evidence that impeached Judge Solomon's recall.

In fact, the State's position at the evidentiary hearing was that Judge Solomon was mistaken; the State did not draft the sentencing order. It was only in the post-hearing memorandum that the State began touting the completely unexplained draft of the sentencing order.[17] But even then, the State inexplicably maintained that the draft sentencing order meant nothing as to the merits of the claim because the prosecutors had testified that they did not draft it and Judge Solomon was mistaken when he asserts that the State did draft it.[18]

At page 42 of its brief, the State asserts, "Judge Solomon testified that he believed that the State drafted the sentencing

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[17] The State's conduct would suggest sandbagging.

[18] As Mr. Roberts asserted in his Motion to Strike the State's closing memorandum, the thread of logic underlying the State's memorandum can at a minimum be described as completely and totally inconsistent and utterly illogical. The simple question which the State refused to answer below was: What does the draft order mean as to whether under Riechmann ex parte contact occurred in the preparation of the sentencing order in Mr. Roberts' case? As to diligence, the State asserted that in essence it meant everything; collateral counsel should have known he had a meritorious claim. Yet, as to the merits, the State asserts it meant absolutely nothing because the prosecutors denied drafting the order and Judge Solomon was mistaken in testifying otherwise. The reality is that the draft order was not introduced at the evidentiary hearing and Mr. Howell testified for the State that it did not exist (SPC-R3. 456-57).

order in this matter."[19] In fact, Judge Solomon's testimony was much more certain than the State acknowledges:

> Q. Judge Solomon, do you recall in Mr. Roberts' case also known as Mr. McCullars having the State draft the sentencing order?
>
> A. The State drafted the order.
>
> MR. MCCLAIN: May I have one moment, Your Honor?
>
> THE COURT: Yes.
>
> BY MR. MCCLAIN:
>
> Q. Do you recall which prosecutor did that?
>
> A. No.
>
> Q. Was that your standard practice?
>
> A. Yes.

(SPC-R3. 144). In cross-examination by Mr. Rosenblatt, the following testimony was elicited:

> Q. 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?
>
> A. We are on this case.
>
> Q. Yes. Do you have a specific recollection of an Assistant State - - of asking any assistant to draft an order in this case?
>
> A. No.

[19] Judge Bagley specifically found in his order granting relief that Judge Solomon "stated unequivocally that he asked someone from the State to prepare the order" (SPC-R3. 524).

Q. So, you are not saying that?

A. I did not draft it.

Q. And?

A. The State Attorney's Office did draft it.

(SPC-R3. 145).

At the October 20, 2000, evidentiary hearing, Mr. Roberts relied upon Judge Solomon's testimony from the April hearing. The State, however, 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. 434). On cross-examination, he stated that the procedure employed in the Riechmann and Maharaj cases in which the State drafted the sentencing order on an ex parte basis was the same procedure employed in Mr. Roberts' case (SPC-R3. 435-36). These were the three cases in which he had imposed sentences of death, and he followed the same procedure in all three cases (SPC-R3. 435). Judge Solomon testified that he did not remember whom the prosecutors were that he spoke to in the three cases. However, he did remember that he followed the same procedure in all three cases ("You just know that it happened? A. Yes." SPC-R3. 436).

The State omits from its brief reference to Judge Bagley's determination that Judge Solomon's testimony was truthful and

that he had engaged in ex parte contact with the State and had State draft the sentencing order without defense counsel's knowledge. Judge Bagley indicated, "Judge Solomon testified 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.'" (SPC-R3. 524). Judge Bagley concluded, "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."(SPC-R3. 526). In fact, Judge Bagley indicated that this was "established by clear and convincing evidence." (SPC-R3. 527).

SUMMARY OF THE ARGUMENTS

In his Initial Brief, Mr. Roberts set forth his Summary of the Arguments for the five arguments he raised in support of his appeal. He will not unnecessarily repeat them here. Herein, Mr. Roberts does include the summary of his argument as to the issue raised by the State in the cross-appeal.

In its closing memorandum below, the State first advanced its argument that Mr. Roberts' claim that the State had improperly drafted the sentencing findings on an ex parte basis was procedurally barred. Judge Bagley properly found this procedural bar argument to be "without merit." Now, once again the State advances this argument without acknowledging that Judge Bagley specifically decided that the State's contention had no merit, let alone identifying any error in Judge Bagley's factual determination. Judge Bagley's ruling is supported by competent and substantial evidence.

Further, having objected to Mr. Roberts' effort to ask a witness for the State, Assistant Attorney General Fariba Komeily, "was there anything in the records that you can point to that should have alerted me to this issue?" on relevance grounds, the State in circuit court waived its procedural bar argument.

The State does not contest Judge Bagley's determination that ex parte contact occurred and that Judge Solomon "completely abdicated and delegated the statutory duty to conduct an

independent and comprehensive evaluation of the applicable aggravating and mitigating circumstances." The State advances no argument that the ruling on the merits of this claim was in anyway erroneous. As a result, the State has waived any argument that Mr. Roberts' claim was not meritorious.

REPLY ARGUMENTS

ARGUMENT I

The State erroneously asserts that rulings on motions to disqualify are reviewed pursuant to an abuse of discretion standard. Not one case is cited by the State for this proposition. In fact, all of the case law that Mr. Roberts included in his initial brief indicated that the issue of whether disqualification is required is a legal one. 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 513, 515 (Fla. 1993)(quoting Livingston).

The State in presenting its argument that the motion to disqualify was not timely filed states: "Mandate issued from the appeal from the summary denial of the second motion for post conviction relief on October 4, 1997." Answer/Cross-Initial Brief at 46. The State is mistaken regarding the year, the

mandate issued on October 4, 1996. The State also makes the same mistake regarding the date of the motion to disqualify which was in fact filed on October 16, 1996. The State argues that the twelve-day gap between this Court's issuance of the mandate and the date of filing the motion rendered the motion untimely.

The State does not acknowledge that this argument was made below and rejected by Judge Solomon. The Motion for Leave to Depose and the Amended Motion to Disqualify were orally argued on January 9, 1997 (PC-R3. 182-213). Mr. Roberts' counsel argued that under the decision in State v. Menses, 392 So.2d 905 (Fla. 1981), jurisdiction was not returned to the circuit court until the mandate was issued and received (PC-R3. 185).

In fact, this Court stated in Blackhawk Heat & Plumbing Co. v. Data Lease Financial Corp., 328 So.2d 825, 827 (Fla. 1975), "When the mandate was received by the trial court, such court should have carried out and placed into effect the order and judgment of this Court." And in O.P. Corp. v. North Palm Beach, 302 So.2d 130, 131 (Fla. 1974), this Court indicated that the mandate communicates to the lower court its obligation to comply with the appellate court's judgment. Thus as a communication to the circuit court, this Court's mandate can only logically accomplish its mission upon its receipt. Therefore, it is at that point that jurisdiction is returned.

As Mr. Roberts' counsel explained to Judge Solomon, "October 7 is when this Clerk's Office received the mandate. October 4 was a Friday; October 7 was a Monday." (PC-R3. 199). 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. Thus, there was a determination that Mr. Roberts' motion, which was filed within ten days of the receipt of the mandate, was timely filed.

Be that as it may, Mr. Roberts argued in his Initial Brief that it was the denial of his Amended Motion to Disqualify and his Motion to Depose, both filed on November 12, 1996, which constituted error. These motions were filed within ten days of the decision in State v. Riechmann granting Mr. Riechmann a resentencing. Based upon that decision, Mr. Roberts sought to depose Judge Solomon "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)(emphasis added). Mr. Roberts' argued for disqualification in light of his motion seeking to depose Judge Solomon which was filed on November 12,

1996. Mr. Roberts sought to question Judge Solomon in light of the November 4, 1996, ruling in State v. Riechmann finding that Judge Solomon engaged in his ex parte contact with the State and had the State draft the sentencing order in that case (PC-R3. 50).

Mr. Roberts' counsel at the January 9th hearing stated:

> At this point in time, I am in the position where I want to be able to depose Your Honor very much like in the situation of what happened in State versus Lewis where . . . .
>
> In this instance, I would like to able to depose Your Honor in order to obtain testimony; but, Your Honor, while you are presiding on this case, you cannot be the presiding judge and the witness, of course, and for that reason, I also believe that Your Honor should disqualify himself so that that deposition can occur.

(PC-R3. 201-02).

Thus, counsel made it clear that Mr. Roberts needed to know if the conduct, which had occurred in Riechmann, also occurred in Mr. Roberts' case. At that point, Judge Solomon knew that he had engaged in the same conduct in Mr. Roberts' case and that it created a cognizable claim upon which relief could be granted, as it had been done in Riechmann. The judge also had to know that he could not preside over a Rule 3.850 proceeding if such a claim was presented. Yet, Judge Solomon, who later testified under oath that he engaged in the same conduct in Mr. Roberts' that he engaged in Riechmann and which warranted Rule 3.850 relief, chose to deny the motion to disqualify and to deny the motion to depose

without revealing his ex parte conduct which warranted a resentencing. This was error.

Judge Bagley has found that Judge Solomon's testimony when it was heard four years later established that a resentencing was required. Yet, Judge Solomon refused to disqualify himself and allow the deposition to take place. Under the principle that this Court enunciated in Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993), Mr. Roberts should be put "in the same position he would have be in if [the relevant information] had been disclosed when first requested."

At page 48 of its brief, the State says: "Even if Judge Solomon had improperly denied the motion to disqualify, Defendant would still be entitled to no more relief than he has already received."[20] To support this position, the State cites State v. Mills, 788 So.2d 249 (Fla. 2001). The State says that this Court "held that the granting of sentencing relief mooted any issue regarding the conviction." Answer/Cross-Initial Brief at 49. The State's reading of Mills is in error. In Mills, the disqualification claim was that the judge should have disqualified himself prior to conducting the penalty phase ineffective assistance of counsel evidentiary hearing. Since the best outcome from an evidentiary hearing on penalty phase ineffectiveness had already been achieved, this Court found the

[20]The State's argument seems odd given that in its brief it does challenge the decision granting the resentencing.

issue moot. This Court specifically stated "[t]he evidence presented at the evidentiary hearing does not call into question Mills' conviction for first-degree murder." Mills, 788 So.2d at 251. That is not the situation here.

Mr. Roberts' case had been remanded for an evidentiary hearing. This Court ordered an evidentiary hearing to hear the testimony of Rhonda Haines and determine whether her recantation of her trial testimony warranted a new trial. In these circumstances, the granting of a resentencing does not moot out Mr. Roberts' claim that Ms. Haines' affidavit when considered cumulative with other errors warrants a new trial.

Mr. Roberts' 1997 evidentiary hearing was presided over by a judge who has since admitted he engaged in ex parte communication when sentencing Mr. Roberts to death. When Mr. Roberts asked this judge to disqualify himself so that Mr. Roberts' counsel could inquire if such ex parte contact had occurred, this judge denied the motion to depose and the accompanying motion to disqualify. Such action had to be error, calling into question the judge's fairness and raising questions about his motives. It legitimately puts Mr. Roberts in fear that he did not receive the cold neutrality to which he was entitled from Judge Solomon. The decision to deny the motions must be reversed.

ARGUMENT II

The State erroneously asserts that the determination that certificates of materiality may not be issued in Rule 3.850 proceedings is reviewed pursuant to the abuse of discretion standard. Answer Brief at 50. It is hard to imagine a more straight up legal question. The State's position to the contrary is ridiculous.

The State argued below that Sec. 942.03(1), Fla. Stat. (1995), did not authorize the circuit court to issue a certificate of materiality in Rule 3.850 proceedings because such proceedings "are in the nature of independent civil actions." (PC-R3. 386). And before this Court, the State asserts "post conviction motions are not steps in a criminal prosecution; they are civil in nature." Answer/Cross-Initial Brief at 51.

This Court recently repudiated the State's position in Miami-Dade County v. Jones, — So.2d — , Case No. SC00-1427(Fla. August 23, 2001). There, this Court stated:

> The County maintains, however, that section 916.115 cannot provide a statutory basis requiring them to be financially obligated to cover the cost at issue in this case because this statute relates to "criminal" proceedings, whereas postconviction proceedings are "civil" in nature. We believe the County's emphasis upon the civil versus criminal distinction is misdirected. Specifically, in State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 409-10 (Fla. 1998), we noted:
>
> > Technically, habeas corpus and other postconviction proceedings are classified as civil proceedings. Unlike a general civil action,

> however, wherein parties seek to remedy a private wrong, a habeas corpus or other postconviction relief proceeding is used to challenge the validity of a conviction and sentence. Consequently, postconviction relief proceedings, while technically classified as civil actions, are actually quasi-criminal in nature because they are heard and disposed of by courts with criminal jurisdiction. (Citations omitted.)
>
> The criminal postconviction proceedings involved here may well be designated "civil," but they involve interests and considerations that are more closely aligned with those traditionally and fundamentally protected in criminal proceedings and recognized in chapter 916.

The State's argument that a circuit court is not authorized in Rule 3.850 proceedings to issue is certificates of materiality is simply erroneous.

In its brief at page 52, the State says "the fact that another circuit had misapplied a statute that by its own terms did not apply does not show that the lower court here abused its discretion."[21] This is apparently in reference to the string of other Rule 3.850 proceedings that Mr. Roberts' cited in his Initial Brief in which circuit courts had issued certificates of materiality in Rule 3.850 proceedings. The State seems to miss the point that the precedent is well established that circuit

[21]Again, this is not a matter of whether Judge Solomon abused his discretion, but whether he misread the statute at the State's urging.

courts are authorized in Rule 3.850 proceedings to issue certificates of materiality.[22]

Moreover, the fact that other similar situated capital defendants have been afforded the ability to subpoena witnesses from at out of state to prove their claims, but Mr. Roberts has been denied that tool, creates as was noted in the Initial Brief a due process issue.[23]

The State asserts that "Haines had indicated that she was willing to attend the hearing voluntarily." Answer/Cross-Initial Brief at 52. For this proposition, the State relies on an unsworn statement by William Howell regarding a telephone conversation he had with Ms. Haines several weeks before the evidentiary hearing. Mr. Howell indicated on the record:

> I finally talked to her on June 23rd of 1997. That is about, I guess about three weeks ago now. It was a Monday. I called her at her - - I can't remember

[22]In fact since the filing of the Initial Brief, undersigned counsel has participated in an additional evidentiary hearing in which certificates of materiality were issued. State v. Mordenti, Case No. 90-3870, 13th Judicial Circuit (Hillsborough County), following this Court's remand for an evidentiary hearing in Mordenti v. State, 711 So.2d 30 (Fla. 1998).

[23]Similarly, the State entirely misconstrued Mr. Roberts' citation to Johnson v. Singletary, 647 So.2d 106 (Fla. 1994). Therein, Justice Overton in his concurring opinion noted that it was necessary to afford Mr. "**Johnson an opportunity to present evidence [corroborating the affidavits].**" Id. at 111 (emphasis added). 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 not afford Johnson the same evidentiary hearing opportunity." Id. And on remand, Mr. Johnson was afforded the tools necessary to obtain out-of-state witnesses.

> whether I called her home or work, but I got in touch with her at any rate and I spoke with her. She was very cooperative. She said she was willing to come. She said that all she needed was something for her work. She just started a new job as a therapist in a nursing home or some similar typed of facility. That she would even - - she said she would need something. She would need a subpoena or a letter. It doesn't [sic] matter to her which one it was, but she just needed something for her work and was willing to come.

(PC-R3. 598). He then indicated that when he talked to her again after he got back from a vacation that she said that she understood that the State was considering charging her with perjury and that she was not coming to testify.[24]

Jennifer Corey, Mr. Roberts' counsel at the July, 1997, hearing then said:

> MS COREY: I'm not sure what that was, whether it was testimony or argument. If it was testimony, I would like the witness sworn.

(PC-R3. 599). Judge Solomon interjected that his "understanding was for the last few months that the lady was going to come

[24]This is the same Mr. Howell who testified in October of 2000 that he had searched the entire State Attorney's office to find a draft sentencing order in Mr. Roberts' case and was unable to find one, then weeks later attached one to his closing memorandum. This is the same Mr. Howell who questioned Judge Glick about their pre-trial discussion regarding Ms. Haines' eleven outstanding arrest warrants, but moments later when he took the stand was unable to recall the discussion. This is the same Mr. Howell who repeatedly appeared before Judge Platzer for ex parte proceedings regarding Mr. Roberts' case.

voluntarily and she wanted to come." (PC-R3. 603).[25] Ms. Corey responded:

> Your Honor, that may have been your understanding from the State, but I certainly never told you that. She certainly never told me that. Even if she was willing to come, there is no legal method to force her to come, there is no legal method to force her to come without issuing a certificate of materiality as we asked Your Honor to do.
>
> I cannot be in a position as Mr. Roberts' attorney of relying on her good graces, trusting the fact that she will get on the plane and be here when I ask her to be here.

(PC-R3. 603).

Contrary to the State's argument in its brief, there was no invited error by Mr. Roberts' counsel. Judge Solomon at the State's urging refused to issue the certificate of materiality necessary to obtain an out-of-state subpoena. That was the error. Mr. Roberts' counsel did not invite this error; counsel opposed it repeatedly requesting a certificate of materiality.

[25]It is a mystery why Judge Solomon thought that for the past few months it was understood that Ms. Haines was coming voluntarily when Mr. Roberts' counsel had repeatedly sought a certificate of materiality. Moreover, Mr. Howell's statement was that he had first talked to her about the July hearing three weeks before the hearing, and the July 16, 1997, hearing was the first time thereafter that Mr. Howell spoke to Judge Solomon about Mr. Roberts' case in the presence of Mr. Roberts' counsel.

The State use of the phrase "invited error" is a misnomer.[26] Apparently, the State is attempting to argue that the error was harmless because Mr. Roberts could have lied to the witness to get her to Florida or not have informed her of the expected cross-examination by the State. Yet, even Mr. Howell acknowledged in his unsworn statement that Ms. Haines never said she would come to Florida without paperwork (PC-R3. 598).

Moreover, standard witness preparation requires a discussion with the witness of the line of inquiry the witness is likely to face on cross-examination. The State repeatedly stated in circuit court that it intended to charge Ms. Haines with perjury if she testified in conformity with her affidavit. Before calling Ms. Haines as a witness, Mr. Roberts' counsel had to insure that Ms. Haines' affidavit was true. And Ms. Haines indicated that her affidavit was true, as Mr. Roberts' counsel put on the record. Ms. Haines' absence was not invited by Mr. Roberts or his counsel.

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[26] For its invited error argument, the State cites Czbak v. State, 570 So.2d 925, 528 (Fla. 1990). However, Czubak does not support the State's argument. In Czubak, this Court explained, "a party may not make or invite error at trial and then take advantage of the error on appeal." In Czubak, this Court found Mr Czubak's counsel did not invite the error. That is the situation here. Mr. Roberts' counsel tried to get the certificate of materiality issued. It was Judge Solomon at the State's urging that refused to issuance the certificate of materiality.

Under standard harmless error analysis, it is the State's burden to prove the error harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Logically to show that the error was harmless the State must prove that Rhonda Haines either would not have testified even if a certificate of materiality had issued or that she would not have testified in conformity with her affidavit. And this the State has not done, nor can it do on the record before this Court.

More importantly, the error at issue here is a structural defect not subject to harmless error analysis. Structural defects are those errors "affecting the framework within which the trial proceeds, rather than simply an error in the trial process." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Such errors are not subject to a harmless error analysis as they "render a trial fundamentally unfair." Rose v. Clark, 478 U.S. 570, 577 (1986).

This Court remanded this case for a bench trial to hear from Rhonda Haines and evaluate her testimony. Yet, because the State convinced Judge Solomon not to issue a certificate of materiality, Mr. Roberts' could not get an out-of-state subpoena issued to compel her testimony. It is hard to imagine a more basic structural defect in the "framework" of the proceedings below rendering the bench trial "fundamentally unfair."

ARGUMENT III

At page 54 of its brief, the State opens its Argument III with the statement that: "Defendant next contends that the order denying his second motion for post conviction relief should be vacated and that **Judge Platzer should be recused based** on alleged ex parte proceedings before her." (emphasis added). This is not an accurate recitation of Mr. Roberts' position. Mr. Roberts contended in his Initial Brief:

> 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.

Initial Brief at 69. Mr. Roberts is claiming that he was deprived of due process when the State and Judge Platzer gathered to discuss how to proceed. Initial Brief at 63.

The dispute between the parties comes down to the accuracy State's following assertion: "Judge Solomon was assigned to hear Defendant's second motion for post conviction relief on February 20, 1996, after a hearing at which Defendant was represented. [Record citation] **As such, this matter was not before Judge Platzer.**" Answer/Cross Initial Brief at 54 (emphasis added). On October 24, 1996, an on-the-record proceeding occurred in front Judge Platzer. The transcript of the hearing appears at PC-R3. 45-49 with a caption that indicated a proceeding in the case of

"State of Florida vs. Rickey Roberts." During the hearing, Judge Platzer was advised that Rickey Roberts was on death row and that Judge Solomon had last heard the matter. "The Florida Supreme Court reversed position [sic] of his order and set [sic] it back for a hearing." (PC-R3. 47). Judge Platzer then asked: "Are you here to send it back to him?" Mr. Howell responded: "Yes." (PC-R3. 48).

The transcript indicates that the matter was very much before Judge Platzer. The State does not dispute that the fact that neither Mr. Roberts nor his collateral counsel received notice of this hearing. The State does not dispute that neither Mr. Roberts nor his collateral counsel were present for this hearing. And finally the State cannot dispute that on October 24, 1996, Mr. Roberts had on file a motion seeking to disqualify Judge Solomon.[27] Implicitly, that means that Mr. Roberts was denied the opportunity to be heard when Judge Platzer asked: "Are you here to send it back to [Judge Solomon]?" (PC-R3. 47).

The State argues that it does not matter because "this matter was not before Judge Platzer." According to the State, it was not before Judge Platzer because the record does not show that she decided the case was before her -- "the proceeding on October 24, 1996, does not show that Judge Platzer had the

[27] Yet, the State argues that the motion to disqualify was untimely filed. Answer/Cross Initial Brief at 46.

proceeding before her at that time." Answer/Cross Initial Brief at 55.

So according to the State the bottom line is that when Judge Platzer, at the State's ex parte urging, decided to do as the State asked and remove the case from her calendar, that determination was binding on Mr. Roberts and precludes consideration of his challenge to the ex parte nature of the determination. So a decision made in his absence and without any representation is binding upon him. A clearer violation of due process (i.e., notice and opportunity to be heard) is hard to imagine.

ARGUMENT IV

At page 57 of its brief, the State opens Argument IV with the statement that "this issue is unpreserved and without merit." The State then continues, "[i]n the lower court, Defendant never moved to disqualify Howell."

The record demonstrates that the State is in error in this regard. At the commencement of the July 16, 1997, hearing the following transpired:

> MS COREY: In terms of housekeeping since Mr. Howell is here and going to be a witness, I would invoke the rule.
>
> I would object to him proceeding as a witness and attorney in this case.
>
> MR. HOWELL: I'm not going to be a witness.

> MS. COREY: Actually, Mr. Howell will be a witness and Mr. Rosenblatt and I arranged [that] Mr. Howell would answer his depositions questions that Your Honor ordered we had - - we had certified.
>
> Because of the budget problems in the office, I couldn't get down prior to then and Mr. Rosenblatt and I agreed we would ask the questions on the stand and my understanding is Mr. Howell would be called as a witness for the State.
>
> If that is wrong, he is going to be the witness for the deposition questions.

(PC-R3. 605-06).

After the State argued against excluding Mr. Howell, Ms. Corey explained on behalf of Mr. Roberts the objection:

> MS. COREY: Your Honor, I would say that Mr. Howell can't act as a witness and advocate in the same proceedings, and if it's possible he is going to be a witness, [he] can't be an advocate.

(PC-R3. 611).

In his Initial Brief, Mr. Roberts relied on Rule 4-3.7 of the Rules of Professional Conduct which state in pertinent part, "[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 . . . ." (Initial Brief at 70). The argument advanced in the Initial Brief is precisely the argument advanced by Ms. Corey below, and that Judge Solomon overruled (PC-R3. 611-12).

As for the merits, the State argues "a defendant must show that he was actually prejudiced by the participation of the

prosecutor." Answer/Cross Initial Brief at 57. For this proposition, the State relies principally on Farina v. State 680 So.2d 392, 395-96 (Fla. 1996), and Meggs v. McClure, 538 So.2d 518 (Fla. 1st DCA 1989). However in those cases, the challenge was made to the elected state attorney and the entire state attorney's office. That is not the situation here. Mr. Howell is not the elected state attorney, and the entire office is not being challenged.

Another case cited by the State is more pertinent. That is State v. Christopher, 623 So.2d 1228 (Fla. 3rd DCA 1993). There, a motion to disqualify a particular prosecutor was made because he had material knowledge. The court held that a showing of actual prejudice was required because "the order under review here was specifically not based upon the 'witness-advocate' rule." Christopher, 623 So.2d at 1229. Prejudice had to be shown because:

> First, the State has clearly and unequivocally stated that it will not call Kastrenakes to testify on its behalf in this case. Second, the record is devoid of any proffer, suggestion, or intimation as to what possible knowledge, if any, that Kastrenakes might possess about which Christopher could have him testify in furtherance of Christopher's defense.

Christopher, 623 So.2d at 1230. That is not the situation here. It was announced that Mr. Howell was definitely going to be a witness, and in fact he was a witness. Thus, the importance of Christopher here is the principle that prejudice need not be

shown beyond the fact that the particular prosecutor being challenged is a witness. If the witness-advocate rule is the basis of the disqualification motion, prejudice is not element of the claim.

The State also cites Scott v. State, 717 So.2d 908 (Fla. 1998). Mr. Roberts acknowledges that Scott is factually very similar.[28] However, this Court before finding no error under the circumstances of that case, noted that:

> [T]he record shows that Selvig [the prosecutor in question] served appropriately as an advocate for the State during the evidentiary hearing and that his conduct comported with the Rules of Professional Conduct and with this Court's rules of procedure.

Scott, 717 So.2d at 910. Mr. Roberts argues that the circumstances are different in his case where the record is rife with ex parte contact between Mr. Howell and Judges Platzer and Solomon. And now before this Court, the State is asserting that Mr. Howell knew at the time of trial that Ms. Haines did not have eleven outstanding arrest warrants and did not correct her testimony ("As the State only learned of these alleged charges at Haines' deposition, this evidence shows that the charges never did exist and does not enhance Haines' credibility." Answer/Cross Initial Brief at 66). This, if true, certainly was an ethical violation. Napue v. Illinois, 360 U.S. 264, 269

[28] Mr. Roberts would note that this Court in Scott did not hold that prejudice was element of a witness-advocate claim.

(1959).[29] Accordingly, Mr. Roberts submits the circumstances here warrant a finding of error.

Finally, the State disingenuously asserts in footnote 6 of its brief, "Defendant would be hard pressed to complain about Howell's action at that point, as Defendant had already called his own counsel to testify on his own behalf." Of course, it was years later when Mr. Roberts called his own counsel to the stand to testify to counsel's diligence on what he believed was an uncontested issue (Rule 4-3.7(a)(4), Rules of Professional Conduct). Judge Solomon had already overruled years before Mr. Roberts' advocate-witness objection to Mr. Howell's participation. Moreover, the State did not object and preserve any issue regarding this.

ARGUMENT V

As to Judge Solomon's failure to conduct any cumulative analysis in his order denying relief, the State argues, "[a]s the lower court properly determined that the new claims were without

[29] Mr. Roberts uses the caveat "if true" because Mr. Howell's testimony at the evidentiary hearing squarely contradicts the State's assertion before this Court. Mr. Howell testified in 1997 that: "In fact, they [the eleven charges] 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." (PC-R2. 706). The State's assertion in this Court would indicate that Mr. Howell lied in his testimony. That too would distinguish Mr. Roberts case from what this Court concluded was the situation in Scott.

merit and the prior claims upon which Defendant relies were also found to be procedurally barred or without merit, this claim was properly denied."[30] Answer/Cross Initial Brief at 62. According to the State, if two Brady claims are separately found meritless, no cumulative consideration is required. However, the State's contention was specifically rejected in Kyles v. Whitley, 514 U.S. 419 (1995), and in Lightbourne v. State, 742 So.2d 238 (Fla. 1999). Even in Jones v. State, 709 So.2d 512, 526 (Fla. 1998), this Court considered the cumulative effect of all the claims that had separately been found to be without merit. Cumulative analysis is required and was not conducted here.

The State also argues that, "Defendant presented no evidence at the evidentiary hearing regarding what efforts had been made to locate Haines before 1996." Answer/Cross Initial Brief at 63. Of course, the State overlooks the fact that Mr. Roberts was relying on Rhonda Haines to establish that she had hidden herself so that she could not be found by Mr. Roberts' counsel. In her affidavit she stated, "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." (PC-R2. 103).

[30] The order was Judge Solomon's only in the sense that he signed the draft order provided by the State without making a single change (SPC-R3. 102, 110).

Moreover, Mr. Roberts' claims arising from Ms. Haines' affidavit include a Brady/Giglio claim and a newly discovered evidence of innocence claim under Jones v. State, 591 So.2d 911 (Fla. 1991). The Brady claim is premised upon the undisclosed impeachment evidence that Ms. Haines has revealed was in the State's possession and not disclosed, and the presentation of her false testimony that she was receiving no consideration in return for her testimony against Mr. Roberts. The State has responded by making alternative and inconsistent factually allegations which constitute further impeachment of the State's trial case. For example, the State has presented the testimony of Mr. Howell regarding whether the State got rid of the eleven outstanding arrest warrants on behalf of Ms. Haines, "[i]n fact, they [the eleven charges] 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." (PC-R2. 706). In Mr. Howell's testimony, he asserts that the charges were not made to disappear in consideration for her testimony, and therefore, the State had nothing to disclose regarding this. So inferentially, there was no disclosure by the State.

But, the State presented at the evidentiary hearing evidence that the charges have in fact disappeared. Because this evidence provides circumstantial corroboration of Ms. Haines' affidavit

(particularly given Mr. Howell's testimony that the warrants were "still pending when we put her on an airplane to go home"), the State has now taken a new tact, claiming that, "Defendant presented no evidence that these charges ever really existed." Answer/Cross Initial Brief at 65. And the State argues, "this evidence shows that the charges never did exist and does not enhance Haines' credibility." Answer/Cross Initial at 66. But, this argument, if true, means that Mr. Howell's testimony was false when he said, "they [the eleven charges] were still pending at the time of trial. They were still pending when we put her on the airplane to go home." (PC-R2. 706).

The State's new contention, if true, establishes a constitutional violation. Ms. Haines testified under oath at trial before the jury she had eleven outstanding arrest warrants (R. 2428).[31] She admitted that she had lied when she was first picked up on accessory charges in Mr. Roberts' case (R. 2426). Initially, she said she had two outstanding warrants (R. 2439). Ms. Haines testified at trial that she had lied, she in fact had eleven (R. 2435). Even though the State objected to the inquiry, the State never indicated that Ms. Haines' testimony was false.

The United States Supreme Court's cases distinguish between incidents of prosecutorial misconduct where a decisionmaker was

[31] The State objected to the inquiry regarding the outstanding arrests (R. 2429). When Mr. Roberts' counsel explained that the inquiry went to the witness' motivations, the State's objection was overruled (R. 2433).

knowingly left with a false impression (cases in the line of Mooney v. Holohan, 294 U.S. 103 (1935)),[32] and cases involving nondisclosure of evidence favorable to the defense where "the good or bad faith of the prosecution" is irrelevant. Brady v. Maryland, 373 U.S. 83, 87 (1963). See Strickler v. Greene, 527 U.S. 263, 281 (1999) (noting distinction between cases involving violations of "duty to disclose" and "earlier cases condemning the knowing use of perjured testimony"); United States v. Bagley, 473 U.S. 667, 679-81 (1985)(noting that different standards of materiality apply in false evidence and nondisclosure cases); Agurs, 427 U.S. at 103-104 ("Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the Mooney line of cases in not necessarily applicable to this case.").[33]

[32] Giglio v. United States, 405 U.S. 150 (972), was specifically cited as one of the "Mooney line of cases" to which the strict reversal standard applies. United States v. Agurs, 427 U.S. 97, 103 n. 8 (1976).

[33] In Kyles v. Whitley, 514 U.S. 419 (1995), before defining the Bagley materiality standard, the Court recounted how in Agurs it had "distinguished three situations in which a Brady claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that the prosecution knew or should have known was perjured." Kyles, 514 U.S. at 433, citing Agurs, 427 U.S. at 103-104. In a footnote following this sentence the Court quoted the requirement that in false testimony cases the conviction "'must be set aside if there is any likelihood that the false testimony could have affected the judgment of the jury.'" Kyles, 514 U.S. at 433 n. 7 (quoting Agurs, 427 U.S. at 103). Preserving the distinction between false evidence cases and "constitutional disclosure cases,"

If the trial prosecutors knew that Ms. Haines' testimony was false (as the State now claims), they had an obligation to correct the false testimony. Therefore, if the State's new claim is true, Giglio, Napue, and Mooney were violated. The State's brief seems to be unwittingly confessing a constitutional deprivation.

However, the reliability of the State's assertions are certainly called into question given its totally erroneous contention that Mr. Roberts' previously Brady claim was procedurally barred. Answer Brief at 66. This Court found the claim lacked merit because "there is no reasonable probability that, had the evidence been disclosed, the result of the trial would have been different." Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990).

The bottom line is that Judge Solomon did not conduct a cumulative analysis as is required under this Court's precedent. Mr. Roberts cited Lightbourne v. State, 742 So.2d 238 (Fla. 1999). The State did not bother to cite, let alone distinguish

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Kyles, 514 U.S. at 436, the Court noted that it would "not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first Agurs category." Kyles, 514 U.S. 433 n.7. Finally, before clarifying the Bagley materiality standard, the Court left intact the distinction between false testimony cases and nondisclosure cases, noting that the Bagley Court only "abandoned the distinction between the second and third Agurs circumstances, i.e., the 'specific-request' and 'general- or no-request' situations." Kyles, 514 U.S. at 433.

or explain why Lightbourne does not control. The judge's failure requires a remand for cumulative consideration, particularly given the State's alternative positions that either Ms. Haines' trial testimony was false as to the eleven outstanding arrest warrants, or she received no consideration and the arrest warrants just magically disappeared on their own.

ARGUMENT VI

THE SENTENCING JUDGE ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND BY FAILING TO DISCLOSE TO MR. ROBERTS AND/OR HIS COUNSEL THE FACT THAT THE STATE PREPARED THE FINDINGS IN SUPPORT OF THE DEATH SENTENCE PURSUANT TO HIS EX PARTE REQUEST.

The State gives short shrift to the circuit court's factual determinations on Mr. Roberts' claim that the State drafted the sentencing findings for Judge Solomon on an ex parte basis. The circuit court specifically 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.

(SPC-R3. 524). The circuit court further found:

> The Court finds that the defendant was not afforded an opportunity to be heard nor was he requested by the sentencing judge to submit a proposed order. In fact, it does appear that trial counsel did not learn about the ex parte communication between the judge and

> prosecutor until or shortly before his testimony at the evidentiary hearing. Furthermore, the Court finds that 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.

(SPC-R3. 526).

The circuit court concluded, "the defendant has established by clear and convincing evidence, which includes the record, testimony and, most particularly, the described practice of the sentencing judge in delegating the aforementioned statutory duty to the State" (SPC-R3. 527).

The State in its brief takes no issue with these factual findings and legal conclusions.[34] The State sole claim of error is based upon its contention that, "Defendant did not show [ ] due diligence." Answer/Cross Initial Brief at 70. For this argument, the State relies upon the presence of an unsigned sentencing order in the materials that Judge Glick provided to Mr. Roberts' collateral counsel at a February 15, 1996, deposition.

[34] Judge Bagley's finding that the claim was meritorious is supported by competent and substantial evidence. Judge Bagley credited Judge Solomon's testimony that he had the State prepare the sentencing findings after engaging in ex parte contact, Judge Solomon's standard practice in obtaining the State's assistance in drafting the sentencing order. Having credited Judge Solomon's testimony, a resentencing was required under this Court's decision in State v. Riechmann, 777 So.2d at 352.

The State first advanced its claim that the unsigned sentencing order appearing as an attachment to Judge Glick's deposition had meaning, not at the evidentiary hearing, but in the closing memorandum filed several weeks later. However, this argument was inconsistent with the State's position at the evidentiary hearing and the State's evidence at the evidentiary hearing. Moreover, Judge Bagley specifically found that the argument lacked merit ("While the State argues that defendant's claim is untimely and could have been presented through due diligence of counsel, the court finds that this assertion is without merit." SPC-R3. 526).

The unsigned copy of Judge Solomon's findings in support of the death penalty in Mr. Roberts' case was not presented at the October 20, 2000, evidentiary hearing. Not one single witness was asked one single question about the specific document on which the State now relies. In fact, Mr. Howell testified as a witness for the State as follows:

> Q. Were you able to ascertain whether or not there are any records of a draft order in the State Attorney's Office with regards to this case?
>
> A. I did. There are no records of a draft order.

(SPC-R3. 456). Mr. Howell, subsequently elaborated:

> Q. In terms of the orders, the question was if you had any knowledge of anybody else in the State Attorney's Office drafting a sentencing order and I believe the answer was you don't recall.
>
> I mean - -

A. Let me clarify that if I could, please.

Two people would have prepared the sentencing order and only two, if the State prepared it, Lenny Glick or me. I did not prepare the sentencing order. I was never asked to prepare the sentencing order. I never saw the sentencing order prior to its - - prior to its signature by Judge Solomon.

I'm not so sure I saw the sentencing order prior to the preparation for this hearing. I don't believe I have ever signed [seen] that sentencing order before the year 2000.

(SPC-R3. 458).

At the evidentiary hearing, Mr. Roberts' counsel sought to inquire of Fariba Komeily, the Assistant Attorney General assigned to Mr. Roberts' case between the years of 1993 and 2000, as follows:

Q. During that time, prior to April 7th of the year 2000, was there anything in the record that you saw to alert an attorney like myself regarding the drafting of the sentencing order by the State on an ex parte basis?

A. I'm not sure I understand the question.

Q. Well, the question is, you raised in a pleading that you filed the question of whether or not I had been diligent in looking at this issue.

Prior to April of the year 2000, was there anything in the records that you can point to that should have alerted me to this issue?

MR. HOWELL: Judge, I'm going to object to the relevance of it.

THE COURT: Sustained.

(SPC-R3. 453).

The question was only irrelevant if the State was not arguing a lack of due diligence. In light of the objection, Mr. Roberts' counsel assumed that questions going towards due diligence were not relevant because diligence was not at issue. From that point on in the hearing,[35] Mr. Roberts' counsel asked no further questions regarding what documents or evidence existed which should have put Mr. Roberts' counsel on notice of the potential claim prior to July of 1996 when he learned of the testimony of Judge Solomon at the Dieter Riechmann evidentiary hearing. The reason such questions were not asked was because the State maintained that such questions were irrelevant. In fact, the State's position at the evidentiary hearing was that Judge Solomon was wrong, the State did not draft the sentencing.

Mr. Roberts was entitled to full and fair Rule 3.850 proceedings. 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). Surely, due process entitles a post-conviction litigant to reasonable notice and opportunity to be heard. Here, the State did not introduce or discuss the unsigned sentencing order on which it now relies. Not a single witness

[35]For example, Fariba Komeily testified before Bill Howell. Given the objection during her testimony, no clarifying questions were asked on cross-examination concerning his testimony that there were no records of a draft order in the State Attorney's Office.

was asked about the draft. Certainly, Judge Glick was not asked to explain its origins.[36] The deposition that he gave in February of 1996 does not refer to the unsigned order in his possession. There is no discussion of where it came from and how it got attached to the deposition.

In October of 2000, the State precluded Mr. Roberts' counsel from asking questions regarding any items that should have put his counsel on notice of the error. Yet, it now seeks to rely on something in the record that it argues should have alerted Mr. Roberts' collateral counsel to the issue. If as the State argued it was irrelevant when Mr. Roberts' counsel asked the question on October 20, 2000, then the State's conduct in making the objection is binding now. The State waived its procedural bar argument and cannot raise this contention now. The objection precluded Mr. Roberts' counsel of presenting evidence on the matter.[37]

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[36] In fact, Judge Glick testified that he did not recall writing the sentencing order, that he did not believe he did write the sentencing order, and that he had no memory of anyone else from the State writing the sentencing order (SPC-R3. 439-42). Obviously, any earlier inquiry of Judge Glick regarding the issue of whether the State drafted the order after receiving an ex parte request from Judge Solomon would not have produced any evidence to support the claim. This, in and of itself, establishes that the only witness who remembered the necessary facts upon which Mr. Roberts could prove his claim was Judge Solomon who in 1996 refused to allow himself to be deposed regarding the authorship of the sentencing order.

[37] Based upon pleadings filed by Ms. Komeily and conversations with her, Mr. Roberts' counsel proffered below that she would have answered the question that she knew of nothing in the record to

Even assuming that Mr. Roberts' counsel should have been on notice on February 15, 1996, to something, what should he have done that he did not do within one year of February 15, 1996. The cognizable claim under State v. Riechmann is ex parte contact, not the possession of an unsigned sentencing order. To have a cognizable claim, a defendant must investigate and present evidence to establish that ex parte contact occurred.

The prosecutors have now testified under the oath. Mr. Howell has stated very clearly that he never saw the sentencing order, let alone draft it, and had no ex parte contact with Judge Solomon (T. 58-59). Judge Glick, who in his deposition made no mention of the mysterious draft and provide no clue as to its origins, has now testified under oath that he does not recall drafting the order or having any ex parte contact with Judge Solomon. The only source of evidence that ex parte contact occurred and the only person who explains how the draft order got to be in Judge Glick's possession is Judge Solomon.

In October and November of 1996, counsel for Mr. Roberts sought to disqualify Judge Solomon so that he could depose Judge

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support Mr. Roberts' claim under Riechmann (SPC-R3. 516-17). Had she in fact given that answer, it would have provided support for Mr. Roberts' claim that he was diligent. Had Ms. Komeily pointed to the draft order, Mr. Roberts' counsel could have examined subsequent witness regarding it, and have retaken the stand to explain the circumstances under which that deposition occurred and why knowledge of the attachment of the draft order to that deposition would not have given rise to a cognizable claim until Mr. Roberts could establish ex parte contact occurred.

Solomon. Mr. Roberts' counsel stated in his motion that he needed to depose Judge Solomon in order "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)(emphasis added).[38]

When Judge Solomon denied the motions to disqualify and depose in January of 1997, there was no one to provide Mr. Roberts' with the proof necessary to make the claim that there had been ex parte contact and that the State had as a result drafted the sentencing order. Implicit in Judge Solomon's order denying the deposition was a tacit denial that ex parte contact had occurred. Further, no one from the State stepped forward to disclose the procedure that had been used to draft the sentencing

[38]This motion to depose Judge Solomon was filed less than one year after the Judge Glick's February 15th deposition and indicated that Mr. Roberts wanted to inquire as to whether the judge had arranged through ex parte contact for the State to write the findings in support of the sentence of death.

findings.[39] At that point, there was no evidence available to prove the claim.

In these circumstances there is competent and substantial evidence to support Judge Bagley's determination that there is no merit to the State's contention that Mr. Roberts' counsel was not diligent. Mr. Roberts' presented evidence that he sought to depose Judge Solomon in 1996 to inquire about the authorship of the sentencing order (PC-R3. 51). At that time, both the State and Judge Solomon were on notice that if such conduct had occurred, Mr. Roberts had would have a viable claim for a resentencing giving the November 4, 1996, circuit court ruling in State v. Riechmann. Yet, neither the State nor Judge Solomon

[39] And in fact, no one from the State Attorney's Office has ever admitted to drafting the sentencing order. Mr. Howell testified that he made an exhaustive search and could find no evidence that a draft sentencing order was in the State Attorney's possession ("There are no records of a draft order." SPC-R3. 456). Mr. Howell also testified that he had no knowledge "of any conversation by Judge Solomon with any other Assistant State Attorney regarding the preparation of this order" (SPC-R3. 457).

disclosed the fact that State had drafted the sentencing order in Mr. Roberts as a result of ex parte contact.[40]

The State does not argue that prior to February 15, 1996, that Mr. Roberts' counsel had any basis for inquiring regarding this matter. The record clearly establishes in November of 1996 that Mr. Roberts sought to find out what Judge Solomon had to say about this issue. And the State can hardly contend that Mr. Roberts could prove his claim without Judge Solomon's testimony. Given that Judge Solomon was the presiding judge over the case, Mr. Roberts had no other means of learning of the evidence that existed in support of the claim. It was only when the matter was remanded for a hearing on Mr. Roberts' motion to get the facts that Mr. Roberts had an opportunity to inquire of Judge Solomon and obtain his testimony. Even then, the State strenuously objected to the line of inquiry (SPC-R3. 139-44). In these circumstances, Judge Bagley's finding that collateral counsel was diligent must be affirmed as it is supported by competent and substantial evidence.

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[40] It should be remembered that the State presented addition evidence at his sentencing before Judge Solomon (R. 3511-13). Ken Lange, Mr. Roberts' counsel, then agued for a life sentence (R. 3537-40). At the conclusion of the argument, Judge Solomon without breaking to consider the arguments or Mr. Roberts' plea for mercy announced he was imposing a sentence of death. Judge Solomon made no oral findings; he simply indicated that he was signing the written findings that he placed in the record (R. 3541). Thus, we now know that Judge Solomon had already communicated his decision to the State prior to the sentencing. This was clearly a due process violation.

CONCLUSION

Based upon the record and the arguments presented herein and in the Initial Brief, 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 before an impartial judge with the necessary tools to obtain witnesses on his behalf. Mr. Roberts respectfully requests that this Court order that William Howell, Assistant State Attorney be disqualified from any further prosecution of Mr. Roberts' case.

As to the State's cross-appeal, Mr. Roberts respectfully urges this Court to affirm Judge Bagley's order granting Mr. Roberts a resentencing.

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 October ____, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Fla. R. App. P. 9.210 (a)(2).

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