IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,670

DANIEL EUGENE REMETA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order denying Mr. Remeta's second Rule 3.850 motion without an evidentiary hearing.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant appeal to this Court;'

All other citations will be self-explanatory.

STATEMENT OF THE CASE AND THE FACTS

Mr. Remeta was indicted by a grand jury for one count of first-degree murder on July I, 1985 (R. 2259). Mr. Remeta was tried by a jury and convicted of premeditated murder in the first degree (R. 2535). A penalty phase was conducted and Mr. Remeta was sentenced to death on the same day (R. 2239, 2554). Mr. Remeta's conviction and sentence were affirmed on direct appeal. Remeta v. State, 522 So. 2d 825 (Fla. 1988). On October 3, 1988, certiorari was denied by the United States Supreme Court. Remeta v. Florida, 109 S. Ct. 182 (1988).

On February 19, 1990, Mr. Remeta timely filed his Rule 3.850 motion. That motion was denied following a limited evidentiary hearing, and this Court affirmed on appeal, as well as denied a state habeas petition. Remeta v. Dugger, 622 So. 2d 452

'Mr. Remeta is writing this brief without the benefit of a record. So there will be no references to page numbers. Further, all references to attachments are the attachments to the appendices filed with the Rule 3.850 motion. Mr. Remeta has already lodged these appendices to the Court.

(Fla. 1993).

Mr. Remeta then filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, which was summarily denied on June 15, 1994. Remeta v. Singletary, No. 93-148-Civ-Oc-16 (M.D. Fla. 1994). An appeal to the United States Court of Appeals for the Eleventh Circuit was subsequently denied. Remeta v. Singletary, 85 F. 3d 513 (I Ith Cir.), reh'q. denied, 96 F. 3d 1459 (11th Cir. 1996).

On January 3, 1997, Mr. Remeta filed a Petition for a Writ of Certiorari in the United States Supreme Court, which was denied on March 24, 1997. Remeta v. Singletary, 117 S. Ct. 1320, reh'q. denied, 117 S. Ct. 1727 (1997).

On December 9, 1997, Governor Lawton Chiles signed a death warrant on Mr. Remeta. He is scheduled to be electrocuted by the State of Florida at 7:00 a.m. on March 31, 1998.

Mr. Remeta filed a motion to compel production of public records, and a hearing was conducted on January 23, 1998.

On February 18, 1998, Mr. Remeta's counsel filed a motion to withdraw due to a conflict of interest. Judge Angel denied the motion, and an appeal was taken to this Court. The Court affirmed, finding no conflict of interest. Remeta v. State, __ Fla. L. Weekly S__ (Fla. 1998).

On March 24, 1998, Mr. Remeta filed a second Rule 3.850 motion, as well as a motion to compel against the Department of Corrections.[2] A telephonic Huff hearing

[2]Mr. Remeta had requested records regarding the executions of Gerald Eugene Stano and Leo Alexander Jones. DOC counsel Mary Ellen McDonald informed the undersigned's office this afternoon that the requested information would be sent via

took place at 4:00 PM on March 25, 1998. After hearing arguments by both parties, Judge Angel issued an order denying the Rule 3.850 motion without an evidentiary hearing early in the morning of March 27, 1998. This appeal follows.

SUMMARY OF ARGUMENT

I. The lower court erred in summarily denying Mr. Remeta's claims regarding the constitutionality of the electric chair. None of the procedural bars found by the lower court is borne out by the Rule 3.850 motion or the record in this case. As the State conceded in its response, Mr. Remeta's claim is predicated on information arising since the March, 1997, botched execution of Pedro Medina. This information was not and could not have been previously raised. Moreover, despite asking to do so, Mr. Remeta was not permitted to participate in the Jones litigation. Mr. Remeta, like Mr. Jones, should be given his day in court. Mr. Remeta alleged information in his Rule 3.850 motion that was never raised in Jones, and the lower court, in its summary disposition of this claim, did not even address these issues. Reversal and a stay of execution are required so that an evidentiary hearing can be conducted.

2. The lower court failed to address Mr. Remeta's claims regarding the financial situation of CCRC-South. Mr. Remeta's counsel received new information as

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Federal Express to arrive at the undersigned's office on Saturday, March 28, 1998. Unfortunately, as the undersigned pointed out to the lower court during the Huff hearing, CCRC-South is out of money and unable to hire an expert to review the documents. See Argument II. These documents are critical to a proper disposition to this claim. For example, Mr. Remeta's counsel understands that during the electrocution of Leo Jones on March 24, 1998, witnesses observed breathing movements from Mr. Jones minutes after the electricity was turned off. Mr. Remeta needs the records, time, and resources in order to confer with experts as to this information, which certainly contradicts the State's position in Jones that death is instantaneous.

a result of public records requests; however, without funds, counsel is unable to investigate any of this information. The State's failure to adequately fund CCRC-South has resulted in a denial of due process and equal protection to Mr. Remeta. Reversal and a stay of execution are required until this Court resolves the funding crisis.

3. The lower court erred in refusing to stay Mr. Remeta's execution while the constitutionality of the Kansas convictions used by the State at the guilt and penalty phases of Mr. Remeta's capital trial continue to be litigated in the courts of Kansas.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE CLAIMS RELATING TO THE CONSTITUTIONALITY OF JUDICIAL ELECTROCUTION.

In denying Mr. Remeta's claim regarding judicial electrocution, the lower court made the following ruling:

> After carefully considering the Motion and appendices filed therewith, the Response to the Motion, the argument presented at the hearing on the claims, and after being otherwise duly advised in the premises, the Court hereby finds that each of the claims and each of the many arguments made in support of each of the claims is procedurally barred in that: 1) the claims were previously raised in Remeta's prior rule 3.850 motion; or 2) through the exercise of due diligence, the claims could have or should have been raised in Remeta's prior rule 3.850 motion; or 3) the Florida Supreme Court has already decided the issues in Jones v. State, 701 So. 2d 76 (Fla. 1997), petition for cert. filed, (U.S. Jan. 20, 1998) (No. 97-7647), and Buenoano v. State, Fla.S.Ct. March 26, 1998, Case No. 92,522.

The lower court erred in all respects in denying this claim as either procedurally barred or already decided on the basis of Jones and Buenoano.

A. The trial court erred in finding Mr. Remeta's claims procedurally barred because they were previously raised in a prior rule 3.850 motion.

Mr. Remeta's claims were not previously raised in a prior rule 3.850 motion. As the State conceded in its response to Mr. Remeta's motion, "the claims contained in Remeta's successive Rule 3.850 motion are based solely on the events of the execution of Pedro Medina in March of 1997" (Response at 12-13). Thus, Mr. Remeta's claim is not "successive" within the meaning of Rule 3.850 (b)(l), as "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." The State conceded this point in its response. Thus, the lower court erred in finding any procedural bar to this claim.

Mr. Remeta's claims in fact could not have been previously raised because they rely on events which have occurred since March 24, 1997: the execution of Pedro Medina and the April 16, 1997 adoption of "Execution Day Procedures" and "Testing Procedures for the Electric Chair" by Department of Corrections (DOC) Secretary, Harry K. Singletary, Jr, (as the State conceded).

B. The trial court erred in finding that Mr. Remeta's claims are procedurally barred because they could have or should have been raised in his prior Rule 3.850 motion.

The trial court erroneously found that Mr. Remeta's claims were procedurally barred because they could have or should have been raised in Mr. Remeta's prior rule 3.850 motion. Mr. Remeta's claims were raised in the same manner in which Leo Jones raised his claims. This Court determined that an evidentiary hearing was warranted in the Jones case. Because Mr. Remeta was prevented from joining the Jones case, he has requested an opportunity to present his evidence - the same opportunity afforded

to Mr. Jones.

Mr. Remeta's claims were not previously raised in his prior rule 3.850 motion because they could not have been - the facts upon which the claims were based had either not occurred or not come to light when he filed his prior Rule 3.850 motion. Again, Mr. Remeta's claims were based on the March 24, 1997 execution of Pedro Medina and the April 16, 1997 modification of DOC's procedures. Again, the State conceded this point below: "the claims contained in Remeta's successive Rule 3.850 motion are based solely on the events of the execution of Pedro Medina in March of 1997" (Response at 12-13).

Under rule 3.850, Mr. Remeta's claims were properly and timely raised and his allegations are unrebutted by the record. The grant of an evidentiary hearing when the facts alleged are unrebutted by the record and would entitle the defendant to relief is the law of this State. A trial court has only two options when presented with a Rule 3.850 motion: "either grant [] an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach(ing) portions of the files and records conclusively showing the appellant is entitled to no relief." Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992); Rodriauez v. State, 592 So. 2d 1261 (2nd DCA 1992); see also Bell v. State, 595 So, 2d 1018 (2nd DCA 1992).

The law strongly favors full evidentiary hearings in capital postconviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because

the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Remeta] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations . . . are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added).

The trial court's denial of this case is in stark contrast to the clear and unmistakable requirements of the law. The trial court failed to attach any record or files in this case to conclusively show that Mr. Remeta is not entitled to relief.

C. **Mr. Remeta was not a patty to the Jones proceedings and the trial court erred in finding his claims procedurally barred by this Court's decision in Jones.**[3]

Mr. Remeta sought leave of this Court to join the Jones case as a party. t request was denied (after being opposed by the State of Florida) and he was therefore not a party to the Jones proceedings. The trial court erroneously found that Mr. Remeta is somehow bound by the decision in Jones. Remeta was not a party to the Jones proceeding.

To the extent the trial court relied on a res judicata bar, the trial court erred. Res judicata refers to the preclusive effect of a judgment on matters that were litigated or

[3] 701 So. 2d 76 (Fla. 1997).

could have been litigated in an earlier suit. See, e.g., Migra v. Warren Citv School District Board of Education, 465 U.S. 77 n.1 (1984). In Florida, "several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identitv of the parties; identity of the quality in the person for or against whom the claim is made." Albrecht v. State, 444 So. 2d 8, 12 (1984). This standard is legally identical to the federal standard that res judicata bars apply only when: 1) there is a final judgment on the merits; 2) the parties, or those in privitv with them are identical in both suits; and 3) the prior lawsuit involved the same cause of action or cause of action that could have been raised. Federal Department Stores v. Moitie, 452 U.S. 394, 398-99 (1981). Because Mr. Remeta was not a party to the Jones proceeding, res judicata bar applies to his day in court. Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958). The trial court erred.

Furthermore, Mr. Remeta alleged in his Rule 3.850 additional evidence that was not adduced in the Jones litigation. For example, Mr. Remeta's petition set forth substantial proffered testimony from Dr. Wikswo, who never testified at the Jones hearing. Also, the only issue addressed in Jones was whether an inmate experiences conscious pain during a judicial electrocution. Mr. Remeta challenged the constitutionality of electrocution due to the mutilation and violence occurring during and resulting from a judicial electrocution. The lower court failed to acknowledge any of this evidence, which was supported with substantial evidentiary proffers in two appendices. The lower court's ruling that these issues were decided in Jones does not comport with the motion filed by Mr. Remeta.

Mr. Remeta requests this Court to stay his execution, reverse the order of the lower court, and order an evidentiary hearing.

ARGUMENT II

THE LOWER COURT FAILED TO ADDRESS MR. REMETA'S CLAIM THAT THE FINANCIAL CRISIS OF CCRC-SOUTH WARRANTED A STAY SO THAT MR. REMETA'S COUNSEL COULD INVESTIGATE NEW LEADS WITH RESPECT TO THE RELIABILITY OF MR. REMETA'S CAPITAL TRIAL AND SENTENCING.

In his Rule 3.850 motion, Mr. Remeta urges the lower court to grant a stay of execution based on his counsel's lack of money to investigate new leads that have developed in his case. Mr. Remeta informed the court that his counsel, the Law Office of the Capital Collateral Regional Counsel - South, due to inadequate funding from the Florida legislature, had no money, cannot incur any expenses, and is thus unable to carry out their ethical obligations to Mr. Remeta.

Mr. Remeta's motion also detailed that his counsel had received numerous public records which he previously did not receive from Florida public agencies. In fact, agencies continued to disclose records until last week.[4] For example, the Florida Department of Law Enforcement just disclosed numerous records late last week, records which had been requested months ago and which were the subject of a motion for an order to show cause filed by Mr. Remeta. Mr. Remeta also received ten (IO) boxes of materials from the State Attorney's Office as a result of a public records request made following the signing of the death warrant. When Mr. Remeta previously made a public

[4]And the Department of Corrections is supposed to provide the records relating to the Stano and Jones executions on Saturday, March 28.

records request to the State Attorney's Office, only two (2) boxes of records were disclosed:

> 1. My name is Cheryl Nuss. I am employed as an investigator at Capital Collateral Regional Counsel - South. One of the cases that I am assigned to is Daniel Remeta. Part of my duties as Mr. Remeta's investigator include sending record request letters on his behalf and acting as custodian of records for all records received on his case.
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> 2. On October 12, 1989, a records request letter was sent to the State Attorney's Office in Marion County asking for all records related to Mr. Remeta. Two boxes of material was received by our office. On December 15, 1997 a second letter requesting all files on Mr. Remeta was sent to the same State Attorney's Office. In response to that letter, ten boxes were produced and sent to our office. In addition, 11 audio tapes were provided for the first time.
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> 3. On January 16, 1990, in response to our January IO records request letter on behalf of Mr. Remeta to FDLE, a letter was received by our office from FDLE stating that "in the event our search reveals information to which you are entitled you will be contacted immediately." No records were received by our office. On December 15, 1997, a second request letter on behalf of Mr. Remeta was sent to FDLE. In response, in February of 1998, our office received numerous records regarding Mr. Remeta.
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> 4. On October 12, 1989, a records request letter was sent to the Ocala Police Department, asking for any and all material related to Mr. Remeta. On October 23, 1989, records were received by our office. On December 15, 1997, a second letter was sent to Ocala Police Department on behalf of Remeta. In response to this request, records were received by our office January 22, 1998. Numerous records were included in this later file that we did not receive back in 1989, such as photos and evidence receipts.

(Attachment 81 to Rule 3.850 motion) (Affidavit of Cheryl Nuss).

In the course of attempting to investigate Mr. Remeta's Kansas cases prior to the financial crisis, Mr. Remeta's counsel also sought and obtained numerous records from

the State of Kansas, records which had never been provided by Florida authorities. For example, many of these records came from the Kansas Attorney General's Office and Kansas prosecutors office and were generated as a result of additional investigation into Lisa Dunn and J.C. Hunter, who were retried in Kansas after Mr. Remeta's first death warrant in 1990." Dunn and Hunter, of course, were involved in and had knowledge of the Florida case as well. The Kansas records also contain information about Mark Walter, the individual accompanying Daniel Remeta and Lisa Dunn in Florida and who Mr. Remeta had said was the shooter in the Florida case. For example, Mr. Remeta's counsel received a document generated by the Kansas Bureau of Investigation which bears on Mr. Remeta's defense that Walter was the shooter. This document sets forth that prior to the Florida crime, Walter was arrested in Michigan and charged with breaking and entering and stealing a rifle and a chain saw (Attachment 82 to Rule 3.850 motion). Walter denied any involvement and was administered a polygraph examination. The results were indicative of deception (Id.).

Additional records not previously disclosed provide numerous names of acquaintances of Walter, names which were previously unknown to either Mr. Remeta's postconviction counsel or his trial counsel. For example, in the files disclosed by the Marion County State Attorney's Office, a letter from the Leelanau County (Michigan) Sheriff's Department discloses an interview with a Troy Allen Ance, a roommate of Walter in Michigan (Attachment 83). Ance reports that he helped Walter move out of his

[5]Dunn was eventually acquitted and now is awaiting trial in the State of Michigan for embezzlement.

parents home and observed and observed a black shotgun case." The document also lists the names of various acquaintances of Walter, such as Al Schriver, Jill Mikowski, and Tim Hagstrom.

Other information regarding Mark Walter needs to be investigated as well. For example, counsel has discovered that Walter was administered a gunshot residue test in the medical examiner's office in Kansas (Attachment 85). The test kit was then submitted to the Florida Department of Law Enforcement with specific instructions to "telephone result to Gerard King of the State Attorney's Office (Attachment 86). No notes or other documents were generated about the results of the testing either from FDLE or from the State Attorney's Office files.[7] The only other documentation about Walter's gunshot residue test is a receipt by the Ocala Police Department dated May 20, 1986, indicating that the gunshot residue test kit referred from Gerard King to G.D. Schore of FDLE was "destroyed" (Attachment 88).[8] This series of events is suspicious at best, particularly given the fact that Walter's test kit was destroyed on May 20, 1986, the day after Mr. Remeta was found guilty by the jury and the jury recommended the

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[6]Ance was certified as a material witness in Dunn's retrial in Kansas in 1992 (Attachment 84).

[7]Mr. Remeta was also administered a gunshot residue test when he was arrested in Kansas. The testing kit was sent to FDLE along with Walter's (Attachment 87). Unlike Walter, however, FDLE did generate a report indicating that the test results were inconclusive for Mr. Remeta (Id.). There was no such request made by the State that Mr. Remeta's results be telephoned only to the State Attorney Investigator.

'Trial counsel did not know of this information.

death penalty.[9] Mr. Remeta should be given an opportunity to investigate this information, which goes directly to his defense that Walter was the shooter."

In February, 1998, FDLE also disclosed additional documents not previously disclosed to trial counsel or collateral counsel, For example, detailed diagrams of the forensic evidence submitted for analysis, as well as extensive handwritten notes by the laboratory analysts, were released. However, without a forensic expert, Mr. Remeta is unable to determine the significance of the disclosed material. If CCRC-South had money, Mr. Remeta would consult with a forensic crime scene expert as well as a laboratory analyst and provide them with these materials. The State should not be allowed to execute Mr. Remeta when it has failed to produce records which could be critical to a just and proper resolution of the case."

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[9]Suspicious circumstances surrounding a fiber apparently collected at the crime scene also warrant further investigation. A fiber on the open cooler door at the crime scene was collected for analysis and sent to FDLE. One month before trial, FDLE issued a report indicating that "[b]ased upon information received from G. Schore, the examination of this case is no longer necessary and the exhibits are being returned " (Attachment 89). Yet in another document, a property receipt from the Ocala Police Department disclosed in 1998, the fiber was to be held and sent to the FBI (Attachment 90). Mr. Remeta has requested records from the FBI regarding any testing on the fiber known as Q34; the FBI responded that is had no such records (Attachment 91). The fiber is important as Mr. Remeta's defense was that it was he, not Walter, who was retrieving beer from the cooler when Walter shot the victim. However, this evidence, like the gunshot residue test kit of Walter, both of which are potentially exculpatory as to Mr. Remeta, mysteriously disappeared.

"This information not only affects the guilt phase but also the penalty phase. If Mr. Remeta was not the shooter. Edmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 107 S.Ct. 1676 (1987).

"Mr. Remeta's counsel would also hire an expert in fetal alcohol syndrome and a false confession expert to review the materials in this case. As to the fetal alcohol syndrome issue, for example, great progress has been made recently in awareness of the syndrome and its lifelong and devastating effects on an individual. The recent

In short, additional investigation needs to be conducted in this case. However, Mr. Remeta's counsel, CCRC-South, has been underfunded and at present time is out of funds to investigate Mr. Remeta's case. While other litigants in successor litigation posture have been provided with the necessary funding to investigate their cases, Mr. Remeta has not. This untenable situation has resulted in a violation of due process and equal protection.

CCRC-South's financial status is the subject of various pleadings that have been filed in this Court (as detailed in Mr. Remeta's Rule 3.850 motion). The lower court, however, did not acknowledge any of the information contained in this claim, much less adjudicate the claim. The Court should not countenance the execution of an individual by the State, the same State which has failed to and/or refused to, adequately fund Mr. Remeta's legal counsel. A stay of execution is warranted pending the determination of the various pleadings before this Court detailing the financial crisis of CCRC-South, and Mr. Remeta should be given an opportunity to further investigate the new information which has come to light in the public records recently disclosed.

ARGUMENT III

THE LOWER COURT ERRED IN FAILING TO STAY MR. REMETA'S EXECUTION PENDING THE OUTCOME OF THE KANSAS LITIGATION.

In his Rule 3.850 motion, Mr. Remeta requested that the lower court enter a stay in order to afford the Kansas courts an opportunity to adjudicate a postconviction motion

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developments in fetal alcohol syndrome research were not available at the time of Mr. Remeta's initial Rule 3.850 motion.

filed by Mr. Remeta in April, 1997. The lower court erred.

On April 21, 1997, Mr. Remeta filed a motion for relief pursuant to K.S.A. § 60-1507 in the district court of Thomas County, Kansas. In an order dated May 12, 1997, district Judge Glenn D. Schiffner denied Mr. Remeta's motion without an evidentiary hearing. A timely notice of appeal followed, and briefs were filed by Mr. Remeta and the State of Kansas in the Kansas Court of Appeals. Because of Mr. Remeta's execution date, and the fact that the Kansas Court of Appeals had not scheduled argument on the appeal, much less issued a ruling, Mr. Remeta could not exhaust his state court remedies and he filed a federal habeas corpus petition on March 18, 1998. Following oral argument, the federal district court judge stayed Mr. Remeta's execution pursuant to his authority under 28 U.S.C. § 2251. Addressing his authority to issue a stay of execution, Judge Saffels wrote:

> The parties have vigorously debated whether this court has jurisdiction to stay the Florida execution. The Court finds jurisdiction is proper. First, the plain language of 28 U.S.C. § 2251 supports this result:
>
> > **Stay of state court proceedings.** A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment or discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State court or by or under the authority of any State for any matter involved in the habeas proceeding.
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> Next, Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Court provides that where a habeas petitioner is not currently in custody pursuant to the state court judgment from which relief is sought, "the officer

> having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents." The court therefore finds the named respondents to this actions are proper parties and rejects the request for dismissal submitted by respondent Singletary.

Memorandum and Order, Remeta v. Stovall, et. al, Case No. 98-3091-DES (March 25, 1998), at 3-4.

Addressing whether it was appropriate for him to exercise his jurisdiction to stay Mr. Remeta's execution, Judge Saffels observed that "these provisions do not grant death-sentenced inmates an automatic stay of execution" (Order at 4). However, Judge Saffels "carefully reviewed the petitioner's claims" and "[a]fter considering the nature of the claims and the relevant case law, the court concludes petitioner has made a sufficient showing to warrant a stay to permit due consideration of his claims of unconstitutional convictions" (Order at 4). Judge Saffels wrote:

> Several factors support this decision. First, the Supreme Court has clearly stated the standard to be applied when a district court receives a motion for a stay in a petitioner's first federal habeas corpus case. Simply put, that standard requires that 'if the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.' Lonchar v. Thomas, 517 U.S. 314, 319 (1996). Not only is this petitioner's first federal habeas corpus petition to challenge the validity of the Kansas convictions, it is readily apparent that the claims presented are not subject to summary dismissal, as petitioner raises colorable claims of constitutional dimension with evidentiary support. While the court offers no opinion on the merits of these claims, it is nevertheless clear that the claims of ineffective assistance of counsel, involuntary guilty pleas, and newly-discovered evidence are substantial issues which should not be summarily dismissed. See Rule 4, Habeas Rules ("If it plainly appears from the face of the petition and

> any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal").

Order at 4-5.

Judge Saffels further found that Mr. Remeta will suffer irreparable injury if a stay was denied while "substantial issues" were pending in the Kansas courts, and that "while the entry of a stay will frustrate the Florida procedure, no threat of irreparable injury will occur" (Order at 5).

As to Kansas's delayed petition argument, Judge Saffels rejected it, observing that "under Rule 9(a) of the Habeas Rules, the federal analog of laches, '[t]he state must make a particularized showing of prejudice in its ability to respond' to the petition" (Order at 5) (quoting Hannon v. Maschner, 845 F. 2d 1553, 1555 (10th Cir. 1988)). Judge Saffels then found as a matter of law that "[t]he present record does not support a finding of inexcusable delay" (Order at 5-6).

As to exhaustion, Judge Saffels found that Mr. Remeta "clearly has not exhausted state court remedies in this case because his Kansas appeal, raising the same issues presented in the instant petition, is still pending" (Order at 6). Judge Saffels acknowledged Mr. Remeta's argument that "the application for writ of habeas corpus under § 2254 was filed only after it became apparent that the Kansas appellate court would not decide petitioner's claims prior to petitioner's scheduled execution" (Order at 6). Judge Saffels then wrote that because "the court is not persuaded the Kansas appellate courts have inordinately delayed consideration of petitioner's claims, the court finds it appropriate to allow the state courts to evaluate petitioner's allegations of error

and order any corrective action that may be required" (Order at 7). The court concluded:

> The court thus concludes that this matter should not be dismissed based upon petitioner's failure to exhaust state court remedies. To preserve petitioner's right to federal habeas corpus review, the court finds it necessary to stay this matter to allow petitioner to exhaust state court remedies in a timely and orderly manner.

(Order at 7). Judge Saffels thereupon entered his stay, which is "indefinite at this time, and its purpose is to allow the courts of the State of Kansas a reasonable period in which to determine the postconviction motion currently pending in the Kansas Court of Appeals, and, if necessary, a reasonable time for this court to determine the merits of the federal petition following exhaustion of state remedies" (Order at 8).[12]

In his habeas petition, Mr. Remeta set forth evidence establishing his innocence of the Kansas convictions. Moreover, Mr. Remeta set forth evidence establishing that his guilty pleas were involuntary under Bovkin v. Alabama, 395 U.S. 238 (1969). Mr. Remeta also demonstrated that a miscarriage of justice has occurred because his co-defendants with equal if not more culpability in the Kansas crimes were retried and eventually acquitted. The Florida jury knew none of this information.

The facts underlying these constitutional defects in the Kansas cases show not only that the prior convictions must be set aside, but also that Mr. Remeta was actually innocent of the charges underlying those convictions.

When a conviction used to justify a death sentence is subsequently invalidated,

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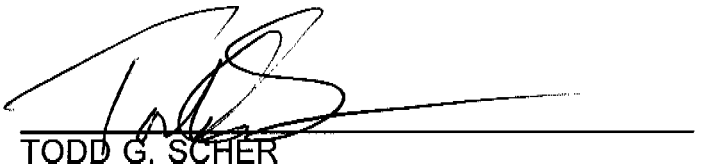
'*Kansas and Florida asked the Tenth Circuit Court of Appeals to vacate the stay, which it did. On March 27, 1998, Mr. Remeta sought certiorari review of the Tenth Circuit's actions, as well as a stay of execution.

the death-sentenced individual may present a Rule 3.850 motion challenging his death sentence. Duest v. Dugger, 555 So. 849, 851 (Fla. 1990)("We reject the state's claim that Duest is procedurally barred from raising this issue because of his delay in seeking to have the conviction set aside"). If the federal court ultimately vacates that prior conviction, Mr. Remeta will be entitled to a resentencing. Duest v. Sinsletarv. 997 F.2d 1336 (1 Ith Cir. 1993) (granting resentencing despite presence of other aggravating circumstances). In the meantime, Mr. Remeta should not be executed. Until a final ruling from the Kansas federal courts, the Court should presume invalid the Kansas convictions and stay Mr. Remeta's execution. Mr. Remeta is entitled to an evidentiary hearing, and thereafter Rule 3.850 relief.

CONCLUSION

Mr. Remeta submits that the lower court erred in all respects in denying Rule 3.850 relief without an evidentiary hearing. Therefore the lower court should be reversed, this matter should be remanded to the lower court for an evidentiary hearing, and a stay of execution should be entered at this time.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by facsimile to all counsel of record on March 27, 1998.



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