IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

RICHARD BARRY RANDOLPH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the denial, by Circuit Judge Robert K. Mathis, of Mr. Randolph's motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows:

"R___." -- record on direct appeal to this Court;

"PCR___." -- record on 3.850 apeal to this Court;

"Ex.___." -- Defendant's exhibits submitted at the 3.850 evidentiary hearing;

"IB" -- Appellant's Initial Brief;

"AB" -- Appellee's Answer Brief;

All other references will be self-explanatory or otherwise explained herein.

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ARGUMENT I

APPELLANT CLEARLY ESTABLISHED THAT HIS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ENGAGED IN IMPROPER *EX PARTE* COMMUNICATIONS WITH THE STATE, WHEN THE TRIAL COURT IMPROPERLY DELEGATED TO THE STATE ITS INDEPENDENT DUTY TO WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND WHEN THE TRIAL COURT PREDETERMINED APPELLANT'S SENTENCE.

Introduction

In its Answer Brief, Appellee makes several attempts to convince this Court that Appellant's right to a fair trial comporting with due process was not violated by the trial court. At times, Appellee's counsel goes so far as to substitute her own version of the testimony from the evidentiary hearing, creating facts that were never presented by either party below. Regardless, Appellant established that he is entitled to relief by presenting the following unrebutted evidence during his evidentiary hearing:

- the prosecutor in Appellant's case assisted the trial judge's law clerk (Pamela Koller) in writing part of the judgment and sentence dealing with the weight of individual aggravating circumstances;

- the law clerk assumed the prosecutor had spoken with the trial judge about the language they were adding because she said she would not have added anything without the trial judge's consent;

- the language that the law clerk remembers adding with the prosecutor's assistance is the language that appears at R 646 and reads:

> In fact, any of the aggravating factors found to exist would outweigh all mitigating factors, statutory and non-statutory.

- neither Appellant nor his trial attorney (Mr. Howard Pearl) were present when the prosecutor assisted the law clerk in determining exactly what language to add to Appellant's judgment and sentence and where to add it;

- before 1997, no attorney of Appellant's, including his trial attorney, was aware that the prosecutor had assisted with drafting a part of Appellant's judgment and sentence dealing with the weight of individual aggravating circumstances;

- nothing in the trial record indicates that the parties were informed that the prosecutor would assist the trial court in drafting the judgment and sentence, and the trial attorney testified below that he was not informed that such a procedure would occur;

As **further** evidence of the state's involvement in drafting the judgment and sentence, Appellant presented the following:

- the State had possession of an original draft judgment and sentence in its files (ex. 1);

- this draft judgment and sentence was not disclosed to Appellant until 1997;

- the draft judgment and sentence bears a mark commonly recognized to mean "insert" on the bottom of the first page (PCR 4681);

- in the final judgment and sentence, language appears at the location of the "insert" mark (that does not appear on the draft judgment and sentence) which reads:

> The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, this Court's mind, are consistent with that

> of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable.

(Compare R 641-42 with PCR 4681-82).

This unrebutted evidence establishes that the trial court improperly engaged in *ex parte* communications with the state that were far more than just "ministerial" in nature. Furthermore, this unrebutted evidence clearly establishes that the trial court improperly delegated to the state its duty to independently weigh the aggravating and mitigating circumstances. Lastly, and most disturbingly, the unrebutted evidence of bias and predetermination of sentence on the part of the trial court establishes a clear violation of Appellant's Sixth, Eighth and Fourteenth Amendment rights. At the very least, the evidence creates an appearance of bias on the part of the trial court too great for this Court to ignore.

A. Improper *ex parte* communication

It is important for this Court to note that Appellee at no time disputes that an *ex parte* communication occurred regarding the drafting of Appellant's judgment and sentence. Given the evidence below, such an assertion on Appellee's part would be absurd. Instead, Appellee attempts to convince this Court that the *ex parte* communication did not violate Appellant's due process rights for a variety of reasons.

Appellee argues that Appellant failed to present any evidence in the court below that the trial judge "told or directed" the law clerk to obtain the subject language from the prosecutor, or that the trial judge "sanctioned" such an act. (AB at 33-4). However, the law clerk did testify that she assumed that the trial judge and prosecutor had **discussed** the issue, and that she would not have made the change without the trial judge's permission. (PCR 5352). Appellee would have this Court believe that the evidence presented below shows that the law clerk took it upon herself to get the subject language from the prosecutor. (AB at 33). No such testimony or evidence, however, was presented by any witness that even vaguely supports Appellee's assertion.[1]

In his initial brief, Appellant cites to Rose v. State, 601 So. 2d 1181 (Fla. 1992), to support his claim for relief. (IB at 46-7). Appellee asserts that Appellant's case is distinguishable from Rose, but again supports this assertion with creative interpretations of the evidence and testimony presented below. Appellee first asserts that, unlike Rose, there is no evidence in this case of any communication between the trial court and the

[1]Furthermore, considering that the subject language deals with the weighing of aggravating and mitigating circumstances (a responsibility which lies solely with the trial court), such an act on the prosecutor's part would be entirely improper and suggests a completely different violation of Appellant's due process rights.

state.[2] (AB at 35). Again, Appellee ignores the law clerk's testimony below that she assumed the trial judge and prosecutor had discussed the issue before the changes were made.[3] (PCR

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[2]Appellee finds significant that "the" communication was between the law clerk and the prosecutor, and cites to Diaz v. Dugger, 719 So. 2d 865 (Fla. 1998), for the proposition that the *ex parte* communication was not improper because the trial judge was not involved. Diaz does nothing for Appellee's position. First, "the" communication Appellee speaks of may have been between the law clerk and the prosecutor but, as the law clerk's testimony below indicates, it came after a previous improper *ex parte* communication between the prosecutor and the trial judge. Second, in Diaz, although the communication came from a judicial assistant, what is more important is the fact that **both** parties were involved in communications with the assistant regarding the proposed order, and the defense was provided an opportunity to respond and file objections to the state's proposed order (but did not). Lastly, and of most significance, is the fact that Diaz concerned denial of a postconviction motion, not the creation of a judgment and sentence.

[3]It should also be noted that the state's argument fails on yet another ground--cited by this Court in Rose v. State, 601 So. 2d 1181 (Fla. 1992). In Rose, this Court wrote:

> No matter how pure the intent of the party who engages in [*ex parte*] contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case.

If one were to accept the state's fictionalized version of the events at hand--which Appellant does not--the problem associated with *ex parte* communications is actually maximized: the judge is hearing **only** "the other side's case" **and** he is not even aware that that is what he is hearing. He mistakenly thinks that he is receiving a report from his law clerk--at which he would never look with the healthy skepticism due a litigant's position. He assumes the report to be without bias and, most likely, would accept it without any questioning whatsoever. In short, he is receiving the wolfish information warned of in Rose, but it is presented to him wrapped in what seems to be innocuously untainted wool.

5352). Furthermore, Appellee again represents to this Court that the evidence presented below shows that the law clerk took it upon herself to get the subject language from the prosecutor when, in fact, no such evidence was presented below.

A central point missed by Appellee is this: a judge's law clerk is forbidden to do all that is prohibited to the judge. Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983) ("Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that **neither parties to the lawsuit nor his most intimate family members may be**. We agree with the Sixth Circuit that the clerk is forbidden to do all that is prohibited by the judge.") (emphasis added) (citations omitted); Kennedy v. Great Atlantic & Pacific Tea Co., Inc., 551 F.2d 593, 596 (5th Cir. 1977) ("It was [the law clerk's] duty as much as that of the trial judge to avoid **any** contacts outside the record that might affect the outcome of litigation. This we perceive to be the basis, so far as related to the judge himself, of the existing Canon 3(A)(4) of the Code of Judicial Conduct for United States Judges which provides: "A judge should. . .neither initiate nor **consider** *ex parte* communications. . . .") (emphasis added) (cf. Fla. Code of Jud. Conduct Canon 3(B)(7) using substantially similar language); In

the Matter of J.B.K., 931 S.W.2d 581, 584 (Tex. Ct. App. 1996) ("Private communications between a lawyer in a pending action and a staff member of [a] court before whom the case is pending concerning the merits of the then pending [case] are "ex parte communications" not authorized by law."); see Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980) ("The principle that reverberates throughout the decisions. . .is that a judge may not direct his law clerk to do that which is prohibited to the judge"); see also VanZant v. R.L. Products, Inc., 139 F.R.D. 435 (S.D. Fla. 1991) (holding that communication with law clerks regarding the merits of a case was "impermissible *ex parte* communication with chambers"); Hence, even if one were to accept the Appellee's version of the "facts," notwithstanding the lack of record support for its version, an improper *ex parte* communication occurred, constituting fundamental error and requiring reversal.

Appellee further asserts that Appellant's case is distinguishable from Rose on the basis of Swafford v. State, 636 So. 2d 1309 (Fla. 1994). In Swafford, this Court found that, although *ex parte* communications had occurred when the judge requested the state to prepare the order, they were not improper because the communications did not involve a discussion on the merits. Id. at 1311. What Appellee fails to point out is that, in Swafford, the defense was informed that the court wanted the

state to prepare the order, and the defense had the opportunity to argue against the order's contents but did not. In Appellant's case, defense counsel was never informed that the state was assisting in the preparation of the order. Furthermore, this Court should note that, in Swafford, the *ex parte* communication occurred during postconviction and the issue before this Court was whether the judge should have disqualified himself simply because the *ex parte* communication had occurred.

Appellee wants this Court to believe that Appellant's case falls into the exception in Rose, in that the *ex parte* communication was not improper but was a "strictly ministerial, or administrative, matter, and did not deal with the merits of the case." (AB at 36).[4] However, the subject language dealt

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[4]Appellee also cites to Rushen v. Spain, 464 U.S. 114 (1983), and Pinardi v. State, 718 So. 2d 242 (Fla. 5th DCA 1998), to support the proposition that Appellant is entitled to no relief. In those cases, the appellant was denied relief because the *ex parte* communication was "innocuous" and "not a comment on the facts in controversy or the applicable law." Rushen, 464 U.S. at 121; Pinardi, 718 So. 2d at 246. In Rushen, the Court defined "innocuous" as an *ex parte* communication where the offending parties "did not discuss any fact in controversy or any law applicable to the case." Id. (The court in Pinardi used the same definition). This is not, however, what occurred in Appellant's case because the *ex parte* communication explored below dealt specifically with the weight assigned to aggravating circumstances. Furthermore, when you compare the draft judgment and sentence (specifically, the insert mark) discovered in the state's files (PCR 4681) with the language appearing in the final judgment and sentence (R 641-42), it becomes clear that the *ex parte* communications also dealt with facts in controversy. Other factors distinguish Appellant's case from Rushen and Pinardi. In Rushen, the *ex parte* communication was between a judge and a juror. In Pinardi, the *ex parte* communication was between a

specifically with the weighing of aggravating circumstances, and the *ex parte* communication was not only improper but also casts serious doubt on whether the trial judge performed his constitutionally required duty of **independently** weighing the aggravating and mitigating circumstances in Appellant's case. See Proffitt v. Florida, 428 U.S. 250 (1976). Furthermore, Appellee's conclusion depends upon her own loose interpretation of the evidence below when she asserts that the law clerk on her own sought out the prosecutor for the desired language. None of the testimony below supports this conclusion, and the lower court's finding that the *ex parte* communication was ministerial in nature is clearly erroneous. And, as stated *supra*, for purposes of an *ex parte* analysis, the law clerk is the judge.

As stated previously, Appellant presented in the court below more than sufficient evidence of improper *ex parte* communications to entitle him to relief. In fact, Appellant's evidence was unrebutted: the State presented nothing. In Rose, this Court granted relief on equal or less evidence than was presented by Appellant below. In Rose, the Appellant had filed a 3.850 motion. In its response, the State agreed that an evidentiary hearing was required. Subsequently, the state submitted a proposed order denying all relief and the trial court adopted it

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judge and employees of the Probation and Parole Services. Neither communication directly involved the opposing parties, as was the situation in Appellant's case.

in its entirety. Rose's counsel was not provided a copy of the proposed order or provided the opportunity to respond. Under these facts, this Court granted relief, holding that it "must **assume** that the trial court, in an *ex parte* communication, had requested the State to prepare the proposed order." Rose, 601 So. 2d at 1182-83 (emphasis added).

In the court below, Appellant's unrebutted evidence included the following:

- the prosecutor in Appellant's case assisted the trial judge's law clerk (Pamela Koller) in writing part of the judgment and sentence dealing with the weight of individual aggravating circumstances;

- the law clerk assumed the prosecutor had spoken with the trial judge about the language they were adding because she would not have added anything without the trial judge's consent;

- the language that the law clerk remembers adding with the prosecutor's assistance appears in the final judgment and sentence;

- the State had possession of an original draft judgment and sentence in its files (ex. 1);

- the draft judgment and sentence bears a mark commonly recognized to mean "insert" on the bottom of the first page (PCR 4681);

- in the final judgment and sentence, language appears at the location of the "insert" mark that does not appear on the draft judgment and sentence (Compare R 641-42 with PCR 4681-82).

- the trial attorney was unaware that the prosecutor had assisted with the drafting of Appellant's judgment and sentence and nothing in the trial record indicates that the parties were informed that the prosecutor would assist the trial court in drafting the judgment and sentence.

These facts are more than sufficient to establish that an improper *ex parte* communication occurred regarding the drafting of the judgment and sentence in this case that does not fall within the Rose exception. The fact, alone, that the prosecutor assisted the judge's law clerk in preparing the judgment and sentence establishes an improper *ex parte* communication. See, e.g., Kennedy, *supra*. At the very least, Appellant is entitled to the same assumption this Court made in Rose, especially considering the fact that the evidence presented below went entirely unrebutted by the state. The impartiality of the sentencing tribunal was compromised, and Appellant is clearly entitled to relief.

B. Impermissible Delegation of Duty by the Sentencing Court

The unrebutted evidence presented by the Appellant below clearly establishes that the trial court improperly delegated to the state its duty to independently weigh the aggravating and mitigating circumstances. Appellee relies on the testimony of the law clerk from the hearing below to show that the trial judge did not delegate his duty to the State. (AB at 39). Specifically, Appellee points to the testimony of the law clerk where she stated that the trial judge told her what he wanted the order to say before the law clerk and the prosecutor added the language.

Appellee's version of the testimony below is inaccurate. At no point does the law clerk testify below that the trial judge told her specifically what he wanted the order to say. Instead, the testimony suggests that the trial judge knew of caselaw relevant to the weight of aggravating circumstances and that he wanted language added to the order along those lines.What is clear from the testimony below is that the prosecutor formulated the language and assisted the law clerk in adding it. What is also clear is that the language dealt specifically with the weighing of aggravating circumstances, an act that the trial court is constitutionally required to undertake independent of either party. Proffitt. This constitutes fundamental error.

The law clerk's testimony from the hearing below is not the only evidence presented that the trial court improperly delegated its duty to the prosecutor. As explained previously, postconviction counsel discovered a draft judgment and sentence in the State's files. (ex. 1). The draft contains initials and a date in a handwriting other than the trial judge's. The law clerk, who was responsible for preparing orders for the trial court, did not recognize the draft. (PCR 5327). An insert mark appears on the draft. In the final judgment and sentence, language appears in the place of the insert mark that does not appear on the draft. Nothing in the record indicates that both parties were informed that the State would be submitting a proposed order. Furthermore, no explanation exists for why the

State was in possession of a draft judgment and sentence to begin with. The law clerk testified below that she did not recall providing the State with copies of any drafts. (PCR 5335-36).

The lower court erred in ruling against Appellant on this issue. Testimony and evidence presented below establish that the prosecutor and the sentencing court engaged in improper *ex parte* communications regarding the substance of the sentencing order, the defense was unaware and not provided an opportunity to respond, and that the sentencing court delegated to the prosecutor all or part of its constitutionally mandated duty to independently decide Appellant's sentence. This was fundamental error.

C. Bias on the part of the Sentencing Court

Lastly, Appellant presented unrebutted evidence of bias and predetermination of sentence on the part of the trial court at the hearing below, establishing a clear violation of Appellant's Sixth, Eighth and Fourteenth Amendment rights. Part of this unrebutted evidence was the testimony of the law clerk where she indicated that the sentencing court determined it would sentence Appellant to death before the penalty phase began, before the jury deliberated its recommendation, and before the final sentencing hearing.

In deciding whether the lower court was correct that no bias existed, this Court should also consider the other unrebutted

evidence presented below. The subject language that the law clerk testified about dealt with the upholding of a death sentence in case all but a single aggravator was rejected by this Court on direct appeal. What is clear from the testimony presented below is that the sentencing court was more concerned with making sure Appellant was executed than fulfilling its duty of independently deciding the weight of each aggravating circumstance. Furthermore, the existence of a draft judgment and sentence in the State's files indicates that the sentencing court included the State, a party adverse to Appellant, in determining Appellant's sentence. This was clear fundamental error and it must be assumed that the sentencing court, as well as the prosecutor, knew this at the time. These factors, combined with the law clerk's testimony, paint a clear picture of a sentencing court that was biased against Appellant. Appellant is entitled to a new sentencing proceeding.

ARGUMENT II

APPELLANT ESTABLISHED THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE.

Appellant has clearly established that defense attorney Howard Pearl provided ineffective assistance of counsel during the penalty phase of Appellant's trial. Attorney Pearl's investigation was inadequate and unreasonable. Family members were never interviewed by counsel, preventing the jury from

hearing facts relevant to Appellant's chaotic and abused childhood, as well as how this affected his early adulthood. Furthermore, attorney Pearl failed to ensure that the mental health assessments performed by the experts during Appellant's trial comported with due process. Due to these failures, the jury provided the trial court with a recommendation for death that did not take into account the extensive and available mitigation.

Regarding Appellant's claim that he was provided ineffective assistance of counsel during the penalty phase investigation, Appellee relies on attorney Pearl's "long-standing practice" in capital cases of letting the mental health expert investigate and find out whatever the expert wanted to know. (AB at 42). Furthermore, Appellee relies on attorney Pearl's representation that had he learned of any information relevant to the penalty phase, he would have provided it to the expert. (AB at 42). Attorney Pearl's representations, however, do not excuse the ineffectiveness of his penalty phase performance.

Attorney Pearl's duty was to conduct a reasonable investigation into Appellant's background and other aspects of his life in order to determine what existed that could mitigate the crime he was on trial for. See Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Elledge v. Dugger, 823 F.2d 1439, 1445 (11th Cir. 1987). In Appellant's case, attorney Pearl's investigation

cannot be deemed reasonable when he practically did no investigation at all. Attorney Pearl's "long-standing practice" appears to be nothing more than letting others do his job for him.[5] Attorney Pearl expected his own mental health expert to conduct the penalty phase investigation for him (PCR 3181-82). Attorney Pearl provided the expert with some materials (R 1720), and the expert contacted a few witnesses (R 1720-22).

Appellant asserts that it was unreasonable for attorney Pearl to rely on a mental health expert to do the penalty phase investigation. However, if this Court finds that it was not unreasonable per se, attorney Pearl must still be held ultimately responsible for the penalty phase investigation (and presentation) provided by the expert. In Appellant's case, the investigation failed to discover the following: Appellant's brain damage; Appellant's abnormal and bizarre childhood behavior, much of which lasted into adulthood; Appellant's childhood psychiatric treatment; Appellant's abnormal physical development; and, most importantly, the clear existence of two statutory mental health mitigators in Appellant's case.[6]

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[5]Appellee points out that attorney Pearl made an exception to his "long-standing practice" of letting the expert do the investigating when he interviewed Appellant's girlfriend, Ms. Bettes. (AB at 43). However, attorney Pearl's own testimony is that his inquiries were focussed on Appellant's crack use around the time of the crime. (PCR 3198-99). This can hardly be considered an effective investigation into mitigation.

[6]The factual circumstances detailed above are just a few that postconviction counsel managed to uncover. A more precise

Appellant was clearly prejudiced from the expert's and/or trial attorney's lack of investigation. No statutory mitigators were argued to the jury or judge. As Appellee points out, Appellant's trial expert determined there were no statutory mitigators from a psychological point of view. (AB 46-47). However, the trial expert's report to attorney Pearl provides the best evidence of an investigation left unfinished.[7] (PCR 900-01). In the report, the trial expert clearly states that he has found no statutory mitigators "at this time." The expert goes on to explain what he would do to complete the investigation. Specifically, the expert wanted verification of drug use and the chance to interview Appellant's parents for additional background information, the same type of information provided (in detail) to the lower court by Appellant's postconviction attorneys and experts. Had Appellant's jury had this information, it is more likely than not that their 8-4 recommendation for death would have become a recommendation for life.

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list in located in Appellant's initial brief. (IB 71-75).

[7]Undersigned would also point out that the experts report (PCR 900-01) also provides evidence that the investigation was ultimately attorney Pearl's responsibility. As one example, in the report the expert **recommends** verification of drug abuse. At no point does the expert say that **he** will be verifying the drug abuse. In Robinson v. State, 707 So. 2d 688 (Fla. 1998), this Court dealt with a nearly identical situation, which also included the same attorney and mental health expert as in Appellant's case. In that case, this Court found that attorney Pearl was "probably deficient" for not being more directly involved with the penalty phase investigation. Id. at 697.

Regarding attorney Pearl's lack of investigation into Appellant's crack addiction, Appellee relies on attorney Pearl's opinion that crack cocaine addiction would not be a good form of mitigation for Putnam County jurors to consider. (AB at 48). This Court should not accept this explanation for several reasons. First, attorney Pearl's lack of investigation prevented himself (or his expert) from knowing the extent of Appellant's drug addiction and, thus, exactly what types of mitigation (statutory and non-statutory) the information would provide. Second, attorney Pearl, despite his opinion regarding crack and Putnam County juries, still questioned Appellant's girlfriend about his crack use, although it seems he was only interested in whether Appellant was under the influence of crack around the time of the incident. Lastly, despite attorney Pearl's opinion, he still placed Appellant's crack addiction before the jury, although he had insufficient information to do so effectively. (PCR 3248).

At the hearing below, Appellant presented the testimony of his father and step-mother, witnesses attorney Pearl never spoke to or called to testify. Appellee characterizes their testimony as "damaging" because they testified that Appellant was disruptive and refused to follow the rules of the household. (AB at 50-51). This Court should reject Appellee's characterization. Alone, this testimony may appear potentially damaging. However, this testimony is consistent with (and relevant to) the other

information discovered in postconviction: Appellant's brain damage; Appellant's abnormal behavior from the time of infancy; the abuse Appellant suffered growing up; and, the fact that Appellant, as a child, had to be examined by a psychiatrist due to behavior control problems. Had attorney Pearl conducted (or ensured) a proper penalty phase investigation, discovered what postconviction counsel was able to find, and supplied this information to his expert, this testimony would have proven more relevant than damaging. Furthermore, this evidence could have been safely presented to the jury through a properly informed expert. Attorney Pearl's fear of live family witnesses can be no excuse for failing to discover the crucial information these witnesses will very often supply. See Baxter, supra; Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991).

Appellant claims that he was not provided an effective and adequate mental health evaluation because attorney Pearl failed to investigate and provide sufficient, relevant information to the trial expert. (IB at 77). Appellee claims that Appellant is barred from raising this issue because the adequacy of the mental health evaluation could and should have been raised in Appellant's direct appeal. (AB at 56-57). Appellee cites Muhammad v. State, 603 So. 2d 488 (Fla. 1992), and Doyle v. State, 526 So. 2d 909 (Fla. 1988), as support for this proposition. Muhammad does not support Appellee's position. In Muhammad, the issues presented concerned the adequacy of the

evaluation itself and **whether Muhammad's counsel was rendered ineffective** by an inadequate evaluation. Muhammad did not address the ineffectiveness of the trial attorney's investigation of evidence relevant to mental health.

Likewise, Doyle lends no support to Appellee's position. In Doyle, this Court found a claim regarding the adequacy of a mental health evaluation barred. However, this Court did consider the ineffectiveness of Doyle's counsel in failing to present expert testimony regarding two statutory mitigators. Clearly, Appellant's claim that attorney Pearl was ineffective in investigating relevant information and providing the information to the jury through his trial expert is not barred. In other postconviction cases, deficient performance has been found due to an attorney's failure to discover and present mitigating information regarding mental health. See Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). In Appellant's case, whether it was the trial expert or the trial attorney's job to find this information is irrelevant. The trial attorney must ultimately be held responsible for the fact that neither the judge nor the jury was provided this information to consider in sentencing.

Citing Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990), Appellee next asserts that Appellant's claim is without merit, arguing that the new information uncovered by postconviction counsel,

although helpful to mental health experts, did not rise to the level of ineffectiveness. In Hill, the new information provided by postconviction counsel only dealt with Hill's drug use and family background. In Appellant's case, the new information attorney Pearl failed to discover consisted of similar evidence, as well as significant evidence of lifelong mental health problems: Appellant's brain damage; Appellant's abnormal and bizarre childhood behavior, much of which lasted into adulthood; Appellant's childhood psychiatric treatment; and, medical evidence that Appellant's use of cocaine and other drugs only exacerbated the psychiatric problems he had suffered from all of his life.

Attorney Pearl's failure to discover, provide to the mental health experts, and present to the jury this extremely relevant information was deficient performance that prejudiced the defendant. The trial court found 3 aggravating circumstances, and only non-statutory mitigation. The information attorney Pearl failed to discover has now been provided to qualified experts who have determined the presence of two statutory mitigators, as well as greater amounts of non-statutory mitigation. This Court must remember that the jury's sentencing recommendation was only two votes short of a life recommendation. The lower court's findings of fact regarding this claim are not supported by competent substantial evidence, and Appellant is entitled to relief.

Regarding the remaining subclaims in Appellant's ineffective assistance of penalty phase counsel claim (subclaims C, D, and E; IB 77-86), Appellant will rely on the arguments presented in his Initial Brief.

ARGUMENT III

DENIAL OF A FULL AND FAIR POSTCONVICTION EVIDENTIARY HEARING.

A. Denial of Appellant's Discovery Motion

The lower court denied Appellant's motion (PCR 4645-46) to depose 7th Judicial Circuit State Attorney John Tanner, Asst. State Attorney Sean Daly, and Circuit Court Judge John Alexander, regarding a draft judgment and sentence discovered in the State Attorney's file. Based on the records provided by the State Attorney's office, Appellant's counsel determined that these individuals had substantial involvement in prosecuting Appellant. Furthermore, Appellant's counsel was aware of a draft judgment and sentence located in the State Attorney's files. Lastly, Appellant's counsel attempted to discuss the draft with one of the three individuals, John Alexander, but he refused. (PCR 4646). Despite these relevant facts, the lower court abused its discretion in denying Appellant's motion, violating Appellant's due process rights and right to effective assistance of counsel in postconviction.

Appellee defends the ruling of the lower court on this issue in several ways. First, Appellee asserts that at the time

Appellant filed the discovery motion, there was no reason for the lower court to believe Tanner, Daly, or Alexander had any relevant and material information regarding the draft judgment and sentence. (AB at 72-73). Appellee's assertion attempts to avoid the obvious. Prosecutors Tanner, Daly and Alexander were substantially involved in Appellant's prosecution. By the time the motion was made, Appellant's counsel had discovered the draft judgment and sentence in the State's files. Unlike the situation in State v. Lewis, 656 So. 2d 1248 (Fla. 1994), where the defendant was able to depose the trial judge, Appellant did not have that opportunity because the trial judge was deceased. Under these facts, it is clear that Prosecutors Tanner, Daly and Alexander were the best source of information available regarding this issue. Appellant provided good cause and the lower court abused its discretion in denying Appellant's discovery request.

Appellee also argues that, even if good cause was properly alleged and established, the motion was still properly denied because Appellant had alternative means of discovering the information through law clerk Koller. (AB at 73). Appellee's argument misses the big picture. Appellant did not know of law clerk Koller's existence until after the discovery motion was denied, and was made aware of Koller only after talking with the deceased trial judge's secretary. Furthermore, Koller ultimately had no information regarding the draft judgment and sentence located in the State Attorney's files. Only after talking with

Koller did Appellant's counsel become aware of Prosecutor Alexander's direct involvement in the preparation of the judgment and sentence, but Koller could not explain the draft judgment and sentence. Thus, Koller was not an alternative means of discovering the information. Because the draft was found in the State Attorney's files, the prosecutors were the best -and only- source for the information.

Appellee also points out that the lower court, in denying Appellant's discovery motion, noted that Tanner, Daly and Alexander were available to testify at the upcoming evidentiary hearing. (AB at 73-74). In Lewis, this Court found that the defendant was entitled to depose a judge whose partiality was a central issue to be investigated in a pending Rule 3.850 motion. Like Lewis, whether Tanner, Daly or Alexander were involved with the drafting of the judgment and sentence had become a central issue in Appellant's request for postconviction relief. Indeed, the entire evidentiary hearing revolved around the existence of this draft judgment and sentence. Appellant should not have been put in a position of having to either blindly call these three potential witnesses or attempt to prove the claim without their testimony.[8]

[8]As stated previously, Appellant requested an opportunity to discuss the draft judgement and sentence with Alexander but he refused. (PCR 4646). Appellant was left with no choice but to file the motion for discovery.

Appellee also represents to this Court that, despite the lower court's denial of Appellant's discovery request, Appellant was earlier provided an opportunity to question[9] Tanner and Alexander at a hearing held before the lower court on December 4, 1997. (Ab at 75). Appellee asserts that, because Appellant was given possession of the State Attorney's files on November 26, 1997, Appellant could have questioned Tanner and Alexander about the draft at the December 4th hearing. Appellee's assertion, however, is not supported by the record. The lower court held the December 4th hearing strictly for the purpose of determining whether the State Attorney's office had complied with Appellant's public records demands. The lower court's order denying Appellant's 3.850 motion makes this clear. (PCR. 4587). Furthermore, Appellant had only been in possession of the State's files for eight days (November 26 to December 4, 1997), four days of which included the 1997 Thanksgiving holiday. Even if these few days were enough for Appellant's counsel to determine the possible existence of a claim based upon the draft judgment and

[9]Appellee also states that Appellant was, at some unspecified time, granted the right to depose Alexander and Tanner but did not do so. (AB at 75). Appellee's answer brief fails to cite any part of the record to support this assertion. At one point, the lower court granted Appellant the right to depose three witnesses regarding public records issues, but Tanner and Alexander were not included. (PCR 3131). Furthermore, it was at these depositions where Appellant discovered that the State Attorney had not turned over all of their files. Only after the state turned over their remaining files (November 26, 1997) did Appellant discover the draft judgement and sentence for the first time.

sentence, the December 4th hearing was not an open-ended hearing where Appellant could address any matter he wished.

Appellant has more than sufficiently established that he is entitled to relief on all claims derived from the presence of the draft judgment and sentence located in the State Attorney's files. However, if this Court finds that Appellant has not established his entitlement to the relief sought in Argument I, this Court should find that the lower court abused its discretion in denying Appellant's discovery request, and reverse and remand to the lower court (as in Lewis) to allow Appellant the discovery necessary to prove this claim.

Regarding the remaining subclaims in Argument III (subclaims B and C), Appellant will rely on the arguments presented in his Initial Brief. (IB at 88-92).

ARGUMENT IV

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE

Regarding Claim IV, Appellant will rely on the arguments presented in his Initial Brief. (IB at 93-96).

ARGUMENT V

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST

Regarding Claim V, Appellant will rely on the arguments presented in his Initial Brief. (IB at 96).

ARGUMENT VI

THE TRIAL COURT'S UNDISCLOSED BIAS

In answering this claim, Appellee complains of being put at a disadvantage because Appellant's counsel was unable to cite to the specific page of testimony from the "Howard Pearl" hearing conducted in 1992, where Judge Perry first revealed that he was a special deputy sheriff.[10] (AB at 95). This Court granted Appellant's motion to consolidate the record of the proceedings in Case No. 81,950 into this case, and the State stipulated to the admissibility of the evidence from the prior hearing at the hearing below. (PCR 2997; 2986-3016). In his Initial Brief, Appellant specifically relies on that record for the facts contained therein. (IB at 14, fn 8). Appellee was put on notice by Appellant's Initial Brief. Appellee also has access to the testimony from the "Howard Pearl" hearings. The referenced testimony is straightforward and by no means extensive. Thus, Appellee is in no way put at a disadvantage due to Appellant's inability to supply the specific page number in the Initial Brief. Furthermore, this Court should note that Appellee has not claimed that Appellant's counsel misrepresented the testimony.

Appellee also claims Appellant should be denied relief because he cannot show that an "acquittal" would have resulted had any other judge presided over his case. (AB at 96). Appellee, however, avoids the clear due process violation

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[10]Judge Perry's testimony appears on pages 936-37 of the transcript from the consolidated hearing on all "Howard Pearl" claims, held in December, 1992.

resulting from a defendant being faced with a biased judge at trial. See, Carey v. Piphus, 435 U.S. 247 (1978); Mathews v. Eldridge, 424 U.S. 319 (1976); Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). Appellee also avoids considering Judge Perry's bias (due to the special deputy status) in conjunction with Judge Perry's impartiality which Appellant has demonstrated in this case. Had Appellant known of Judge Perry's status as a special deputy sheriff, he would have had a well grounded fear that he could not receive a fair trial, and ultimately moved for Judge Perry's recusal. Considering Judge Perry's bias outlined in Argument I, supra, Appellant's fear would have been well founded.

ARGUMENT VII

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR

Judge Perry defined the heinous, atrocious, or cruel aggravator thus:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. A conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

(R. at 1842.)

The court below held that the instruction given by Judge Perry was not the same as that given--and struck down--in Espinosa v. Florida, 505 U.S. 1079 (1992), and that it "conformed to the jury instruction upheld by the Florida Supreme Court in

Hall v. State, 614 So.2d 473 (Fla. 1993)." Whether the instruction was the same as that given in Espinosa is irrelevant: the issue is whether "its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa at 1081.

Notwithstanding the lower court's *ipse dixit* conclusion that Judge Perry's instruction "conformed" to that given in Hall, Appellant would respectfully contend that it does not "conform" enough to pass constitutional muster. Though the instruction given by Judge Perry shared some language with that given in Hall, it lacked the "additional acts" component of the Hall instruction, thus, it left the jury with nothing but unconstitutionally vague terms and insufficient guidance for finding the presence or absence of the "heinous, atrocious, or cruel" aggravating factor. Under Espinosa, this Court must find that the instruction was constitutionally infirm.

CONCLUSION

Appellant has established the presence of judicial impropriety in his case that raises substantial doubt about the appropriateness of his conviction and sentence of death. The convictions and sentence of death were obtained in violation of the Sixth, Eighth and Fourteenth Amendments. Appellant is entitled to a new trial and/or penalty phase.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 26, 2000.

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