IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96890

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

LAWRENCE FRANCIS LEWIS,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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ARGUMENT I--NO ADVERSARIAL TESTING AT THE GUILT PHASE

A. CLAIM UPON WHICH EVIDENTIARY HEARING WAS GRANTED.

In his 3.850 motion, Mr. Lewis asserted that no adversarial testing occurred at the guilt phase for a variety of reasons, one being that either the State failed to disclose or trial counsel Kirsch failed to investigate the existence of pending charges against James Mayberry and that the Broward authorities were engaged in behind-the-scenes negotiations with Mayberry which were undisclosed to trial counsel. This was the only aspect of the guilt phase claim for which an evidentiary hearing was granted.[1]

The State asserts that "[n]ot only was there no Brady[2] violation, but there was neither deficient performance nor prejudice established as required by Strickland"[3] (AB at 34). In the order denying this claim, the lower court wrote that "while it could be said that defense counsel was negligent in not obtaining the necessary documentation pertaining to the pending Dade and Broward cases, the Defendant has failed to show prejudice flowing from this negligence" (PCR V 1062). Mr. Lewis' view of the lower court's statement is that deficient performance

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[1]The disposition of the claims which were summarily denied is discussed infra at Section B.

[2]Brady v. Maryland, 373 U.S. 83 (1963).

[3]Strickland v. Washington, 466 U.S. 668 (1984).

was found, yet the State argues to the contrary, asserting that the lower court's finding "is merely acknowledging that there may be a question" as to deficient performance (AB at 36-37). The State's view, however, is clearly refuted by the order itself and the language used by the lower court.

The State asserts that Kirsch was aware that Mayberry had charges pending in Dade County which were dropped after Mayberry's identification of Mr. Lewis, and thus he could not be ineffective nor could the State have withheld the evidence (AB at 37-39). First of all, this position is contrary to the lower court's finding that Kirsch was "negligent" in failing to obtain the "necessary documentation" about Mayberry's Dade and Broward charges. Moreover, Mr. Lewis' allegation is not that Kirsch did not know that Mayberry had Dade charges which were pending and dropped. Mr. Lewis' allegation, established through the evidence adduced below, is that Mayberry's release from Dade custody was linked to his cooperation with the State in Mr. Lewis' case, and that the discussions between the Broward authorities and the Dade authorities should have been disclosed pursuant to Brady. At the evidentiary hearing, Mr. Lewis presented proof that (1) the Broward authorities were in contact with the Dade authorities regarding Mayberry's status (PCR XII 605-06); the prosecutor, Ralph Ray, had conversations with the Dade authorities regarding Mayberry's situation (Id. at 605); and Kirsch did not know that Ray had been in touch with Dade authorities regarding Mayberry's situation and "would have expected" to be told of such

communications (PCR IX 230-31). It is the suppression of the behind-the-scenes negotiations which provided context for the "dropping" of Mayberry's initial charges within days of his identification of Mr. Lewis as the perpetrator that violated Brady and which the jury was entitled to know when evaluating Mayberry's credibility. See White v. Helling, 194 F.3d 937, 945 (8th Cir. 1999) ("This sequence of events, withheld from the defense at trial, would have provided powerful ammunition for attacking the credibility of Mr. Stouffer's in-court identification of petitioner as the man who took his wallet").

As to Mayberry's numerous other criminal charges, the State asserts that Ray sent Kirsch a letter "advising him that there were outstanding Dade and Broward County charges filed against Mayberry," and therefore Mr. Lewis failed to prove that Kirsch "did not know the specifics of the disposition of Mayberry's pending charges (AB at 39-41). The State also assails Mr. Lewis' position based on the fact that Kirsch did not recall receiving the letters (AB at 42). The State completely ignores that these letters did not disclose the full nature of Mayberry's criminal history; thus, whether Ray sent them, whether Kirsch received them, and/or whether Kirsch remembered receiving them, are not relevant considerations when the bottom line is that the letters contained materially inaccurate statements and/or material omissions.[4] As detailed in Mr. Lewis' opening brief, the letters

[4]That Ray's letters failed to include the full extent of Mayberry's criminal history certainly explains Kirsch's failure to question Mayberry about it at the time of trial. Counsel can

that Ray sent to Kirsch, along with the actual criminal history printouts which were provided to Kirsch, failed to disclose most of Mayberry's criminal history; in fact, the criminal history printouts revealed no criminal history for Mayberry subsequent to 1982 (Amended Brief of Appellee/Cross-Appellant at 30-31).[5] The State does not appear to dispute, nor could it, that the State is duty bound to disclose criminal histories of its witnesses. State v. Gunsby, 670 So. 2d 920, 923 (Fla. 1996). And to the

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hardly be required to question a witness about information that was improperly withheld by the State. While the State now argues that Kirsch "obviously make a strategic decision not to impeach Mayberry any further with more of the same" (AB at 43), this bald assertion has no evidentiary support whatsoever. In fact, the very opposite is true; Kirsch testified that had he known of the undisclosed information, he would have used it to further impeach Mayberry (PCR IX 231).

[5]As the State acknowledges, Ray's first letter to Kirsch, dated March 10, 1988, revealed that Mayberry had been arrested on August 18, 1987, in Dade County and charged with burglary of a conveyance (AB at 41 n.9). Ray's letter did ***not*** disclose, however, that Mayberry was also charged at that time with second degree grand theft, possession of burglary tools, resisting arrest without violence, and obstruction of justice; nor did the letter mention that Mayberry's bond on those cases was later estreated and a capias issued for failure to appear. As the State also acknowledges, Ray's March 10 letter also revealed that Mayberry was arrested in Broward County on September 7, 1987, and charged with grand theft auto and possession of cannabis (AB at 41 n.9). Ray's letter did ***not*** disclose, however, that Mayberry was also charged with no vehicle registration, expired tag, fleeing a police officer, driving while license suspended, as well as the outstanding capias warrants. Ray's letter further failed to reveal that Mayberry was also arrested on July 13, 1987, for possession of burglary tools, petit theft, grand theft, and fleeing. The possession of burglary tools and petit theft charges were later dropped. Thus, with this in mind, Ray's letters to Kirsch are essentially meaningless, except to the extent that Kirsch could reasonably rely on Ray's representations in his letter that the extent of Mayberry's charges were those that were contained in the letter.

extent that the State argues that Mr. Lewis "failed to prove" that Kirsch "could not have obtained" the specifics of Mayberry's charges with due diligence by "questioning Mayberry more carefully" (AB at 41-42), Mr. Lewis submits that he did in fact prove deficient performance, as the lower court found (PCR V 1062) ("it could be said that defense counsel was negligent in not obtaining the necessary documentation pertaining to the pending Dade and Broward cases").[6]

Turning to prejudice and materiality, the State, in the face of unequivocal precedent, stubbornly forges ahead and argues that "other evidence of Lewis' guilt" conclusively demonstrates a lack of prejudice and/or materiality (AB at 43).[7] Time and time

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[6]Apparently, the State agrees that Kirsch was deficient, as it assails him for failing to call Mayberry's prosecutor or defense counsel in both the Dade and Broward cases, failing to review the circuit court files for the specifics on the cases, and failing to directly ask Mayberry about his cases (AB at 43). Mr. Lewis agrees that Kirsch could have done all of these activities and his failure to do so constitutes deficient performance. However, the blame also rests with the State; while defense counsel has a constitutional duty to investigate, the State also has a constitutional duty to disclose this information. Gunsby, 670 So. 2d at 923 ("no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses").

[7]The withheld information goes far beyond the fact that "Kirsch did not elicit testimony that Mayberry's Broward sentence ran concurrently with the Dade charges (AB at 45). The State's cramped assessment of the evidence is incorrect. As detailed in his opening brief and in this brief, Mayberry had a substantial number of felony convictions which were never disclosed, many of which "went away" after his involvement in assisting the State in its prosecution against Mr. Lewis. In at least one of the cases, it does not appear that Mayberry was ever required to pay the nearly $2,000 restitution to the victim. Moreover, Mayberry was never charged with any of the criminal activity he was engaging in on the night of the crime. Finally, that the Broward

again, the Supreme Court has made it clear that sufficiency of the evidence is ***not*** the test for assessing Brady's materiality prong or Strickland's prejudice prong. See Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Time and time again, this Court has enunciated the same principle. See Young v. State, 739 So. 2d 553 (Fla. 1999); Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Hoffman v. State, 26 Fla. L. Weekly S438 (Fla. July 5, 2001). As for whether "other evidence of guilt" can automatically defeat a claim of Strickland prejudice, this Court recently reaffirmed:

> After all, if sufficiency of the evidence were the standard, no defendant could ever successfully assert a collateral claim of ineffective assistance of counsel because, presumably, by the time the defendant is able to raise such a claim, his or her conviction would already have been affirmed--something which would only happen if the evidence was sufficient to support the conviction. The test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

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authorities were actively in contact with Dade and Broward authorities over a long period of time is also evidence that the jury could have used to evaluate Mayberry's credibility. The nature and extent of the potential impeachment thus goes far beyond the limited area than the State apparently wishes, and is ***qualitatively*** different from the matters on which Mayberry was impeached, and thus not "cumulative" of matters already known to the jury. Brown v. Wainwright, 785 F. 2d 1457, 1466 (11th Cir. 1986); United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977). "[T]he fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner [does not turn] what was otherwise a tainted trial into a fair one." Napue v. Illinois, 360 U.S. 264, 270 (1959).

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Thompson v. State, ___ So. 2d ___, ___ n.9 (Fla. Sept. 20, 2001).

In any event, the "other evidence of guilt" relied upon by the State by witnesses Tracy Marcum and Charles Heddon is hardly that (AB at 45-46). Picking out individual snippets of testimony, as the State does, is not a proper analysis; the full testimony of these witnesses, which includes cross-examination, must be assessed as well. With respect to Marcum, the State fails to mention that, at trial, she acknowledged lying not only to the police but also to the grand jury (R. 1635-44). Heddon also (1) acknowledged lying to the State Attorney's Office in his sworn statement (R. 1714-17), (2) gave significantly different testimony at trial than he gave at his deposition (R. 1714-36), (3) acknowledged his prior testimony to the police, the State, and in deposition that, until trial, he maintained that he could not identify the truck because he was so drunk, (4) and acknowledged that he had lunch with Marcum just before testifying at the trial during which time he read a detailed newspaper article about Mr. Lewis. Thus, the credibility of Marcum and Heddon was hardly stellar and unimpeached.

The State does not address the impact of the nondisclosure of Mayberry's full criminal history and the State's behind-the-scene activities on Mr. Lewis' penalty phase. Apparently the State wishes to ignore the prosecutor's explicit argument to the jury at the penalty phase that "Mayberry was telling the truth"

and that "you have to consider his testimony when you consider the fact that Mr. Lewis had a premeditated design to kill these two fellows" (R. 3181). The trial court's sentencing order relied heavily on Mayberry's recitation of the events in order to find the existence of aggravating circumstances, namely, during the course of a kidnapping and heinous, atrocious, or cruel (R. 3563-65). Obviously, the Brady material affects both the veracity of the prosecutor's arguments,[8] as well as undermines confidence in the weight of the evidence used to find aggravating circumstances. See, e.g. Young v. State, 739 So. 2d 553, 560-61 (Fla. 1999) (suppressed evidence material to aggravating circumstances that were considered by jury); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) (remanding for evidentiary hearing to evaluate cumulative effect of Brady evidence and newly discovered evidence because of "serious doubt about at least two of the[] aggravators"). Thus, at a minimum, the Brady material undermines confidence in the outcome of Mr. Lewis' sentencing proceedings.[9]

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[8]See Kyles, 514 U.S. at 444 ("[t]he likely damage [to the State's case due to suppressed information] is best understood by taking the word of the prosecutor"); Arango v. State, 497 So. 2d 1161, 1162 (Fla. 1986) (suppressed evidence, "coupled with [] prosecutorial argument to the jury," required new trial); Wilson v. State, 363 Md. 333, 349, 768 A.2d 675, 683 (Md. Ct. App. 2001) (materiality established where "disclosure of the plea agreements by the witnesses on the stand was not entirely accurate, and that inaccuracy was compounded by the State's characterization of the agreements and the witness' motives to testify in closing arguments").

[9]In light of the lower court's order vacating Mr. Lewis' sentence of death on other grounds, the Brady claim as it relates

B. CLAIMS WHICH WERE SUMMARILY DENIED.

Despite acknowledging that the lower court, in summarily denying several of Mr. Lewis' guilt phase allegations, failed to attach portions of the record which conclusively refuted the allegations, the State argues that such is "appropriate" because the court had the parties' pleadings, the trial record, and the benefit of the parties' argument at the Huff[10] hearing. That the trial court had the pleadings of the parties and the benefit of argument does not vitiate the fundamental requirement that a court must attach portions of the record or "clearly spell[] out" in its order the basis for the summary denial. Patton v. State, 784 So. 2d 380, 388 (Fla. 2000). In all cases, not just death cases, a court is going to have the "benefit" of the pleadings and the trial record. In Mr. Lewis' case, the trial court's order summarily denying numerous claims failed to attach any records which conclusively refuted the allegations or to "clearly spell[] out" the reasons for the summary denial. As to the allegations relating to the guilt phase, which were alleged in Claim II of Mr. Lewis' amended postconviction motion, the lower court's order provided:

> Claim II -- Ineffective assistance of counsel at the guilt phase of trial, and State's failure to disclose exculpatory evidence. An

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to the sentencing is arguably moot; however, the State has appealed the lower court's order granting relief. The Brady issue provides further support for the propriety of the vacation of Mr. Lewis' sentence of death.

[10]Huff v. State, 622 So. 2d 982 (Fla. 1993).

> evidentiary hearing is necessary **only** to determine whether there was ineffective assistance of counsel or a violation of Brady v. Maryland, 373 U.S. 83 (1963) pertaining to the State's witness, James Mayberry. **All** other portions of this claim fail as either being procedurally barred, insufficiently pled, or refuted by the record.

(PCR V 655-56) (emphasis in original).

The lower court's order gives Mr. Lewis and this Court no specific record-based explanation of why his claims were summarily denied, and is error. A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant 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). Accord Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990); Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

The files and records in this case do not conclusively rebut Mr. Lewis' allegations. For example, with respect to the allegations regarding the failure to call David Ballard, the State suggests that Kirsch had a strategic reason for not presenting Ballard to testify to the exculpatory statements he made because, had he been called, "could have been impeached easily" with other statements he made which implicated Mr. Lewis (AB at 50-51). Of course, this is not a reason set forth by the lower court, as the lower court's order was devoid of any

analysis on the reasons for the summary denial (PCR V 655-56). Moreover, the State's argument that Kirsch must have had a strategy is insufficient to justify summary denial. As this Court recently observed, "[i]f this were the standard, a strategy could be presumed in every case and an evidentiary hearing would never be required on claims of ineffective assistance of counsel." Patton, 784 So. 2d at 387. See also Thomas v. State, 634 So. 2d 1157 (Fla. 1st DCA 1994) (inappropriate to find that defense counsel's actions were tactical absent an evidentiary hearing); Davis v. State, 608 So. 2d 540 (Fla. 2d DCA 1992) (same). At this point in the proceedings, no one, including the State, knows why Kirsch did not call Ballard to testify at Mr. Lewis' trial. Such a determination can only be properly made after an evidentiary hearing.

The State appears to suggest that calling a witness who had provided inconsistent statements about Mr. Lewis' involvement would be unreasonable (AB at 51).[11] In light of the facts of this case, the State's argument is rather disingenuous. The State's argument ignores the ugly fact that each of its key witnesses--Wendy Rivera, Charles Heddon, Martin Martin, Tracy Marcum, and Stacy Johnson-- all admitted to lying to the police, prosecutors, and grand jury about Mr. Lewis' supposed involvement in the crime. See Amended Answer Brief of Appellee/Initial Brief

[11]Of course, the inculpatory version of events that Ballard provided came after a substantial number of criminal charges were dropped. See Amended Answer Brief of Appellee/Initial Brief of Cross-Appellant at 40-41.

of Cross-Appellant at 6 n.3. The bottom line is that it was for the jury to decide what happened, and to cull through the lies and inconsistencies of the evidence in this case. For no tactical reason apparent on the record, Kirsch did not call Ballard, and thus the jury was deprived of potentially significant information to complete the picture of what occurred. This is particularly so with respect to Ballard, as even the prosecutor told the jury that there were "a lot of reasons" why the State did not call David Ballard to testify" (R. 2912).[12] In light of this comment, one can only imagine that the jury would speculate that the prosecutor might not have called Ballard because Ballard would not have helped the State's case. Yet the defense never called him either, and the jury had to have been left with nagging questions.

Mr. Lewis also alleged that trial counsel unreasonably failed to object to various comments by the trial court. First, the trial court told the jurors before reading the jury instructions at the guilt phase that the evidentiary portion of Mr. Lewis' trial was "not necessarily" very interesting, the jury instructions were "pretty boring" and "just not that interesting," and pointed out that when a judge begins to read

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[12]Perhaps one of the reasons was that the prosecution had information that, contrary to Ballard's police statement that Mr. Lewis used a steel pole which he found in the jeep, it was Ballard himself who threw away a piece of pipe that evening. As alleged below and on appeal, notes in the State Attorney's files reveal that Ballard, not Mr. Lewis, threw away a steel pipe. This Brady allegation was never resolved, and an evidentiary hearing is warranted.

the instructions, "everybody runs" (R. 2951-52). No objections were made by trial counsel. The State argues that the comments were "proper" yet fails to explain how they were "proper." The State's suggestion to this Court that it is "proper" for a judge in a criminal case (much less a capital case) to denigrate the importance of jury instructions on the law, to joke about the jury instructions, and to telegraph to the jury that the judge himself found the evidentiary portion of the case "not necessarily" very interesting, is barely worthy of much reply.

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." Carter v. Kentucky, 450 U.S. 288, 302 (1981). Judges must "take great care to separate the law from the facts, and to leave the latter, in unequivocal terms, to the judgment of the jury, as is their true and peculiar province." Starr v. United States, 153 U.S. 614, 626 (1894). The trial judge's comments in Mr. Lewis' case "were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances . . . It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest work or intimation is received with deference, and may be controlling." Id. Because a judge can "communicate hostility and bias to a jury in ways that are not ascertainable from a reading of a `cold' written record of the proceedings," Anderson

v. Sheppard, 856 F. 2d 741, 746 (6th Cir. 1988), it is impossible to know the effect that the judge's comments had on Mr. Lewis' jury.[13] That being said, a new trial is required.

As to trial counsel's failure to object to the manner in which the court responded to the jurors' request for a read-back of testimony, the State provides a clinical and paraphrased discussion of the court's comments (AB at 55-56). It is quite apparent, however, even from the cold record, that the general tenor of the judge's comments was intended to convey to the jury that it would be a great hardship to have the requested testimony read back to them. For example, the judge, although telling the jury that it would not be impossible to have the testimony read back, made it very clear that "it's very impractical" for the court and the attorneys to "go through all that testimony first by ourselves," and that it would take "between four and eight hours to figure out everything that was said by these people." Thus, the judge told the jury to "go back" and "discuss . . . whether you feel that it's necessary or still necessary"; although the judge said that he did not want the jury to "read anything into what I'm saying to make you think you should have any pressure on you," he finished that same sentence by telling them that if they still wanted to hear the testimony, "we are

[13]That the judge happened to throw in qualifying language that although boring and uninteresting, the instructions were nonetheless "very important" is essentially the same as if he had conspiratorially "winked" to the jurors as he was espousing the "importance" of the instructions.

going to be here for hours." Again, even though he next said that this "should not be part of your consideration," he immediately followed up by saying "even if we have to go into tomorrow or whatever." Thus, the judge told the jurors "think about it and talk about it some more." Within moments after returning to the jury room, the jurors sent a note that they "decided to proceed from our own recollections" (R. 3031). It could not be clearer that the judge was pressuring the jurors. Trial counsel's "agreement" with what the judge did (AB at 56), is, of course, the pith of Mr. Lewis' ineffective assistance of counsel claim.

The judge's comments in Mr. Lewis' case were akin to an Allen[14]-charge type of situation, that is, comments intended to coercing the jury into acting hastily or abandoning its conscientious belief in order to satisfy the court. See Thomas v. State, 748 So. 2d 970 (Fla. 1999). Here, the jurors made a reasonable request to have critical testimony read back to them; the trial had been quite long, and a large number of witnesses had been presented. Moreover, the witnesses whose testimony the jurors wanted read back had vacillated numerous times as to their stories.[15] The aggregate nature of the judge's comments to the

[14]Allen v. United States, 164 U.S. 492 (1896).

[15]The jury had requested to hear "testimony or evidence that Larry Lewis was seen in the truck at Holly Lakes Trailer Park including transcripts of testimony from Martin Martin, Stacy Johnson, Chuckie Heddon, Tracy Marcum" as well as "Mayberry's testimony identifying Lawrence Lewis" (R. 3025-26).

jurors in response to their request made it clear that it would be quite a burden to comply with their request, and thus had an unduly coercive effect on the jury.[16] Id. at 977 (error when "the cumulative nature of the trial judge's actions and comments under the extreme prevailing circumstances created a substantial risk of coercion"). Trial counsel's failure to object was unreasonable and an evidentiary hearing is required.

Mr. Lewis relies on his opening brief to refute the remainder of the State's arguments, and submits that an evidentiary hearing is warranted on these additional allegations of ineffective assistance of counsel.

ARGUMENT III -- JUDICIAL BIAS[17]

In his postconviction motion, Mr. Lewis alleged that he was entitled to a new trial and/or sentencing proceeding due to the bias of the trial judge, Stanton Kaplan. He also asserted his entitlement to an evidentiary hearing on this claim. After initially summarily denying the claim, the lower court granted a hearing following the State's concession of the need for an evidentiary hearing in light of Thompson v. State, 731 So. 2d 1235 (Fla. 1998). However, because the lower court subsequently granted sentencing relief on other grounds, the judge bias issue

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[16]Of course, the judge had already made it quite clear to the jurors that he was not particularly impressed with the "excitement" of the evidentiary portion of the trial.

[17]Argument II of Mr. Lewis' opening brief addressed the propriety of the lower court's granting of relief; the State's reply to that argument is contained in Argument I of its Reply Brief/Cross-Answer Brief.

was rendered moot (PCR VII 1148).

In this appeal, Mr. Lewis raised this issue in the unlikely event of a reversal of the grant of sentencing relief. In response, the State, in a 100% reversal of its position below, first argues that no evidentiary hearing is required and the claim should be summarily denied (AB at 60). The State's actions are shocking and worthy of utter condemnation by this Court. Below, the State first conceded that an evidentiary hearing should be granted in a written pleading:

> The State submits that this Court should grant the Defendant's "Supplement to Motion for Rehearing" as it relates only to **Claim V** of his final amended motion for postconviction relief and hold an evidentiary hearing on this claim.

(PCR VII 1140) (emphasis in original). At a hearing, the State's representative also orally conceded a hearing:

> MS. BAGGETT: The State stands on its response to the original motion to the hearing pursuant to this Court's orders, we responded to the supplemental motion for rehearing as well **and do agree that as to claim five only we need to have an evidentiary hearing**. . .

(PCR XII 650-51) (emphasis in original). Based upon the State's stipulation, the lower court granted an evidentiary hearing.

Now, the State asserts that no evidentiary hearing should be granted. Apparently the representatives of the State do not believe that they should be required to stand by their representations made to courts of law in this State, and would rather say whatever is convenient at whatever time it suits them.

If a CCRC attorney were to withdraw stipulations or engage in the type of behavior as the State is in Mr. Lewis' case, one can only imagine the response of the representatives of the State of Florida. The State's unethical sandbagging should be condemned.

The State next asks that the Court "revisit" the Court's opinion in Thompson (AB at 62).[18] Of course, the Thompson decision came out in 1998, and the State's rehearing in that case was denied.[19] The opinion has been final for many years, and the State's ongoing displeasure with the outcome in that case provides no basis, legal or otherwise, for "revisiting" the decision years later. If the Court were to do so, there are a number of decisions from this Court that Mr. Lewis' collateral counsel would like to have "revisited" as well.

The State avers that the "sole basis" for Mr. Lewis' position on appeal that an evidentiary hearing should be held is the State's concession that a hearing is required, and has the temerity to suggest that Mr. Lewis' insufficiently briefed this point (AB at 62). Apparently, the State is suggesting that Mr. Lewis' counsel was simply stupid for relying on the

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[18]The main reason underlying the State's request is that the remedy afforded in Thompson was, according to the State, "unique (new sentencing without an evidentiary hearing)" (AB at 61). Granting of relief without an evidentiary hearing, although not a routine remedy, is hardly "unique." For example, in Young v. State, 739 So. 2d 553 (Fla. 1999), the Court granted sentencing relief on an issue on which no evidentiary hearing had been held. In Roman v. State, 528 So. 2d 1169 (Fla. 1988), the Court granted a new trial on an issue on which no evidentiary hearing had been held.

[19]Mr. Thompson was subsequently sentenced to life.

representations and legal positions taken by the State before the lower court, and should have, in writing his brief, divined that the State would change its mind. In a system that operates on the representations made by attorneys licensed to practice law in this State, Mr. Lewis' counsel believed he had a right to rely on the concession of the State; although, based on the State's conduct in unabashedly taking back their concession regarding an evidentiary hearing, perhaps collateral counsel did naively believe that the Assistant Attorney General's words, both in writing and orally, to the lower court actually meant something. Collateral counsel has learned his lesson that the State's word is obviously not to be trusted.

The State next uses selective portions of Judge Kaplan's deposition, which was taken as part of the postconviction proceedings,[20] to argue that the claim should be summarily denied (AB at 63-66).[21] However, this deposition is extra-record information that the State cannot use to challenge and/or refute the allegations of judicial bias made by Mr. Lewis. See, e.g. McClain v. State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993) ("the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of

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[20]See State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

[21]Of course, as noted above, the State below conceded an evidentiary hearing based on these same allegations.

counsel claims"); Gholston v. State, 648 So. 2d 192, 193 (Fla. 1st DCA 1994) (error to summarily deny a motion where "[t]he State filed a response which included documents which were not part of the trial record in support of the contention that there was no use of perjured testimony, knowing or otherwise"). Because the State cannot use extra-record allegations to refute the extra-record allegations made by Mr. Lewis, an evidentiary hearing is clearly warranted on this basis alone.

The allegations set forth in Mr. Lewis' postconviction motion were more than sufficient to warrant an evidentiary hearing (as the State later conceded and the lower court later found).[22] On March 31, 1993, the CBS television network, as a segment of its weekly newsmagazine "48 Hours," aired a program entitled "Rough Justice." The show focused on the critical state of the criminal justice system in general, and, in particular, on the type of justice that an accused criminal can expect in the courtroom of Judge Stanton Kaplan. Throughout the program, Kaplan was described as "a hanging judge, death on wheels" ("Rough Justice" transcript at 17). He explained that his job in dealing with accused criminals was "to get rid of these people . . . and keep them off the streets as long as possible so that you

[22]Certainly, this Court's statement in Thompson that relief was warranted in part due "questions regarding the bias of the original trial judge," Thompson, 731 So. 2d at 1236, is sufficient to warrant an evidentiary hearing on the issue in Mr. Lewis' case. It would indeed by an anomaly that Mr. Thompson would get relief based on the deposition of Judge Kaplan that was taken in Mr. Lewis' case, and Mr. Lewis would not even get an evidentiary hearing on the issue.

and I can be rid of them" (Rough Justice transcript at 16).[23] He further elaborated that his policy was that "you've got to fight fire with fire" (id.). Prosecutors who were interviewed on the program discussed how "excited" they were when they were assigned cases in front of Kaplan because, as Kaplan himself explained, "Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail" ("Rough Justice" transcript at 18).

Kaplan's public comments also revealed his bias toward mitigation evidence ("Rough Justice" transcript at 20). He stated "I'm always looking at a negative approach, somebody's trying to con me." Id. Had counsel at trial been aware of Kaplan's bias, he would have moved to disqualify him because his bias would have been a legally sufficient reason to disqualify him from presiding over Mr. Lewis's capital trial. Martin v. State, 2001 WL 1098246 (Fla. Sept. 12, 2001). This was a public pronouncement made too late and Kaplan failed to disclose this bias or take responsibility for removing himself from Mr. Lewis's case. Kaplan's public statement of bias reveals that he was predisposed to find against Mr. Lewis, particularly with respect to sentencing issues, was unable to fairly and impartially preside over the case. Porter v. State, 723 So. 2d 191 (Fla. 1998); Hayes v. State, 686 So. 2d 694 (Fla. 4th DCA 1996);

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[23]To Judge Kaplan Mr. Lewis was clearly one of "these people." He indicated in his letter to the Executive Clemency Board that Mr. Lewis was "unfit to live in society," and that he "will kill again and should never be released."

Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994).

In the deposition taken of Judge Kaplan below, Kaplan affirmed that the transcript of the "48 Hours" interview accurately represented his judicial philosophy and his animosity toward criminal defendants including Mr. Lewis:

> Q I'm turning your attention to page 16 which would be the left-hand side of this page that I'm showing you. About -- not quite halfway down, the transcript indicates, "Judge Kaplan," and **then you are quoted as saying," I want to get rid of these people and keep them off the streets as long as possible."**
>
> Do you see where that is?
>
> A Yeah. You're talking the middle of the page before you get to "The Punisher."
>
> * * *
>
> Q **Well, do you recall giving that answer.**
>
> A **Oh, yeah. Definitely.**
>
> Q What did you mean in terms of when you said, "I want to get rid of these people and keep them off the streets as long as possible?"
>
> * * *
>
> A First, let me answer it this way.
>
> I want you to understand that on the show, my participation was about seven minutes.
>
> They interviewed me for an hour and 15 minutes here.
>
> And what they did is they obviously had an agenda to make me look like the Public Defender's nightmare.

My purpose here, I'm sure what they used me for, is a tough sentencer.

And so they were asking me all kinds of questions for an hour and 15 minutes, and I believe we were talking about people who are convicted of crimes and are habitual offenders and are violent criminals.

And when they asked me these questions, that was one of the answers I gave why I was a tougher sentencer, or something of that nature.

Now, you won't see that question there because these are all overlays. These are not questions and answers as this was presented in the show, they were questions and answers when I was interviewed.

And that was the answer to one of the questions, "I want to get rid of these people and keep them off the streets as long as possible." And the reason is obviously they're habitual criminals and violent people and a pain in the neck to our -- to law abiding citizens.

So, I hope that answers your question.

Q In terms of that answer, "I want to get rid of these people and keep them off the streets as long as possible," is that -- in terms of is that how you see your -- or when you were explaining this to the reporter, your judicial role, your judicial purpose?

A Only on convicted violent people, yes, that's my role, to make sure I keep them off the streets so that they don't bother you and me.

Q Now, would you classify that as your, so to speak, judicial philosophy?

A To be tough on criminals in sentencing that are people who are convicted? Certainly.

Q To get rid of these people and keep them off the streets as long as possible.

A Yeah.

These people are violent criminals, habitual criminals.

And, yeah, I want to get them off the streets if they're convicted of violent crimes, right.

Q How long has that been your philosophy or has that always been your thinking?

A That's always been my philosophy.

(Supp. PCR IV at 578-82 (emphasis added).

Kaplan further elaborated on his judicial philosophy of giving defendants "stiffer sentences" than they might otherwise deserve just to "get them off the streets":

Q I'm turning to page 18 at the top, the first quotation that's attributable to you states, quote, **"Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail."**

A **That's right.**

Q Do you remember making that statement?

A Yes, I do.

Q And could you explain what you meant by that statement?

A It means --

MS. BAGGETT: Objection. Thought process.

THE WITNESS: Thanks.

I'm going to answer this one, too.

It means that you -- we all know that -- especially back at this time they were letting people out left and right. You were

giving people 30 months and they weren't -- they were spending nine months, eight months. Something like that.

So, I -- in fact, right above I think explains where we're headed. It says, if you give them 15 years in prison, they're probably going to spend three. You see?

And that's something I'm talking about there.

Sometimes you give them a little stiffer sentence. So you give them more than -- if I want somebody to say spend five years in jail, if I give them a five year sentence, they may only spend two.

If I'm able to give them a ten year sentence, maybe they'll spend five.

Now, today, they're supposed to be serving more time.

But in those days, three years ago, forget about it. The state prisons were overcrowded.

Now they're not because now the county jails are overcrowded.

They changed the whole system. They don't let you put people in jail anymore for drug offenses or minor drug offenses.

Anyway, that's what I mean.

If you want me to explain more, I will, if it's not clear.

But, yes, I do -- did give them higher sentences so that they could spend more time in jail than what I might normally because of the system.

And I think that's in there at some place, where I say you got to fight fire with fire. And that's what I mean. You've got to give them a little extra time so that they spend the time that you really want them to spend.

> **You've got to almost fight the system that -- where they're letting them out so soon. That's what I mean.**

(Id. at 585-88) (emphasis added).

Kaplan also explained why prosecutors got "excited" when their cases were assigned to him:

> THE WITNESS: Okay. Well, what I mean by that was -- in for instance plea negotiations in my court, normally I don't try to undercut the prosecutors.
>
> They can -- in my court, **they know if somebody gets convicted of a serious crime, they're going to get a stiff sentence so they can hold out for more.**
>
> A lot of judges -- I don't know if it's in your circuit or some of the other circuits, but a lot of judges like to move cases. They'll take just about anything in plea negotiation. Whatever somebody agrees to, they're going to move their docket.
>
> We got people in this circuit that have like 200 cases, 300. I got 500. Some have 600, some have 700, some have had 900 over the last year.
>
> And, you know, so there's -- some judges will just take anything that's worked out and they work things out like that.
>
> Also, some judges won't declare anybody a habitual offender. I will.
>
> In fact, now the law has changed where you have to declare people habitual offenders if they qualify, and if you don't, you got to give a reason why you didn't.
>
> Before, you didn't have to do that. Before, if somebody was a habitual offender, all you had to do is when you habitualize them is tell them why you habitualize them.
>
> Now it's different. You got to tell them why you're not if you don't. So --

BY MR. SCHER:

Q Back when -- like you said it was discretionary as to whether to habitualize somebody, was it your practice to habitualize somebody so that you could impose a tougher sentence?

MS. BAGGETT: Same objection.

THE WITNESS: Not every case. **But I habitualize people more than any other judge I would think, or at least as much as any other judge in the circuit.**

* * *

Q Getting back to the prosecutors being quoted as they can get away with stuff in your court that they can't get away with in other counts, in terms of you mentioned plea agreements, what other sort of things can prosecutors, quote, get away with, end quote, in your court?

MS. BAGGETT: Same objection.

THE WITNESS: Well, I'm still going to answer it. Thanks, though.

They can't get the plea agreements, as I said, from other judges or some other judges.

There's a lot of judges like me, too, but there's a lot that aren't.

That they can get -- **they can hold out for a better plea or stiffer sentence in my division than they can from other judges.**

A lot of judges, as I say, won't habitualize defendants who should be habitualized, in my opinion.

* * *

Q **But as a general rule, prosecutors know that they can count on you, so to speak, in your words.**

A **Right.**

Q On page 20 --

A They can count on me?

Q I think that's what you said.

A I don't know if they can count of me.

They know my philosophies and they know that I'm a tough sentencer and I hold out for a tough sentence.

(Id. at 588-92).

Kaplan acknowledged his bias toward defendants, defense attorneys, and especially against mitigation evidence:

Q **And you're attributed as saying, "I'm always looking at a negative approach. Somebody's trying to con me."**

A Right.

Q And that's a quotation.

A Right.

Q Do you recall making that statement?

A Yes, I did.

Q And what did you mean --

A That had nothing to do with -- well, I think it did have something to do with Thomas Seebert, but, you know, listen, **defendants and their -- and defense attorneys are always, you know, telling me, oh, well, I won't do it again, I'm -- you won't have to worry about me, I learned my lesson, I won't take drugs anymore, I won't hurt anybody anymore, I'll do what I'm supposed to, I'll do everything you say.**

And that's what I mean. I always look out for that. Every case -- not every case, but many, many cases you see that come in one morning where I got 50 people on there and

you'll hear 25 of them tell me the same thing, every single day.

Q So when you -- the somebody that you're referring to in that sentence is a defendant or defense counsel?

A It's just in general. Just in general.

Everybody's got a reason why you're -- they won't do it again or, you know, you could count on me now, I learned my lesson, I didn't think you meant business the first time when you put me on probation but -- and I already had a violation but now I really know you mean business, I'm willing to make my reports now and I'll show up when I'm supposed to and I'll go to my drug program. That's what I mean.

Now they start telling me that, I look at that with a jaundiced view.

Because, you know, everyday people are coming to me lying to me. It happens everyday. You know that.

Q Has that always been your belief about --

A No, not always.

It's just after years of this, you just -- just realize that, you know, **that type of situation is going to call for people looking for mercy I guess, or looking to see if they could persuade me.**

And I just look at them with skepticism on something like that.

Although I -- you know, a lot of them do still get me.

(Id. at 593-95) (emphasis added).

Kaplan sentenced Mr. Lewis to death in 1988 and in 1993 he made the following remarks:

> In reference to your letter of October 11, 1991, regarding the above-named inmate being considered for Executive Clemency, I wish to make known my feelings in this matter.
>
> Mr. Lewis is unfit to live in society. He not only brutalized Michael Gordon but drove him around in a disabled condition to show off his captive to his friends. He then, for no good reason, smashed his skull and beat him to death with a motor vehicle jack.
>
> Lewis was only out of jail 15 days before he committed this murder.
>
> Lewis enjoyed every minute of the abuse, showing no mercy, no compassion and no humanity.
>
> He will kill again and should never be released.
>
> Please refer to my comments contained in my sentencing order dated the 27th day of September, 1988.

(PCR I at 69). Regarding this letter to the Parole Commission, Judge Kaplan testified:

> A I got something from the Capital Punishment Research Specialist, clemency department -- I guess he was asking for clemency -- and they asked me if I wanted to comment. And I did.
>
> I do it as a matter of course. I've commented on all the others.
>
> Q All the others meaning --
>
> A Anybody else on death row.
>
> Q How many -- do you know how many cases of individuals you've sentenced to death row are on death row at this time?
>
> A I have an approximation of how many I sentenced.

They're not there anymore.

I mean, no one's ever been put to death, but a lot of them have been reversed.

I'd say probably eight or nine, ten.

Q And it's your recollection that you wrote a similar letter in those cases as well?

A If they asked me or told me -- asked if I wanted to comment on a clemency situation, I probably would have written one.

These are very serious cases. And they want my input, I give it to them.

Q In what capacity were you responding to that request? Were you responding as a judge?

A As a judge. Yeah.

Q And in fact, is that letter on judicial stationery, letterhead stationery?

A Yes, it is.

That's what they -- that's why they sent it to me, because I was the judge.

Q Now, when you write these letters or this letter in particular, what do you -- what information do you consider when writing that letter? That letter in particular.

A I usually indicate a short statement of what basically the brutality of the murder was and anything else which would be relevant that I could think of.

As you noticed, the letter's very short and sweet, and that's the way I write them, short and sweet. I don't go into everything.

If they want to refer to my sentencing order -- in fact, the last sentence, I say, "Please refer to my comments contained in my sentencing order." And, you know, that's where all the details are.

So I just make it short and tell them what I think.

And, yeah, I object to any clemency for him.

Q When you write -- or when you wrote that letter in particular, did you consider any information or evidence that wasn't presented at either the trial or the penalty phase?

A I don't know any evidence that wasn't presented. I only remember what I heard in the case and that's about it.

Q In terms of clemency, did you talk to anybody or seek out any information that might be relevant to clemency?

A No. I think the only thing I did is probably got a copy of my sentencing order and referred to the facts to make sure I recollected what all the facts are.

I mean, I remember generally, but I probably apprised myself of -- I refreshed myself as to the specifics and then I wrote the letter.

I didn't talk to anybody about it or -- I didn't have to think too hard about it.

Q Now, in that letter, there's a passage where you talk about Mr. Lewis, that he, quote, "will kill again," end quote. Do you see that part of that letter?

A Yes.

* * *

Q Now, you indicated that you had written that letter as a judge.

Were you exercising your judicial role when you made that statement that Mr. Lewis will kill again, or your opinion that Mr. Lewis will kill again?

A Sure.

* * *

> Q And again, when you made that statement, that Mr. Lewis was unfit to live in society, were you carrying out your role as a judge while you were expressing that sentiment?
>
> A Of course. That's why I gave the death penalty.

(Supp. PCR Vol. IV at 601-05).

Judge Kaplan never disclosed to trial counsel his bias and predisposition. See Morgan v. Illinois, 504 U.S. at 739 (if judge has announced a predetermination of sentence before evidence is presented, the judge "should disqualify himself or herself").[24] Recently, the Fourth District Court of Appeals addressed an analogous situation in Martin v. State, 2001 WL 1098246 (Fla. Sept. 12, 2001), albeit not in the context of a capital case. Martin sought disqualification of Judge Barry Goldstein based on remarks made by Goldstein to the media to the effect that "My feeling is, if I'm going to sentence someone to state prison or county jail, it should always be followed by probation." In his motion to disqualify, Martin alleged that Goldstein had a "policy of ordering probation following any jail or prison sentence" and thus violated the judge's duty to

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[24]Judge Kaplan was obligated under the Canons of Ethics to disclose any evidence of bias or partiality which he maintained. "Canon 3E(1) requires a judge to sua sponte disqualify himself if his impartiality might be reasonably questioned." Porter v. Singletary, 49 F. 3d 1483, 1489 (11th Cir. 1995). Further, "[t]he Commentary to Canon 3E(1) provides that a judge should disclose on the record information which the parties or their lawyers might consider relevant to the question of disqualification." Id. Although "both litigants and attorney should be able to rely upon judges to comply with their own Canons of Ethics," id., Judge Kaplan violated the ethical canons with impunity.

"utilize individualized sentencing criteria." The Court granted a writ of prohibition, concluding that Goldstein's comments "did not conform to any mandatory sentencing requirements, but expressed his own sentencing preferences and policies." The Court rejected the State's argument that the motion was legally insufficient because the judge's comments "were merely generalized and not directed to any single defendant appearing before the judge," concluding that the remarks

> could reasonably be interpreted an announcing a fixed intention to have probation invariably follow any jail or prison sentence that he would impose. At the very least, as the result of the judge's comments, Martin could reasonably fear that any argument that probation following a term of incarceration was unnecessary in his individual case would first have to overcome the judge's presumption to the contrary. The fact that the judge may have deviated from this pronouncement in a few recent cases does not erase the statements made or their implications for the defendant.

The reasoning of Martin applies equally to Mr. Lewis' case, and warrants similar relief. At most, Mr. Lewis is entitled to a new sentencing pursuant to Thompson; at a minimum, he is entitled to an evidentiary hearing in accordance with the State's stipulation below.

REMAINING ARGUMENTS

Mr. Lewis relies on his Initial Brief as rebuttal to the remaining arguments advanced by the State.

CONCLUSION

Based on the arguments set forth in this Brief as well as his opening brief, Mr. Lewis submits that the lower court's order granting sentencing relief should be affirmed in all respects. In the event the Court reverses on that issue, an evidentiary hearing should be ordered regarding the issue of judicial bias. Moreover, an evidentiary hearing is warranted on the additional allegations of ineffective assistance of counsel which the lower court erroneously denied without a hearing.

CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief is typed in Courier-12 font.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail to all counsel of record on September 28, 2001.

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