IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-99

JUAN DAVID RODRIGUEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State will rely upon the Statement of Case and Facts in its initial brief in these proceedings, with the following additions:

Defendant's conviction began final on October 4, 1993, when the United States Supreme Court denied certiorari from this Court's affirmance of his convictions and sentences. *Rodriguez v. Florida*, 510 U.S. 830 (1993).

On September 19, 1994, Defendant filed initial motion for post conviction relief, which was a shell motion and asserted that he did not have public records from the State Attorney's Office. (R. 40-96). On February 9, 1995, the State Attorney's Office informed Defendant that its files were ready for inspection and copying. (R. 98-99) On February 22, 1995, Defendant responded that he wanted the State Attorney's file to be copied and provided to him before he sought to inspect the file. (R. 104-05) The State Attorney's Office sent those copies on March 6, 1995. (R. 439)

At a status hearing held on September 7, 1995, the State Attorney's Office provided those portions of its files that it did not believe it was required to disclosure under the public records law to the trial court for an in camera inspection. (R. 369-75) On September 11, 1995, the trial court entered a

written order, finding that Defendant was not entitled to disclosure of any of the materials submitted for in camera inspection. (R. 568)

On June 28, 1996, Defendant filed his first motion to compel public records compliance and included the State Attorney's Office as one of the agencies who had not complied with his requests.[1] (R. 604-08) On December 5, 1996, the trial court held a hearing on this motion. (R. 777) After another public records hearing on April 18, 1997, the trial court ruled that Defendant had received all of the public records to which he was entitled, that he had waived his right to seek further public records by his dilatory pursuit of them and that a final amended motion for post conviction relief was to be filed with 30 days. (T. 298-330)

After receiving several extensions of time, Defendant's third amended motion for post conviction relief was filed on July 31, 1997.[2,3] (R. 1667-1858) The State filed its response to

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[1] The trial court had ordered Defendant to file a motion to compel at that time so that the public records issues could be resolved. (T. 4-6)

[2] Defendant had filed an amended motion on October 4, 1995. (R. 140-273) He corrected that motion on October 10, 1995. (R. 280-358) He had also filed a second amended motion on April 18, 1997. (R. 1044-1265)

[3] Defendant filed a corrected third amended motion for post conviction relief on August 10, 1997. (R. 1862-2054)

this motion on September 8, 1997. (S.R. 182-237)

Despite the trial court's ruling that Defendant had the public records to which he was entitled, Defendant continued to seek additional public records concerning other individuals.[4] (R. 1379-1480) On December 5, 1997, the trial court held a status hearing, during which the trial court ruled that Defendant had waived his right to seek additional public records by his dilatory actions in litigating the issue and ordered that the matter would proceed to a *Huff* hearing in 90 days. (R. 22, T. 341) That day, the State served notice that the *Huff* hearing in this matter would be held on March 13, 1998. (R. 2077)

On March 13, 1998, the day of the *Huff* hearing, Defendant filed a fourth amended motion for post conviction relief. (R. 2092-2268) Defendant had not been granted leave to amend his third amended motion and the grounds claimed in the motion for the need to amend at this late date was Defendant's "review of public records following [the trial court's] *ore tenus* finding of compliance with Chapter 119." (R. 2093, 2094)

This fourth amended motion sought to raise, for the first time, a claim that the State had written the sentencing order as

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[4] In fact, Defendant continued to request additional public records regarding others through the end of December 1998. (R. 2558-65)

a result of an ex parte communication with the trial judge. (R. 2262-64) The claim stated:

> 5. However, here the judge simply adopted the State's draft sentencing findings at the sentencing. This violated Patterson. There is an unsigned version of the sentencing order that Judge **Kaplan** signed when he sentenced [Defendant] to death. The unsigned order is in the same typographical font as the many other motions and pleadings filed by the State. It is clear that the State, at the direction of Judge Carney (after some communication that occurred off-the-record), drafted the sentencing order in this case. Prior to the sentencing hearing, Judge **Kaplan** did not announce his findings of aggravating and mitigating circumstances, and the order located in the State's files is therefore the result of putting those findings in writing. The unsigned order in the State's files is the same order that Judge **Kaplan** eventually signed. An evidentiary hearing is warranted on this issue. Card v. State, 652 So. 2d 344, 345 (Fla. 1995). Thereafter, Rule 3.850 relief must issue.

(R. 2262-64)(bold added). Simultaneously, Defendant also filed a motion to disqualify Judge Carney. (R. 2341-53) This motion was based on the allegations in the claim and need to call Judge Carney as a witness to this claim. *Id.*

At the beginning of the *Huff* hearing, the issue of Defendant's belated pleading was discussed. (T. 334-36) The State argued that the motion to disqualify should be denied because Defendant had been provided with the State Attorney's file at least two years before the hearing, that Defendant had therefore had the unsigned copy of the order from the file for

more than ten days and that any motion to disqualify based on that information was untimely. (T. 336-37)

Defendant asserted that the trial court had not given him leave to amend his pleading after he had complete disclosure of public records and that he was entitled to do so. (T. 337-39) Defendant also asserted that the motion to disqualify was timely because a new attorney had appeared on his behalf 11 days before the hearing, the new attorney had reviewed the public records materials in Defendant's possession and the new attorney had noticed the unsigned copy of the sentencing order three days before the hearing. (T. 339-40) Defendant claimed that he should be given leave to amend based on the public records requests he had made regarding other people after the trial court had already ruled that all public records had been provided, that the trial court should disqualify itself, and that the *Huff* hearing should be continued. (T. 341-43)

The State responded that Defendant had been given amply opportunity to amend and to conduct public records litigation before doing so. (T. 346) It reiterated that the State Attorney's file had been provided in 1995 and asserted that the appearance of new counsel did not make the disqualification motion or the amendment timely. (T. 346-48) After listening to the arguments, the trial court denied the motion to disqualify

and refused to grant leave to file the fourth amended motion for post conviction relief, because they were untimely. (T. 351, R. 2354, 2356)

After an evidentiary hearing, the trial court denied the motion for post conviction relief and Defendant appealed. Among the issues raised on appeal were the denials of the motions for disqualification and the denial of an evidentiary hearing on the claim regarding the sentencing order.

On November 4, 2002, this Court entered an order in this matter, relinquishing jurisdiction back to the circuit court to hold an evidentiary hearing on the authorship of the sentencing order with 60 days and to file an order within 30 days after the hearing. (S.R. 1996)

On November 13, 2002, Defendant filed a motion to disqualify Judge Carney. (S.R. 2131-32E) In the motion, Defendant claimed that Judge Carney was a material witness in these proceedings. *Id.* On November 19, 2002, the Judge Carney had a status hearing in this matter. (S.R. 2289) The State indicated that Judge Carney should not rule on this issue because he might be a witness in these proceedings. (S.R. 2291) Judge Carney indicated that he believed that this matter could be addressed by obtaining affidavits from John Kastrenakes, the prosecutor in this matter, and from Judge Carney's secretary. (S.R. 2291-92)

The State indicated that another judge should decide whether Judge Carney was a material witness and stated that the judge assigned to the division in which the case resided was the appropriate judge. (S.R. 2292) Defendant asked that the new judge be assigned randomly. (S.R. 2293) The State responded that the appropriate method of randomly assigning a judge was to have the judge who was assigned to the division in which the case was randomly assigned hear the case. (S.R. 2293) Judge Carney agreed to have the division judge hear this matter. (S.R. 2293)

On November 21, 2002, Judge Sigler held a status hearing on this matter. (S.R. 2296) Defendant asserted that Judge Carney had recused himself and that a hearing needed to be conducted pursuant to this Court's relinquishment order. (S.R. 2298) The State responded that Judge Carney had not recused himself. (S.R. 2298-99) Instead, he had referred the matter to the division judge to determine whether he was a material witness. (S.R. 2999)

The scheduling of a hearing and the need for Defendant's presence at the hearing was then discussed. (S.R. 2299-2303) During this discussion, the trial court inquired what witnesses Defendant planned to call to substantiate his claim. (S.R. 2303) Defendant stated that he did not know who could testify on

his behalf other than his trial counsel, who would say that he knew nothing about an ex parte contact or the authorship of the sentencing order. *Id.*

Defendant then pointed out that he had filed that morning motions to depose Judge Carney and the trial prosecutors, Mr. Kastrenakes and Terrence Toner, claiming they were all material witnesses. (S.R. 1997-2002, 2303) In the motion to depose the prosecutors, Defendant asserted that Mr. Kastrenakes had refused to speak to Defendant and that Mr. Toner had "failed to return his counsel's telephone calls." (S.R. 2001). The State explained that Mr. Kastrenakes had not refused to speak to Defendant; he had simply requested that Defendant include a representative of the State in any conversation with him. (S.R. 2304-05)

The State also indicated that it was in the process of obtaining affidavits from Mr. Kastrenakes and Judge Carney's Judicial Assistant. (S.R. 2305-06) These affidavits would demonstrate that Judge Carney wrote the sentencing order. (S.R. 2305) Since a defendant is only entitled to depose a judge if the judge's testimony was absolutely necessary, the State asserted that Defendant was not entitled to depose Judge Carney. (S.R. 2305-06) The State also pointed out that the pleading was a form pleading in which Defendant had not even bothered to

include the correct name of the judge involved. (S.R. 2306) The State indicated that it did not appear that Defendant had done any investigation into the claim and that unless Defendant could proffer that Judge Carney's testimony would be any different than Mr. Kastrenakes's affidavit or the statement of Judge Carney's secretary, there was no basis to depose Judge Carney. (S.R. 2306-07) Defendant replied that Judge Carney was a material witness because he knew whether he had written the sentencing order or not. (S.R. 2307) When the trial court inquired why Judge Carney's testimony at a hearing would not be sufficient, Defendant asserted that if he could depose Judge Carney, an evidentiary hearing might not be necessary. (S.R. 2307)

With regard to the prosecutors, the State asserted that Defendant was free to speak to them by phone and did not need to depose them. (S.R. 2308) The State argued that it had no reason to believe that Mr. Toner would not speak to the defense. (S.R. 2308) Defendant claimed that he had tried to speak to Mr. Toner at his office, which Defendant alleged was in New Jersey. (S.R. 2308-09) Defendant claimed that an out of state subpoena would be necessary to depose Mr. Toner. (S.R. 2308-09)

The trial court then inquired about the deadline for the hearing in the relinquishment order. (S.R. 2309) Both parties

agreed that the hearing had to be held before January 3, 2003. (S.R. 2309) Defendant asserted that setting such a hearing in that time would be difficult because of his counsel's personal vacation schedule. (S.R. 2309-10) Defendant indicated that he could move this Court to extend the relinquishment. (S.R. 2310) The State responded that it was ready for a hearing and would object to extending the relinquishment. (S.R. 2310) The trial court deferred ruling on the motions for depositions and set a hearing for November 25, 2002. (S.R. 2310-11)

At the hearing on November 25, 2002, the trial court entered a written order denying the motions for deposition. (S.R. 2315, 2006-07) The trial court found that Defendant had not demonstrated good cause for the taking of deposition. (S.R. 2006-07) The trial court also indicated that the witnesses were free to speak to the attorneys if the witnesses chose to do so. (S.R. 2006-07)

The trial court then indicated that it was scheduling the hearing in accordance with this Court's relinquishment order. (S.R. 2315-17) The State then filed affidavits from Elizabeth Dean, Judge Carney's Judicial Assistant, and Mr. Kastrenakes. (S.R. 2317-18) The State indicated that it had prepared them to aid the trial court in ruling on the motion to depose but that since the court had already ruled, it was providing them as

discovery. (S.R. 2317-19) The trial court then set the hearing for December 12, 2002 at 8:15 a.m. (S.R. 2320-24)

Defendant then sought a certificate of materiality to compel Mr. Toner's attendance at the evidentiary hearing. (S.R. 2324) In arguing for the issuance of such a certificate, Defendant admitted that he had no knowledge of what Mr. Toner would say on the issue, as he had not spoke to Mr. Toner. (S.R. 2324-28) The trial court indicated that Defendant should speak to Mr. Toner and that his testimony could be handled through a telephonic hearing. (S.R. 2328-29)

On December 6, 2002, Defendant again sought a certificate of materiality regarding Mr. Toner. (S.R. 2334) However, he again admitted that he had not spoken to Mr. Toner and had no idea what he would say. (S.R. 2334-35) The State indicated that it had spoken to Mr. Toner, that he stated that he had not written the sentencing order and that he was available for a telephonic hearing that day. (S.R. 2335) The trial court asked the State to assist Defendant in speaking to Mr. Toner that afternoon to determine if he wrote the sentencing order. (S.R. 2336)

The trial court held the evidentiary hearing on December 12 & 23, 2002. (S.R. 1983, 1985) At the beginning of the evidentiary hearing, Defendant again raised the issue of

speaking to Mr. Toner. (S.R. 2041) Defendant asserted that the trial court had ordered that Mr. Toner be made available to speak to Defendant. *Id.* The trial court stated that Defendant was incorrect and that it had not ordered that Mr. Toner be made available. *Id.*

Defendant then admitted that he had been able to speak to Mr. Toner on the phone with a representative of the State. (S.R. 2042) However, he claimed that he still needed to depose Mr. Toner because the State intervened in the discussion and Mr. Toner was not under oath. *Id.* When the trial court inquired how a deposition would prevent the State from objecting and why Mr. Toner needed to be under oath, Defendant asserted that it would enable him to have his questioned answered. (S.R. 2042-43) The State responded that the questions that it objected to during the call concerned Mr. Toner's background and experience but that Mr. Toner had answered these questions. (S.R. 2043) The State asserted that it was objecting to preliminary questions and wanted Defendant to question Mr. Toner about the limited subject of the hearing. (S.R. 2043) The State reminded the Court that Mr. Toner could agree to speak to Defendant privately if he wanted and that Defendant's real complaint was that Mr. Toner had stated that he did not write the sentencing order and that Judge Carney had done so. (S.R. 2044) Defendant

also asserted that he needed to subpoena Mr. Toner as a witness at these proceedings. *Id.* The trial court reserved ruling on the issue. *Id.*

Defendant then presented the testimony of Scott Kalish, his trial attorney. (S.R. 2045-46) Mr. Kalish stated that he did not recall if Judge Carney had asked him to prepare a sentencing order and did not recall doing so. (S.R. 2046-47) Mr. Kalish believed that the sentencing order from the case appeared to be a pleading from the case. (S.R. 2047) Mr. Kalish did not know if he had ever seen an unsigned copy of the sentencing order. (S.R. 2047-48) He did not recall seeing Judge Carney asking the State to draft a sentencing order and did not believe that he had seen a copy of the sentencing order before sentencing. (S.R. 2048)

On cross, Mr. Kalish stated that copies of the sentencing order were handed out at sentencing. (S.R. 2051) He did not recall if the copies were signed or unsigned. *Id.* On redirect, Mr. Kalish stated that he did not consider it unusual for a judge to provide an unsigned copy of an order before he signed the order. (S.R. 2053-53) However, once a judge signed an order, he usually hands out signed copies. (S.R. 2053)

Defendant next called Judge Carney. (S.R. 2054) Before beginning his testimony, he asked to confer with Judge Sigler.

(S.R. 2054) Defendant objected to the judges conferring. *Id.* Judge Carney then stated in open court that he was concerned that if he testified, he would have to recuse himself from the case. *Id.* Judge Sigler stated that whether Judge Carney would have to recuse himself from further proceedings in the case would be addressed at a later time. *Id.*

Judge Carney stated that he had been a circuit judge since 1985. (S.R. 2055) During that time, he had presided over more than 40 capital cases, about 20 percent of which had proceeded to a penalty phase. (S.R. 2055) Judge Carney was unable to give names and dates for the more than 40 cases. *Id.* In four cases, the jury had recommended a death sentence. *Id.* Judge Carney stated that he had prepared four or five orders sentencing defendants to death. (S.R. 2056) Judge Carney stated it was his practice to write out sentencing orders and have his secretary type them. (S.R. 2056) Judge Carney stated that his secretary was Elizabeth Dean and that she had been his secretary since 1985. *Id.*

Judge Carney identified that order he entered sentencing Henry Garcia to death and the order he entered sentencing Defendant to death. (S.R. 2057-58) Judge Carney stated that he wrote the order in this case, his secretary then typed the order, and he then edited and revised the order. (S.R. 2057)

Judge Carney did not recall the number of times he had edited the order in this case. (S.R. 2058) Judge Carney stated that the order was typed by his secretary and that he had never asked the State to draft the order, to edit the order or to review the order for him. (S.R. 2058) Judge Carney was not sure how the State received an unsigned copy of the sentencing order but could offer a possible explanation. (S.R. 2059) It was not Judge Carney's practice to hand out unsigned copies of orders. (S.R. 2059)

On cross, Judge Carney stated that because of the manner in which capital sentencing orders have to be entered, the order had to be signed on the bench. (S.R. 2059-60) Because of this procedure, Judge Carney would bring multiple copies of unsigned orders to sentencing. (S.R. 2060) Judge Carney stated that he would only sign one copy of the order. (S.R. 2061) Judge Carney would then provide copies of the order to the parties and would prefer that this copies be stamped with his name. (S.R. 2061) He did not know if the copies that he directed the clerk to provide to the parties in this case were unsigned or not. (S.R. 2061)

Judge Carney stated that the sentencing order that was entered in this case was the product of his own mental processes and weighing. (S.R. 2061) The order reflected his decision

making. (S.R. 2062) Judge Carney never asked the State or defense to draft a proposed order in this matter. *Id.*

On redirect, Judge Carney stated that he may have provided unsigned orders to the parties. (S.R. 2062) Judge Carney stated that copies of orders provided to the parties by the clerk in a criminal case would not normally be signed copies. (S.R. 2062-63) He stated that a criminal clerk would not normally have a stamp of his signature to stamp the orders. (S.R. 2063)

Before adjourning the hearing that day, the trial court denied Defendant's request to depose Mr. Toner. (S.R. 2064) However, the trial court did agree to allow Defendant to subpoena Mr. Toner for the hearing. (S.R. 2064) Because Mr. Toner had agreed to testify and travel was difficult over the holidays, the parties agreed that Mr. Toner could testify by telephone. (S.R. 2065-66)

Defendant then presented the testimony of Mr. Kastrenakis. (S.R. 2094, 2098) Mr. Kastrenakes stated that he had been a prosecutor with the Dade County State Attorney's Office from 1981 to 1983 and 1984 to 1995. (S.R. 2099) After leaving the office, he had worked as a Special Assistant State Attorney in the prosecution of Billy Alexander and post conviction proceedings in this case and the Maharaj case. (S.R. 2100)

During the time that Mr. Kastrenakes was an Assistant State

Attorney, he prosecuted between 20 and 30 capital cases. (S.R. 2100) Among them were Defendant, Angel Diaz, Krishna Maharaj, Joyce Cohen, Scott Snook, Victor Tony Jones, a national guardsman named Coleman, Ricardo Grant, Pablo San Martin, Leonardo Franqui and Willie James King. (S.R. 2101-02) About 70 percent of the capital cases Mr. Kastrenakes handled went to a penalty phase. (S.R. 2101) Among those cases were Grant, Cohen, Defendant, Maharaj, Diaz, San Martin, Franqui, Jones and King. (S.R. 2101-02) In seven or eight cases, the defendant was sentenced to death, including Defendant, Diaz, Jones, San Martin, Franqui, Maharaj and King.

In this case, Mr. Kastrenakes was lead counsel for the State and Mr. Toner was second chair. (S.R. 2103) Mr. Kastrenakes was assigned to the case from its beginning, and Mr. Toner started working on the case near the time of trial. (S.R. 2103) Mr. Kastrenakes assigned work in this case to Mr. Toner, which included preparing and presenting the testimony of some witnesses and making the argument for a death sentence to Judge Carney. (S.R. 2103) Mr. Kastrenakes would ask questions of the people assigned to the Legal Division of the State Attorney's Office, but no one from that division provided day-to-day assistance or sat through the trial. (S.R. 2104-05) Mr. Kastrenakes did not recall any specific assistance from anyone

in the Legal Division. (S.R. 2105)

Mr. Kastrenakes was absolutely sure that no one from the State Attorney's Office prepared a sentence order in this case. (S.R. 2105) Mr. Kastrenakes could be so sure because he was responsible for this case. (S.R. 2106) Mr. Kastrenakes identified the signed sentencing order in this case. (S.R. 2107) The unsigned copy of the order appeared to be exactly the same as the signed order but it was not signed and dated and had been copied differently. (S.R. 2107-09)

Mr. Kastrenakes stated that at the time of Defendant's trial, the State Attorney's Office had a typing unit that used a fully justified font and that did not hyphenate words. (S.R. 2110) Additionally, any document from the State Attorney's Office would have the initials of the Assistant State Attorney who dictated the document and the typist who typed the document on the bottom. (S.R. 2110) Both copies of the sentencing order were not fully justified, had words that were hyphenated and did not have any initials on the bottom. (S.R. 2109-10) Thus, both the signed and unsigned copies of the sentencing order had not be typed by the State. (S.R. 2109-10) Mr. Kastrenakes stated that the word processing system at the State Attorney's Office changed in 1994 or 1995. (S.R. 2111) Mr. Kastrenakes stated that any document he would have prepared in 1990 would have been

produced by the word processing unit on a word processor. (S.R. 2111-12) They would not have been typed by a secretary and would not have been typed on a manual typewriter. (S.R. 2111)

Mr. Kastrenakes stated that the first time he saw a copy of the sentencing order was at the sentencing hearing. (S.R. 2112) Mr. Kastrenakes did not recall whether the sentencing order he received at sentencing was signed or not. (S.R. 2113) However, after reviewing the transcript of the sentencing hearing, Mr. Kastrenakes stated that any copy of the sentencing order that may have been found in the State's files was the one that Judge Carney directed the clerk to hand to the parties at the end of the sentencing hearing. (S.R. 2113-14) Thus, Judge Carney must have had the clerk hand out unsigned copies. (S.R. 2114)

Mr. Kastrenakes was positive that the State Attorney's Office did not draft the sentencing order in this case. (S.R. 2114) Mr. Kastrenakes could be so sure because he did not prepare an order, the only two people who worked on this case were he and Mr. Toner, any document in the case would have been prepared at his direction and with his approval and he did not direct anyone to prepare an order or approve any draft order. (S.R. 2114)

Mr. Kastrenakes admitted that he had written the sentencing order in the Maharaj case. (S.R. 2115) Mr. Kastrenakes stated

that it was not the practice of the State Attorney's Office at the time to draft sentencing orders. (S.R. 2116)

Rachel Day, an attorney with CCRC-South, testified that she first became involved in this matter as second chair counsel around 1998 and that she became lead counsel in this case in 1999. (S.R. 2118) Ms. Day found an unsigned copy of the sentencing order in the State's file around 1999 but did not remember exactly when she found the order. (S.R. 2118)

On cross, Day stated that she found the unsigned order when she was going through the public records produced by the State Attorney Office sometime after she was assigned to the case. (S.R. 2120) Day did not know how or when the unsigned order got into the State Attorney's file. (S.R. 2121-22) However, Day believed that the finding of an unsigned order was important because she was aware of the *Riechmann* litigation. (S.R. 2123) No one ever told Day that anyone other than Judge Carney wrote the sentencing order in this case. (S.R. 2122-23)

The trial court then inquired if Defendant wished to call Mr. Toner who was available by telephone. (S.R. 2123) Defendant indicated that he did not wish to do so. (S.R. 2123)

On December 30, 2002, Defendant filed a post hearing memo. (S.R. 2083-90) Defendant argued that neither the testimony of Judge Carney or Mr. Kastrenakes should be relied upon by the

trial court because they were incredible. (S.R. 2085-89) The State also filed a post hearing memo. (S.R. 2069-76) The State pointed out that the claim that was at issue was filed late and that Judge Carney had refused to consider the claim because it was a form claim filed more than two years after the State had provided public records. (S.R. 2070-71) The State argued that Defendant bore the burden of proof on this claim and had not presented any evidence to support the claim. (S.R. 2073-74) The State asserted that Defendant was improperly relying only upon speculation and that the claim was improperly filed without any investigation. (S.R. 2073-74)

On December 31, 2002, the trial court entered an order denying this claim. (S.R. 2077-82) In doing so, the trial court found the testimony of Judge Carney and Mr. Kastrenakes regarding Judge Carney's authorship of the sentencing order to be credible. *Id.* As such, the trial court found that Defendant had not met his burden of proof. *Id.*

On January 22, 2003, Defendant filed a motion for rehearing. (S.R. 2133-57) He asserted that the trial court should have addressed the State's conduct in other cases before other judges. Defendant claimed that he had only become aware of a statement in the State's Initial Brief in *State v. Riechmann*, Florida Supreme Court case no. SC89,564, after the evidentiary

hearing. *Id.* He also asserted that he had recently learned that the State had presented evidence about a search of its computer files in *State v. Roberts*, 11th Judicial Circuit Case no. F84-13010. *Id.* Defendant asked the trial court to grant rehearing so that he could investigate the basis for the statement in *Riechmann* and the State's computer files. *Id.* After the State filed a response (S.R. 2166-73), the trial court denied rehearing. (S.R. 2155)

This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in refusing to allow Defendant to amend his motion for post conviction relief on the day of the *Huff* hearing, where the attempted amendment was based on materials that had been in Defendant's possession for years. Because the alleged basis for disqualification depended on being allowed to amend, the trial court properly refused to disqualify himself. The trial court also properly denied the motion for disqualification as untimely and facially insufficient.

Because the amendment was properly refused, Defendant was not entitled to a hearing on this claim and any error in the conduct of a hearing on the claim was harmless. Moreover, Defendant does not have standing to challenge the assignment of

the judge to hear the claim and the judge assigned was the proper judge. The trial court also properly refused to grant Defendant leave to take depositions because Defendant did not show that deposing the trial judge was absolutely necessary and was allowed to obtain discovery by other means. Moreover, Defendant has not shown that he was prejudiced by the refusal to allow depositions.

The trial court's denial of his claim that the State wrote the sentencing order is supported by competent, substantial evidence.

ARGUMENT

I. DEFENDANT IS ENTITLED TO NO RELIEF ON HIS CLAIM REGARDING THE DISQUALIFICATION OF JUDGE CARNEY.

Defendant first asserts that this Court should reverse the denial of all of his claims in his motion for post conviction relief. Defendant contends that Judge Carney should have recused himself prior to the *Huff* hearing and that Defendant should be placed in the condition that he would have been in had the trial court done so. However, Judge Carney did not abuse his discretion in refusing to allow Defendant to amend his motion for post conviction to add the claim that was the basis for the motion to disqualify, as it was not timely file. Judge Carney also properly found that the motion to disqualify was

untimely and facially insufficient.

The basis of Defendant's assertion that Judge Carney should have recused himself prior to the *Huff* hearing is that Defendant had properly filed a claim regarding the authorship of the sentencing order, which made Judge Carney a material witness. However, nothing could be further from the truth. Defendant received the State Attorney's file regarding Defendant's case in March 1995. (R. 439) Defendant's counsel testified at the evidentiary hearing that this file was the source of the unsigned copy of the order that prompted the filing of this claim. (S.R. 2118) Judge Carney ruled on April 18, 1997, that Defendant had received all of the public records to which he was entitled. (T. 298-330) Defendant filed his final amended motion for post conviction relief (the third amended motion for post conviction relief) on July 31, 1997, 104 days later. (R. 1667-1858) There was no claim about the authorship of the sentencing order in this motion. Instead, Defendant did not attempt to assert this claim until March 13, 1998, the day of the *Huff* hearing, when he tendered his fourth amended motion for post conviction relief. (R. 2262-64) The trial court refused to consider the fourth amended motion containing this claim because it was untimely. (R. 2356, T. 351)

In *Moore v. State*, 820 So. 2d 199 (Fla. 2002), this Court

held that a trial court had not abuse its discretion in refusing to consider an amendment to a motion for post conviction relief in a similar situation. There, the defendant had engaged in extensive public records litigation and had amended his motion multiple times. *Id.* at 203-05. When the trial court ordered the last public records compliance, it gave the defendant leave to amend limited to any new matter that arose from the last public record provided. *Id.* at 205. The defendant subsequently attempted to file a third amended motion with new claims that were not based on the recently provided public records. *Id.* The trial court refused to consider the third amended motion because it was untimely. *Id.* This Court upheld that decision. *Id.*

Here, Defendant was permitted to seek public records for three and a half years before the trial court determined (after a full day evidentiary hearing held on December 6, 1996, and a second public records hearing held on April 18, 1997) that Defendant had received all the public records to which he was entitled. The trial court then gave Defendant 104 days to file his final amended motion for post conviction relief. Defendant did not seek to file his fourth amended motion for post conviction relief, which was the first time Defendant sought to raise a claim regarding the authorship of the sentencing order,

until almost 11 months after the trial court had ruled that public records litigation was over. This claim was based on a document that had been in Defendant's possession for about three years at the time that he sought leave to file this amendment, and Defendant had already been permitted to amend his motion for post conviction relief three times after the document had been disclosed. Thus, under *Moore*, the trial court did not abuse its discretion in refusing to consider the fourth amended motion for post conviction relief. Because the trial court properly refuse to allow the amendment that included this claim, Judge Carney was not a material witness and did not need to disqualify himself on that basis. The denial of the motion for post conviction relief should be affirmed.

Moreover, the trial court's denial of the motion to disqualify was also proper because the motion was untimely. Pursuant to Fla. R. Jud. Admin. 2.160(e), a motion for disqualification must be filed within 10 days of when the basis for disqualification is discovered. This Court has held motions untimely where the defendant should have known of the reason for the disqualification earlier. *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001).

Here, Defendant was provided with the State Attorney's file three years before he filed the motion to disqualify. At the

hearing on the motion, Defendant claimed that the motion was timely because new counsel had appeared on his behalf 11 days before the filing of the motion and that new counsel had only noticed the unsigned copy of the order days before the motion was filed. However, Defendant was represented by the same counsel from the time he received the State Attorney's file in March 1995 until October 1997. (R. 2065-66) That attorney represented Defendant at the April 18, 1997 hearing at which the trial court ruled that all public records had been provided, that Defendant had waived the right to seek any further public records and that Defendant was being leave to file his final amended motion within 30 days of that hearing. (R. 298-331) That attorney filed Defendant's third amended motion, the final amendment which Defendant was given leave to file. (R. 1667-1860) Thus, that attorney should have found the unsigned copy of the sentencing order. The fact that Defendant subsequently had new counsel appear on his behalf does not make the motion to disqualify timely. *See Klapper-Barrett v. Nurell*, 742 So. 2d 851 (Fla. 5th DCA 1999)(change of counsel well after 10 day limit did not make motion to disqualify timely). As such, the trial court properly denied this motion as untimely. The denial of the motion for post conviction relief should be affirmed.

Even if the motion had been filed timely, the trial court

would still have properly denied the motion as legally insufficient. The factual allegations in the motion consisted of assertions that Defendant had made allegations in a motion for post conviction and that the basis for those allegations was the discovery in the State Attorney's file of "documents which suggest that Judge Carney had engaged in ex parte communications with the State Attorney's Office." (R. 2341-53) A review of the allegation from the motion for post conviction relief show that the only fact that is the basis of the claim is that the State had an unsigned copy of the sentencing order. (R. 2262-64) Based on that fact, Defendant speculates that the State must have written the sentencing order and that ex parte communications must have occurred. These assertions are not legally sufficient.

In *Barwick v. State*, 660 So. 2d 685, 692-93 (Fla. 1995), this Court held that conclusory allegations of ex parte contact and claims of ex parte contact that "based upon rumors and gossip about what the trial judge said to unidentified people, at unidentified times and under unidentified circumstances" were facially insufficient. Here, Defendant's claims about the ex parte communication with the State were conclusory and were based on speculation about what the judge may have said to unidentified people at unidentified times in unidentified

circumstances. As such, the motion was legally insufficient and was properly denied.

Defendant's reliance upon matters that occurred during the remand is misplaced. These actions could not have formed the basis of a motion to disqualify at the time of the *Huff* hearing because they had yet to occur. Moreover, the only action Judge Carney took in this case after the remand was to send the matter to another judge to determine if he was a material witness. The courts of this State had sanctioned having a substitute judge determine whether a trial judge should be recused when it appears that Defendant intentionally created a situation to cause a disqualification. *Palmer v. State*, 775 So. 2d 404 (Fla. 4th DCA 2000). Since Judge Carney did nothing else, there is no basis for claiming that Defendant was denied due process.

Moreover, here, utilization of such a procedure was warranted. Defendant did not file any claim regarding the sentencing order in a timely fashion. It was apparent that he had conducted no investigation before filing this claim. He had repeatedly attempted to disqualify Judge Carney, without success. He had to be ordered to litigate his public records issues and did so in a dilatory manner even then. Even after the trial court had ruled that Defendant had waived any further public records requests, Defendant continued to make such

requests. Defendant had already caused the continuation of one *Huff* hearing setting in this manner. Under these circumstances, it was appropriate for Judge Carney to have another judge determine whether he was a material witness and to express concern that such a ruling be made before he testified to prevent Defendant from using this claim to obtain his disqualification improperly. *Palmer*; *State v. Lewis*, 656 So. 2d 1248, 1250 n.3 (Fla. 1994)(depositions of trial judges should not be used to disqualify the judge). The denial of relief should be affirmed.

II. DEFENDANT IS NOT ENTITLED TO ANY RELIEF BASED ON HIS CLAIMS REGARDING THE ASSIGNMENT OF THE JUDGE TO CONDUCT THE REMAND PROCEEDING OR THE REFUSAL TO ALLOW DEPOSITIONS.

Defendant next contends that the denial of his claim that the State wrote the sentencing order should be reversed and a new evidentiary hearing on this issue ordered. Defendant bases this claim on the fact that the matter was assigned to Judge Victoria Sigler on relinquishment and that he was allegedly not permitted to depose the Judge Carney or the trial prosecutors before the hearing. However, these assertions provide no basis for relief.

First, as argued in Issue I, *supra*, the trial court did not abuse its discretion in refusing to consider the fourth amended

motion for post conviction. The motion was not timely filed, and the trial court had already given Defendant amply opportunity to amend. As such, any error that may have been committed in handling the remand was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The denial of the motion for post conviction relief should be affirmed.

Even if these issues were properly before the Court, this Court should still affirm. With regard to the assignment of Judge Sigler to this matter, Defendant asserts that since Judge Carney had recused himself, the matter should have been reassigned through a blind filing system. However, Defendant has no standing to make this challenge. In *Kruckenberg v. Powell*, 422 So. 2d 994 (Fla. 5th DCA 1982), the court addressed the issue of a litigant's power to challenge the assignment of his case to a particular judge:

> The assignment and reassignment of specific court cases between or among the judges of a multi-judge court is a matter within the internal government of that court and is directed and controlled by policy adopted by the judges of that court, either directly or by and through their chief judge. If such policy is in writing, it is properly documented by an administrative order or similar directive usually directed to the clerk of the court for ministerial implementation.
>
> Where the court has jurisdiction, it is the court, and not the particular judges thereof, that has jurisdiction over a particular cause, controversy and the parties thereto. Every duly elected or appointed judge of a court has the bare power or authority to

exercise all of the jurisdiction of that court. Administrative orders evidencing internal matters of self-government of the court do not limit the lawful authority of any judge of the court, nor do they bestow rights on litigants. In legal contemplation judges, like litigants, are all equal before the law. Subject only to substantive law relating to disqualification of judges, litigants have no right to have, or not have, any particular judge of a court hear their cause and no due process right to be heard before any assignment or reassignment of a particular case to a particular judge.

The assignment and reassignment of cases in a busy multi-judge court presents a continuous administrative problem resulting, not only from the disqualification of judges in particular cases and the need to conserve judicial labor by the consolidation of companion and other related cases, but also from many other complex causes, including the rotation of judges between divisions of the court, equalization and control of individual judge case loads, the temporary absence of judges or the temporary inability of judges to perform services, termination of the service of individual judges by death, retirement or otherwise, and other good reasons. Contrary to petitioner's assertion, in the administration of the internal matters of a court the judges thereof exercise an authority that goes far beyond the judicial discretion that judges exercise in the disposition of cases and controversies before the court. A litigant does not have standing to enforce internal court policy, which is a matter of judicial administration and the proper concern of the judges of the particular court and of the administrative supervision of the judicial system. We note that the order of reassignment in the case was signed by Judge Powell as "administrative judge" and we presume that he was acting under Florida Rule of Judicial Administration 2.050(b)(5), as the designee of the chief judge of the judicial circuit who has administrative supervisory authority over such matters under Judicial Administrative Rule 2.050(b), and article V, section 2(d), Florida Constitution, and whose authority is subject to the administrative supervision of the chief justice of the supreme court who has such supervising authority under article V, section 2(b), Florida Constitution.

Id. at 995-96; *see also Adler v. Seligman of Florida, Inc.*, 492 So. 2d 730, 731-32 (Fla. 4th DCA 1986); *Allen v. Bridge*, 427 So. 2d 249 (Fla. 4th DCA 1983). Defendant did not allege below and has not alleged in this Court any grounds to claim that Judge Sigler was biased against Defendant and should have been recused. As such, Defendant does not have any standing to complain about her assignment to this matter. The claim should be denied.

In fact, in *Adler*, the court was confronted with a very similar issue. There, the original trial judge recused himself. He then sent a memorandum to the chief judge suggesting that the case be reassigned to a particular judge. The case was then assigned to the suggested judge. In an opinion authored by then-Judge Anstead, the court held that the litigant did not have standing to challenge that action. The court specifically rejected the litigant's attempt to rely upon cases about a judge not having the power to enter orders after he was recused, as Defendant argues here. Thus, under *Adler*, Defendant does not have standing to challenge the assignment of Judge Sigler to hear this matter.

Moreover, Defendant's entire argument is premised on the assumption that Judge Carney recused himself and that the matter should have been governed by Defendant's construction of an

administrative order of the Eleventh Judicial Circuit. However, Judge Carney has never entered a order recusing himself. Instead, he merely asked another judge to determine if he would be a material witness. The fact that the new judge subsequently allowed Defendant to call Judge Carney as a witness does not indicate that Judge Carney should have considered himself a material witness. Thus, this matter is not governed by the administrative rule governing reassignments after a recusal. The denial of the motion for post conviction relief should be affirmed.

Further, Judge Sigler is the judge to whom the case was properly assigned under the administrative order. Pursuant to Administrative Order 96-25, cases are assigned to divisions or sections of the criminal division of the Eleventh Judicial Circuit; not judges. In this case, the matter was assigned to Division 04 at the time it was filed. At the time, Judge Ursula Ungaro-Benegas was assigned to that division and presided over the proceedings. (R. 7-8) Judge Carney was subsequently assigned to that division and presided over this case. (R. 12-20) Judge Carney continued to preside over this matter even after he was reassigned from Division 04 to a backup division. Had Judge Carney recused himself, the Administrative Order would have naturally returned the case to the division to which it was

assigned, which was the division in which Judge Sigler presided.[5] As such, the case was assigned to whom it belonged under the Administrative Orders, and Defendant's claim that it was not is meritless. The denial of the motion for post conviction relief should be affirmed.

While Defendant argues that this method of assignment somehow allowed the State to select the judge who heard this matter on remand, this is untrue. The State had no control over in which division of criminal division this matter was assigned at the time it was filed. The State also had no control over the assignment and reassignment of judges to this division once the case was assigned to that division. Thus, the State had no control over the fact that Judge Sigler was assigned to this matter. Moreover, the fact that the State understood how the administrative order and blinding filing system worked and was able to articulate it does not indicated that the State "chose" Judge Sigler. Thus, there is no basis for relief, and the denial of the motion for post conviction relief should be affirmed.

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[5] In fact, this is what happened in ***Roberts v. State***, 840 So. 2d 962 (Fla. 2002), when this Court relinquished jurisdiction. Judge Solomon, the original trial judge, was recused by order of this Court. The case was then assigned to Judge Platzer, the judge presiding over the division in which the case was pending. Only after Judge Platzer recused herself on a defense motion was another judge assigned.

With regard to the claim regarding the depositions, Defendant is entitled to no relief. In *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994), this Court addressed whether discovery was permissible in a post conviction proceeding and whether a judge could be deposed during such discovery. This Court ruled:

> In most cases any grounds for post-conviction relief will appear on the face of the record. On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party's] burden to show that the discretion had been abused.

642 So. 2d at 284. The trial judge, in deciding whether to allow this limited form of discovery, shall consider the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts. *See People ex rel. Daley v. Fitgerald*, 123 Ill. 175, 526 N.E.2d 131, 135, 121 Ill. Dec. 937 (Ill. 1988). This opinion shall not be interpreted as automatically allowing discovery under rule 3.850, nor is it an expansion of the discovery procedures established by rule 3.220. We conclude that this inherent authority should be used only upon a showing of good cause.

We also find that a party may be allowed to take post-conviction depositions of the judge who presided over the trial only when the testimony of the presiding judge is **absolutely necessary** to establish factual circumstances not in the record, provided that the requirements set forth above are fulfilled and the judge's thought process is not violated.

Id. at 1250 (emphasis added). This Court further cautioned that attempts to depose the presiding judge should not be used to disqualify him. *Id.*

For something to be absolutely necessary, it must be shown that alternative have considered and found wanting. *See Thomason v. State*, 620 So. 2d 1234 (Fla. 1993). In fact, this Court has required litigants to show that information can only be obtained from inquire of opposing counsel and that all other avenues of obtaining the information have been exhausted before any discovery directly from the attorney may be obtained. *Eagan v. De Manio*, 294 So. 2d 639 (Fla. 1974); *see also Laura McCarty, Inc. v. Merrill-Lynch Realty/Cousins, Inc.*, 516 So. 2d 23 (Fla. 3d DCA 1987); *Perez v. State*, 474 So. 2d 398 (Fla. 3d DCA 1985). The rationale behind such a rule is that it prevents the opposing party from forcing the litigant from whose attorney the discovery is sought to lose counsel of his choice by making the attorney a witness in the proceeding when the discovery could be obtained by other means. *Arcara v. Philip M. Warren, P.A.*, 574 So. 2d 325 (Fla. 4th DCA 1991); *Ray v. Stuckey*, 491 So. 2d 1211 (Fla. 1st DCA 1986). That reasoning has even more applicability when the litigant is attempting to obtain discovery from the trial judge and can use this tactic to forum shop. Thus, a

defendant would need to show that he has explored other avenues of discovery before seeking to depose the judge to show that such a deposition is absolutely necessary.

Here, the trial court did not abuse its discretion in finding that Defendant had not demonstrated that deposing Judge Carney was absolutely necessary. At the time that Defendant filed his motions for deposition, he had not spoke to either of the prosecutors assigned to the case about the sentencing order and the State's possession of an unsigned copy. In fact, it did not appear that Defendant had done any investigation at all, other than locating an unsigned copy of the sentencing order in the State Attorney's file three years after that file was provided to him. Since Defendant had not exhausted other means of discovery, the trial court did not abuse its discretion in determining that Defendant had not shown that deposing Judge Carney was absolutely necessary. This is particularly true, given that the trial court agreed to reconsider the issue if Defendant could show that a deposition was necessary. (S.R. 2006-07) The denial of the motion for post conviction relief should be affirmed.

The trial court also did not abuse its discretion in refusing to allow Defendant to depose Mr. Kastrenakes and Mr. Toner. As asserted by the State at the time that Defendant

filed his motion to depose the prosecutors, Mr. Kastrenakes had not refused to speak to Defendant; he had only asked that a representative from the State be included in any such conversation. (S.R. 2304-05) During the argument about the motion to depose, the trial court was informed that the State was in the process of obtaining an affidavit from Mr. Kastrenakes about his knowledge on this issue. That affidavit from Mr. Kastrenakes was provided to Defendant before the evidentiary hearing. (S.R. 2013-15) In the affidavit, Mr. Kastrenakes stated that he had not prepared the sentencing order, had not engaged in any ex parte conversations with Judge Carney, and had not directed anyone from the State Attorney's office to do either of these things. *Id.* He also stated that the sentencing order was not in a format typically used by the State Attorney's Office. *Id.* Defendant also spoke to Mr. Toner on the phone and was informed that Mr. Toner did not write the sentencing order. (S.R. 2042-44) While Defendant complained about the State's conduct during the call, Defendant was unable to explain how a deposition would further his discovery. *Id.* As Defendant was able to learn the content of the prosecutors' testimony before the evidentiary hearing, the trial court did not abuse its discretion by the manner in which it allowed Defendant to conduct discovery. *Lewis*, 656 So. 2d at 1250

(judge permitted to consider alternate methods of providing information in ordering post conviction discovery). The denial of the motion for post conviction relief should be affirmed.

Defendant appears to argue that anytime that he claims that the State wrote the sentencing order, he is entitled to depose the trial judge and to disqualify that judge if necessary. However, it that were true, this Court would have had no reason to have described the showing necessary to a judge should be deposed as absolute necessity. In fact, such a procedure would encourage the filing of such claims merely as a method of disqualifying a judge, a result that this Court has discourage.

This case provides an example of just such litigation tactics. Here, Defendant waited until the day of the *Huff* hearing to attempt to raise any claim regarding the sentencing order. Defendant did so despite the fact that he had received the State Attorney's file containing the unsigned copy of the sentencing order three years earlier, that he had been told that public records litigation was closed almost a year earlier and that he had filed his final amended motion for post conviction relief about seven months earlier. When Defendant did file the claim, it appears that he simply copied a form claim, given that he did not even name the proper judge on three occasions in a single paragraph. (R. 2262-64)

Moreover, it does not appear that Defendant had conducted any investigation regarding why the State had an unsigned copy of the sentencing order in his possession. At the *Huff* hearing, Defendant's counsel claimed to have only seen the order in the State Attorney's file three days before the hearing. (R. 339-40) In moving to depose the prosecutors and judge after this Court relinquished jurisdiction, Defendant stated that the only witness who he knew to list at that time was his trial counsel and that his trial counsel would testify that he had no knowledge about the authorship of the sentencing order. (S.R. 2300-03)

Moreover, Defendant has already attempted to disqualify Judge Carney on two occasions. In the first motion, Defendant asserted that Assistant State Attorney Penny Brill had an ex parte communication with Judge Carney about the status of public records litigation and the setting of a *Huff* hearing. (R. 587-98) However, this allegation was based entirely on Defendant's speculation based on the fact he had been called by the judicial assistant about scheduling a hearing and overheard a man tell the judicial assistant that the proposed hearing would be on the merits. *Id.* Further, this allegation was made despite the fact that Defendant had received two letters from Ms. Brill informing him that no ex parte communication had occurred. (R. 582-86)

The second motion to disqualify Judge Carney was based on his having excused witnesses from defense subpoenas that were not served in a timely manner[6] when the witnesses called his chambers to complain. (R. 645-71) Defendant also claimed an ex parte communication regarding the location of those documents the State had submitted for an in camera inspection and the trial court had determined were not subject to disclosure more than a year earlier. *Id.* The allegation of an ex parte communication was based upon a letter the State had sent to the trial court and Defendant five months earlier. *Id.* Further, Defendant claimed that Judge Carney was a necessary witness to the fact that these documents had been lost, a fact that Defendant had no basis to dispute. *Id.*

Given the timing of the filing of this claim, the apparent lack of investigation, the use of a form pleading and Defendant's repeated attempts to disqualify Judge Carney without basis and in an untimely manner, it appears that this claim was made based on a desire to disqualify Judge Carney and not based on any bona fide basis to believe that the State had written the sentencing order in this case. To require that a judge be

[6] Some of the subpoenas were not served until the afternoon before the morning the hearing was schedule to commence. (R. 646)

disqualified and deposed under these circumstances would violate both the language of *Lewis* and its spirit. The denial of the motion for post conviction relief should be denied.

Even if Defendant had shown that the trial court abused its discretion in refusing to allow the depositions, Defendant would still be entitled to no relief. This Court has held that reversal is not warranted unless the lack of discovery prejudiced Defendant. *Antone v. State*, 382 So. 2d 1205, 1214 (Fla. 1980)(disclosure of confidential informant); *Richardson v. State*, 246 So. 2d 771 (Fla. 1971)(discovery violation at trial).

In this case, Defendant has not shown prejudice either in the trial court or before this Court. When the trial court inquired what benefit Defendant would receive from deposing Judge Carney before calling him at the hearing, the only allegation that Defendant made was that it might make the hearing unnecessary. (S.R. 2307) In this Court, Defendant merely alleges that he was prejudiced without any explanation of how or why. Thus, Defendant has never articulated any basis for determining he was prejudiced. Moreover, before the evidentiary hearing, Defendant had spoke to Mr. Toner and been provided with an affidavit from Mr. Kastrenakes. He also was given an affidavit from Ms. Dean, which stated that she had typed the sentencing order at Judge Carney’s direction, and she recognized

both the original sentencing order and the unsigned copy as documents she had typed. (S.R. 2010-12) As such, Defendant had every reason to know what the substance of the testimony of the prosecutors and Judge Carney would be at the evidentiary hearing. Under these circumstances, Defendant has not shown that he was prejudiced from the refusal to allow the depositions. *Richardson*; *Antone*. The denial of the motion for post conviction relief should be affirmed.

III. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT THE STATE WROTE THE SENTENCING ORDER.

Defendant finally contends that the trial court's order denying his claim that the State wrote the sentencing order should be reversed and a new sentencing hearing order. Defendant bases this claim on the assertion that the witnesses who testified at the evidentiary hearing were incredible, that the State had written other sentencing orders in other cases before other judges and that the State failed to present evidence to rebut his claim. However, the denial of this claim should be affirmed because the trial court's finding is supported by competent, substantial evidence and the claim is based entirely on speculation.

As argued in Issue I, *supra*, the trial court did not abuse its discretion in refusing to consider the fourth amended motion

for post conviction. The motion was not timely filed, and the trial court had already given Defendant amply opportunity to amend. As such, any error that may have been committed in denying the claim on the merits was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The denial of the motion for post conviction relief should be affirmed.

Moreover, the defendant bears the burden of proving that the State drafted the sentencing order as the result of an ex parte communication with the trial judge at an evidentiary hearing. *Randolph v. State*, 28 Fla. L. Weekly S659, S659-61 (Fla. Apr. 24, 2003); *Jones v. State*, 845 So. 2d 55, 63-65 (Fla. 2003); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). The defendant may not carry that burden by relying upon speculation. *Jones*, 845 So. 2d at 64; *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). This Court has refused to consider conduct in other cases as proving misconduct in the case at bar without proof of misconduct in the matter under consideration. *Maharaj*, 778 So. 2d at 951-52 (fact that judge had been arrest for bribery in unrelated case, coupled with approach of defendant by person claiming to have a special relationship with judge, did not prove judge attempted to solicit bribe in case). A trial court's findings regarding such an issue are reviewed to determine whether they are supported by competent, substantial

evidence. *Randolph*, 28 Fla. L. Weekly at S660.

Here, the trial court's determination that the sentencing order was sentencing order was written by Judge Carney without the assistance of the State is amply supported by the record. Judge Carney and Mr. Kastrenakes both testified that Judge Carney wrote the sentencing order and the State did not.[7] (S.R. 2057-58, 2105, 2114) Mr. Kastrenakes also testified that the sentencing order and unsigned copy were not in the format used by the State in typing documents: they were not fully justified, contained hyphenated words and did not have initials on the bottom. (S.R. 2110) Defendant presented no evidence to contradict this testimony. As such, the trial court's denial of this claim is supported by competent, substantial evidence and should be affirmed. *Randolph*; *Jones*.

In attempt to avoid the fact that the trial court's order is supported by competent substantial evidence, Defendant contends that the trial court should have granted relief because the State possessed an unsigned copy of the sentencing order. However, both Judge Carney and Mr. Kastrenakes offered a plausible explanation for the State's possession of an unsigned copy of the sentencing order. (S.R. 2059-63, 2113-14) The

[7] Defendant called both of these witnesses. Defendant elected not to call Mr. Toner even though he was available to testify by phone. (S.R. 2123)

direct appeal record reflects that Judge Carney directed the clerk to provide copies of the sentencing order to the parties at the sentencing hearing. (D.A.R. 1767) Judge Carney testified that because of the manner in which capital sentencing proceedings were conducted, the sentencing order had to be signed in open court. (S.R. 2059-60) As a result, Judge Carney brought multiple unsigned copies of the order with him to court, signed one and directed the clerk to provide the other, unsigned copies to the parties. (S.R. 2060-61) While Judge Carney would have preferred that the clerk stamp his name on these copies, the clerk did not normally have a stamp for this purpose and would normally provide unsigned copies. (S.R. 2061-63) Mr. Kastrenakes stated that the copy of the sentencing order from the State Attorney's file was the copy provided by the clerk at the sentencing hearing, which must therefore have been unsigned. (S.R. 2113-14)

In *Jones*, this Court rejected a similar contention. There, the State possessed an unsigned copy of a sentencing order on the prosecutor had made a marginal comment. *Jones*, 845 So. 2d at 63. The prosecutor had testified at an evidentiary hearing that the probable reason for his possession of this document was that the trial judge had circulated drafts of the order for comment before signing it. *Id.* This Court rejected the claim

that the State's possession of this document showed that the State wrote the sentencing order after an ex parte contact as being based on mere speculation. *Id.* at 63-64. Here, Defendant's own witnesses presented a plausible explanation for the State's possession of the unsigned sentencing order: the clerk handed out unsigned orders at sentencing. Thus, under *Jones*, Defendant is entitled to no relief based on his speculation that the State drafted the sentencing order. The denial of the motion should be affirmed.

Defendant also claims that the trial court should have granted him relief because Judge Carney and Mr. Kastrenakes were incredible. However, this assertion does not entitle Defendant to relief. First, it is the trial court's job to make credibility determinations and this Court does not substitute its judgment on this issues for that of the trial court. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)(quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)(quoting *Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955))). Here, Judge Sigler directly found Judge Carney and Mr. Kastrenakes credible. (S.R. 2081) Thus, Defendant is entitled to no relief.

Second, even if the witnesses were, in fact, incredible, Defendant would still not be entitled to relief. Defendant bore the burden of proving that the State wrote the sentencing order

and engaged in ex parte communications with Judge Carney. Without the testimony of Judge Carney and Mr. Kastrenakes, there was no evidence regarding who wrote the sentencing order or how the State came to be in the possession of an unsigned copy thereof. All Defendant would have proven at the evidentiary hearing was that the State had an unsigned copy of the order. While Defendant appears to assume that if his witnesses were not credible the opposite of their testimony should be accepted as true, this is not the law. In *Morton v. State*, 689 So. 2d 259, 261-64 (Fla. 1997), this Court decided to limit a party's ability to impeach its own witness. In doing so, this Court reasoned that showing one's own witness was incredible did not prove any material fact at issue and had "a net result of zero." *Id.* Thus, claiming that his witnesses were incredible does not prove that the State wrote the sentencing order. Instead, the result would be that Defendant's entire claim would be based on speculation about how the State got an unsigned copy of the order. However, this Court has repeatedly held that such speculation does not sustain a defendant's burden of proof. *Jones*; *Maharaj*. The denial of relief should be affirmed.

Defendant next asserts that he was entitled to relief because the State had written other sentencing orders in other cases before other judges. However, in *Maharaj*, this Court

refused to find that speculation about what a judge might have done in a case was not sufficient to prove a post conviction claim even where that same judge had engaged in similar behavior in another case. Here, Defendant asks this Court to speculate about what Judge Carney may have done based on what other judges did. Under *Maharaj*, such speculation does not prove the claim, and the denial of the claim should be affirmed.

Defendant finally asserts that he was entitled to relief because the State did not present evidence about a statement in a brief in *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000), and about a search of its computer system. Defendant asks this Court to draw an adverse inference from the State's failure to present this "evidence." However, this issue is not preserved and is meritless.

Defendant did not attempt to present any evidence about the statement or searching the computer system at the evidentiary hearing. Instead, he first mentioned these issues in his motion for rehearing after his claim was denied. (S.R. 2133-57) Even at that point, Defendant did not assert that the trial court should draw an inferences adverse to the State. Instead, he asked the trial court to reopen the matter to allow him conduct discovery regarding the basis for the statement and any attempt to search the State's computer system. *Id.* Moreover, this

motion for rehearing was filed after the trial court had already completed all of the tasks assigned to it in the relinquishment order. Since the motion was untimely, was a motion for rehearing asserting new grounds and did not raise this issue, the issue is not preserved. *See Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002); *Preston v. State*, 528 So. 2d 896, 898 (Fla. 1988); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Super Transp., Inc. v. Fla. Dep't of Ins.*, 783 So. 2d 1225 (Fla. 1st DCA 2001); *Palm Beach County v. Boca Dev. Associates, Ltd.*, 485 So. 2d 449 (Fla. 4th DCA 1986); *Palma Sola Harbour Condominium, Inc. v. Huber*, 374 So. 2d 1135 (Fla. 2d DCA 1979). The denial of the claim should be affirmed.

Moreover, Defendant did not explain why he could not have discovered the information about which he sought discovery after the denial of his motion earlier through an exercise of due diligence. Defendant had been in possession of the State Attorney's file containing the unsigned copy of the sentencing order for almost 8 years when he filed his motion for rehearing. The brief in *Riechmann* had been filed 4 years by that time and was readily available from this Court and counsel. Day admitted that *Riechmann* had caused her to file this claim. (S.R. 2123) Moreover, Defendant's counsel was from the same office that litigated *Roberts v. State*, 840 So. 2d 962 (Fla. 2002), the case

in which testimony about searching the State's computer system was given and upon which Defendant was relying. Thus, the trial court properly refused to allow Defendant to reopen the evidentiary hearing based on information that had been available to Defendant through an exercise of due diligence. *Vining*. The denial of the claim should be affirmed.

Even if these claims could be properly considered, they would provide no basis for relief. The statement in the *Riechmann* brief does not cite any record or caselaw support, appears to be based on Former Assistant Attorney General Randall Sutton's personal opinion and refers to a time before *Patterson*. In *Randolph*, this Court rejected a claim regarding a sentencing order that was only supported by personal opinion. *Id.* at S660-61. Thus, Defendant would be entitled to no relief on this basis.

While Defendant asks this Court to speculate that the State's computer system must contain a copy of the sentencing order because the State did not present evidence about such a search, there is no basis for such speculation. Defendant bore the burden of proof at the evidentiary hearing and proved that Judge Carney wrote the sentencing order. The State had obtained affidavits from Mr. Kastrenakes and Ms. Dean before the hearing that showed that Judge Carney wrote the sentencing order. Thus,

there was no reason for the State to have conducted any search of its computers.[8] Moreover, this Court has repeatedly stated that such speculate does not support a basis for relief. *Jones*; *Maharaj*. The denial of relief should be affirmed.

[8] It is not clear that such a search could be conducted. The testimony from *Roberts* only indicated that records from 1985 had been destroyed with a change of computer system in 1989. (S.R. 2154) It did not indicate that records from after 1989 were available. Mr. Kastrenakes testified that the computer system again switched in 1994 or 1995. (S.R. 2111) Whether records were destroyed during this switch does not appear in the record.

CONCLUSION

For the foregoing reasons, the denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Rachel Day**, Assistant CCRC, CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida, this 26th day of September, 2003.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-

point font.

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SANDRA S. JAGGARD
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