IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 00-99

JUAN DAVID RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of post conviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing, following remand by this Court to the Circuit Court in and for the Eleventh Judicial Circuit in and for Dade County , Florida. The following symbols will be used to designate references to the record in this appeal:

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

"PC-R. ___" -- record on initial appeal to this Court following the denial of Mr. Rodriguez' Rule 3.850 motion;

"Supp. PC-R. ___" -- supplemental record on appeal to this Court[1];

"T. __" Transcript of hearings in the initial post-conviction appeal.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Rodriguez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the

[1] This comprises both the original supplement, the record on relinquishment and the supplement to the record on relinquishment requested by the undersigned counsel, numbered consecutively.

claims involved and the stakes at issue. Mr. Rodriguez, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration.

Mr. Rodriguez was charged by indictment dated May 3, 1989 with first degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault and attempted murder in the first degree. He pled not guilty.

Mr. Rodriguez' trial was held in January, 1990. A jury returned a verdict of guilty on all counts and recommended a death sentence by a vote of twelve to zero.

On March 28, 1990, the trial court imposed the death sentence on Count I, a life sentence on Count II, fifteen years on Count III, fifteen years on Count IV, life on Count V, five years on Count VI and a life sentence on Count VII. A sentencing order, was entered on the same date.

This Court affirmed Mr. Rodriguez' convictions and sentences on direct appeal. Rodriguez v. State, 609 So. 2d 493 (Fla.1992). The United States Supreme Court denied certiorari on October 4, 1993.

On September 12, 1994, Mr. Rodriguez filed his initial Rule 3.850 motion.(PCR-40)

The State served a response on July 17, 1995. On October 4, 1995, (PCR - 140)[2] Mr. Rodriguez filed an amendment to his Rule 3.850 motion. The State responded on April 2, 1996. Following public records litigation, Mr. Rodriguez filed further amendments on July 31, 1997,

[2] A correction to this motion was filed on October 10, 1995. (PCR-280)

and March 13, 1998. (PCR -2092)

Simultaneously with the filing of the amendment of March 13, 1998, Mr. Rodriguez filed a motion to disqualify the lower Court, Judge Thomas M. Carney, because he was not impartial, detached or neutral, and due to him being a material witness in the proceeding. (PCR-2341). Judge Carney was a material witness because Mr. Rodriguez had raised a claim that Judge Carney had not personally authored the sentencing order in Mr. Rodriguez' case, but via improper ex parte contact had impermissibly had the State draft the order for him.

Following a Huff hearing, the lower court granted a very limited evidentiary hearing.(PCR-2356) The hearing was restricted to the issue of whether trial counsel was ineffective at Mr. Rodriguez' penalty phase for failing to investigate and present Mr. Rodriguez' mental health mitigation including his mental retardation and brain damage. A hearing was not granted on the issue of whether trial counsel was ineffective for failing to investigate numerous mitigating factors arising from Mr. Rodriguez' social and cultural background. Similarly, Mr. Rodriguez was not afforded the opportunity to present evidence as to his claim that the trial court had signed a sentencing order prepared by the State, and thus not afforded an independent weighing of mitigation at his penalty phase. No hearing was granted on any of Mr. Rodriguez' claims relating to his guilt phase.

The limited evidentiary hearing was held on April 5,6,7, and 12, 1999.(T. 432 et seq) The lower court denied relief by order dated November 29, 1999 whereupon Mr. Rodriguez timely filed a notice of appeal.

Following briefing, this Court heard oral argument in June 2000. On November 4, 2002, this Court temporarily relinquished jurisdiction to the lower court to conduct an evidentiary hearing on the sentencing order issue. On November 13, 2002, Mr. Rodriguez timely filed a motion to disqualify the lower court, Judge Thomas M. Carney on the grounds that he was a material witness in this cause, and requested that the case be reassigned by random selection. At a hearing before Judge Carney on November 19, 2002, the motion to disqualify Judge Carney was argued. The State argued that (1) Judge Carney should temporarily remove himself from the case for the sole purpose of deciding whether Judge Carney was a material witness as to the sentencing order issue, and (2) that the case should not be reassigned by random selection but given to another judge in Judge Carney's former division.[3] Over Mr. Rodriguez' objection, Judge Carney granted the State's request. Judge Carney did not enter an order recusing himself. The State then apparently unilaterally went to the office of the Clerk of Court and arranged for the case to be assigned to Judge Victoria S. Sigler.

Mr. Rodriguez filed motions to depose Judge Carney and the trial prosecutors on November 23, 2002. (Supp. PCR. 1997-2005). Judge Sigler denied the motions at a hearing on November 25, 2002. Judge Sigler's rationale was that "there is no general provision or entitlement under the Florida Rules of Criminal Procedure for discovery in post conviction relief motions", (Supp. PCR-2007) and that "the

[3] According to the State, Judge Carney is now a back up judge, but at the time of Mr. Rodriguez' capital trial he was a regular division judge.

purpose of discovery is to prevent surprise to a party" (PCR2-2007). The lower court did not make any finding that Judge Carney was not a material witness nor did she limit the scope of the hearing by prohibiting Mr. Rodriguez from calling Judge Carney.

The evidentiary hearing was subsequently held before Judge Sigler on December 12 and December 23, 2002. Testifying witnesses were trial attorney Scott Kalisch, Judge Carney and lead trial prosecutor John Kastrenakis.[4] On December 31, 2002, Judge Sigler signed an order denying relief to Mr. Rodriguez on the sentencing order issue.[5] (Supp. PCR. 2077-2082). Following Judge Sigler's denial of Mr. Rodriguez' timely motion for rehearing (Supp. PCR. 2166-2284), Mr. Rodriguez filed a notice of appeal and moved this Court to permit supplemental briefing on the issues arising from the relinquishment of jurisdiction. (Supp. PCR. 2155). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. Judge Carney erred in denying Mr. Rodriguez' May 1998 motion to disqualify him because he was a material witness in the sentencing order issue, and Mr. Rodriguez should therefore be put in the position he would be if Judge Carney had correctly recused himself.

2. Mr. Rodriguez was denied due process and equal protection during the proceedings on relinquishment to the lower court following

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[4] Undersigned counsel also testified only insofar as to lay the predicate for the unsigned sentencing order that she had found in materials supplied by the Office of the State Attorney.

[5] The order was not served until January 8, 2003.

this Court's November 4, 2002 Order due to the failure to reassign the case randomly for the evidentiary hearing, and the failure by the lower court to allow Mr. Rodriguez to conduct depositions of the trial Court and the trial prosecutors.

3. The lower court erred in denying Mr. Rodriguez relief on the sentencing order issue, and in denying his motion fro rehearing.

ARGUMENT 1

JUDGE CARNEY ERRED WHEN HE DENIED MR. RODRIGUEZ' MOTION TO DISQUALIFY JUDGE CARNEY WAS A MATERIAL WITNESS AND SHOULD NOT HAVE PRESIDED OVER MR. RODRIGUEZ' RULE 3.850 PROCEEDINGS.

On March 13, 1998, Mr. Rodriguez filed a amendment to his Rule 3.850 motion, based in part on materials that had been turned over to him by the Dade County State Attorney's Office.(PCR. 2092-2268) Contained within those materials was an unsigned sentencing order which was identical in both format and content to the order signed by Judge Carney sentencing Mr. Rodriguez to death. The unsigned order provides a basis for a good faith Rule 3.850 claim that Judge Carney had improper ex parte contact with the State and that the State had improperly drafted the sentencing order that was ultimately signed by the Judge. The claim was properly pleaded and if proven would have been grounds for penalty phase relief. See e.g. Roberts v. State 840 So. 2d 962 (Fla. 2002); Maharaj v. State, 778 So. 2d 944 (Fla. 2000); Riechmann v. State, 777 So. 2d 342, (Fla. 2000). As such, the lower court was obliged to hold an evidentiary hearing on this issue, since the files and records in the case did not conclusively show that Mr.

Rodriguez was not entitled to relief.[6]

Simultaneously with the amended Rule 3.850 motion, Mr. Rodriguez filed a motion to disqualify Judge Carney because of his inability to be impartial in the matter and because he was a material witness to this claim. (PCR.2341-2353). The motion was legally sufficient on both grounds.

Judge Carney denied the motion to disqualify himself, and did not consider the March 1998 amendment, and did not permit an evidentiary hearing on the unsigned sentencing order issue, but proceeded to hold an evidentiary hearing on Mr. Rodriguez' claim of ineffective assistance of trial counsel and Mr. Rodriguez' penalty phase which he subsequently denied.(PCR-2354).

Mr. Rodriguez was entitled to full and fair Rule 3.850 proceedings. Jones v. State, 740 So 2d 529, (Fla. 1999); Holland v. State, 503 So. 2d 354 (Fla. 1987); Easter v. Endell, 37, F. 3d 134 (8th Cir. 1989) The lower court's denial of an evidentiary hearing on the sentencing order issue was erroneous, as this Court recognized when it relinquished jurisdiction to the circuit court for evidentiary hearing on the matter on November 4, 2002. Had Judge Carney properly granted the evidentiary hearing on the sentencing order issue, he would have been required to disqualify himself as a material witness in Mr.

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[6]Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250, (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984);

Rodriguez' case.

This Court has long recognized that the trial judge may be called as a witness in capital post conviction proceedings. In State v. Lewis, 656 So. 2d 1248, (Fla. 1995) this Court held that a capital post conviction litigant was entitled to depose the sentencing judge "when the testimony of the presiding judge is absolutely necessary to establish factual circumstances not in the record" 656 So. 2d at 1250. The need to have the trial judge testify is very limited in scope and particularly only to factual matters that are outside the record" 656 So. 2d at 1250, n.3. In Lewis, this Court implicitly recognized that when a judge's testimony was warranted, disqualification of that judge is required. This is apparent from the Court's observation that requesting such a deposition "should not be utilized as a technique to disqualify the original trial judge from further hearings in the case" Id. Mr. Rodriguez' case presents one of the very limited situations envisaged by Lewis.

Moreover, this Court has recently recognized explicitly that when the authorship of a sentencing order is at issue in post-conviciton proceedings, the testimony of the trial judge will be necessary to determine the issue. See, Roberts v. State, 840 So. 2d 962, 969 (Fla. 2002). Mr. Rodriguez had presented a properly pleaded claim in his Rule 3.850 motion, predicated on an unsigned sentencing order found in materials supplied pursuant to Chapter 119 litigation. The allegations relating to the authorship of the sentencing order and the ex parte communication are "factual circumstances not in the record" Id. Because only the trial judge and prosecutors are privy to the

knowledge as to who in fact drafted the sentencing order, Judge Carney's testimony was "absolutely necessary" to establish those factual circumstances. Contrary to the State's assertions below, Judge Carney was a material witness in the case.

Following this Court's relinquishment of jurisdiction Judge Carney did in fact testify as to this issue (Supp. PCR. 2355-2364). Because Judge Carney was always a material witness in a claim which this Court recognized should have been heard, he should have disqualified himself.

Judge Carney's failure to disqualify himself also violated due process as it exacerbated his apparent bias against Mr. Rodriguez.[7] Post conviction litigants are entitled to due process, Teffeteller v. Dugger 676 So. 2d 69 (Fla. 1996). Due process guarantees litigants the fair determination of the issues by a neutral detached judge, Porter v. State, 723 So. 2d 191, 197 (Fla. 1998). The proper focus of this enquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than on the judge's perception of his [or her] ability to act fairly or impartially" Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases the trial judge " should be especially sensitive to the basis for the fear , as the

[7] Prior to the 1998 motion to disqualify Judge Carney, Mr. Rodriguez had already filed two motions to disqualify the judge, due to ex parte communications with the State about a prospective public records hearing; the judge's ex parte communication with Mr. Rodriguez' witnesses, and further ex parte communication regarding the court's in camera inspection of materials claimed as exempt by the State. (PCR.2341-2353A) These circumstances were raised in Mr. Rodriguez' initial brief before this Court (Initial Brief at 86), and Mr. Rodriguez relies on his initial Brief as to those motions.

defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id. This principle applies s to Rule 3.850 proceedings as well as to capital trials. Rodgers v. State, 630 So. 2d 5139 (Fla. 1993); Suarez v. Dugger, 527 So.2d 191 (Fla. 1988). Judge Carney's refusal to disqualify himself as a material witness in a situation in which his own conduct at Mr. Rodriguez' trial would be scrutinized gave Mr. Rodriguez a well founded fear that Judge Carney lacked the neutrality and detachment required by due process. This situation even extended itself into the proceedings held below during the relinquishment period. Following relinquishment of jurisdiction, on November 13, 2002, Mr. Rodriguez timely filed a motion to disqualify Judge Carney on the grounds of him being a material witness at the forthcoming evidentiary hearing. At a status conference on November 19, 2002, at the State's behest, Judge Carney did not disqualify himself from the case but instead remanded the case to the Honorable Victoria S. Sigler, who had been chosen by the State(See argument 2 infra), only for the purpose of determining whether he in fact was a material witness. Despite the State's protestations that Judge Carney was not a material witness, Judge Sigler permitted Mr. Rodriguez to call Judge Carney as a witness. However even after being sworn, Judge Carney addressed Judge Sigler about his concerns about being called as a witness:

> [Judge Carney] Before I [testify] I would like to confirm [sic] with you for a moment; is that permissible?
>
> [The Court] I don't know.
>
> [Judge Carney] Because I have a legal question.

> [Ms Diaz] Your Honor, I would object. Judge Carney's interest has nothing to do with this.
>
> [Judge Carney] I will talk to you on the record if you want, That's fine if the lawyers want to be present it's fine also. My only concern, if I testify, this may automatically result in me having to recuse myself.
>
> [The Court] And then I can try it.
>
> [Judge Carney] There is nothing to try yet.
>
> [The Court] Well, if you testify beside that then we'll cross that bridge when we get to it.

(Supp. PCR. 2061)

Even when subpoenaed and called as a witness, Judge Carney was anxious to retain the case at all costs, despite the fact that he was clearly a witness in the proceeding at that point. This clearly belies the "detached neutrality" that a trial judge is required to exhibit and gives an appearance of wishing to uphold Mr. Rodriguez' conviction and death sentence at all costs.

The purpose of the disqualification rules direct that a judge must avoid even the <u>appearance</u> of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. <u>Crosby v. State</u>, 97 So.2d 181 (Fla. 1957); <u>State ex rel. Davis v. Parks</u>, 141 Fla. 516, 194 So. 613 (1939); <u>Dickenson v. Parks</u>, 104 Fla. 577, 140 So. 459 (1932); <u>State ex rel. Mickle v. Rowe</u>, 100 Fla.

1382, 131 So. 3331 (1930).

* * * *

> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

The inextricable link between Judge Carney's denial of Mr. Rodriguez' properly pleaded claim and his insistence on remaining on the case despite a legally sufficient motion to disqualify adds to the appearance of impropriety and bias against Mr. Rodriguez.

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.140(d)(1) & (2). Both situations are applicable here. The motion was legally sufficient because Mr. Rodriguez alleged facts that demonstrated " that the moving party has a well grounded fear that he or she will not receive a fair trial at the hands of the judge" Roberts at 969 quoting Correll v. State, 698 So. wd 522, 524 (Fla. 1997); Cave v. State, 660 So. 2d 705, 708(Fla.

1995). To determine if a motion to disqualify is legally sufficient, this Court looks to see wehter the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial" Id. In the instant case, Mr. Rodriguez had found the unsigned sentencing order in materials supplied by the State. This led him to believe that Judge Carney had engaged in improper ex parte contact with the State and had the State improperly draft the order that sentenced Mr. Rodriguez to death. Given this scenario, any reasonably prudent person would be placed in fear of not receiving a fair and impartial trial from the judge he suspects of such wrongdoing. Moreover a reasonably prudent person would also fear that Judge Carney could not be impartial since he would have to be a witness in the case. Clearly Judge Carney could not be both a witness and a presiding judge at the post- conviction hearing on this issue.

Because the motion to disqualify was legally sufficient, the judge should not have considered the facts of the motion; he should take no action other than setting in motion the reassignment of the case. See Fla. R. Jud. Admin. 2.160(f). However Judge Carney continued with the case, conducted a Huff hearing, and then proceeded to conduct an evidentiary hearing on Mr. Rodriguez' claim of ineffective assistance of counsel at the penalty phase which he duly denied.(PCR-2354). Given that he should have disqualified himself in March 1998, this further action was clearly erroneous. This Court and other Florida appellate courts have repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification

"shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988) (emphasis added). See Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); Digeronimo v. Reasbeck, 528 So. 2d 556 (Fla. 4th DCA 1988); Ryon v. Reasbeck, 525 So. 2d 1025 (Fla. 4th DCA 1988); Fruhe v. Reasbeck, 525 So. 2d 471 (Fla. 4th DCA 1988); Lake v. Edwards, 501 So. 2d 759 (Fla. 5th DCA 1987); Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th DCA 1986); ATS Melbourne, Inc. v. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985); Gieseke v. Moriarty, 471 So. 2d 80 (Fla. 4th DCA 1985); Management Corp. v. Grossman, 396 So. 2d 1169 (Fla. 3rd DCA 1981). See also Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993). The fact that Judge Carney was required to testify necessarily meant that he would "pass on the truth of the facts alleged" in Mr. Rodriguez' legally sufficient motion. He was called as a witness in the proceedings.

Had Judge Carney presided over the full evidentiary hearing that Mr. Rodriguez was entitled to, Judge Carney would have been "faced with the unusual setting of a judge trying a case in which he was a principal actor in the factual issues to be determined . . . . He obviously could not be a witness and a judge in the same proceeding." United States v. Columbia Broadcasting System, Inc., 497 F.2d 107, 109 (5th Cir. 1974). In a similar situation, the Fifth Circuit held the judge should have recused himself:

> The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system. Cf. Mayberry

> v. Pennsylvania, 1971, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532; Grizzell v. Wainwright, 5 Cir. 1973, 481 F.2d 405.
>
> * * *
>
> The trial judge in this case may well have had the unique ability to be an impartial judge in the circumstances, but regardless of that fact, such a trial does little to protect the judicial process from any possible suspicion of bias.

Unites States v. Columbia Broadcasting System, Inc., 497 F.2d at 109-10. Cf. Rogers v. State, 630 So. 2d 513 (Fla. 1993).

Judge Carney denied Mr. Rodriguez due process by not granting an evidentiary hearing on the sentencing order issue. This situation is similar to that in Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) in which this Court held that its prior remand for Chapter 119 disclosure which had been erroneously denied below " were designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested" The denial of the motion to disqualify together with all of Judge Carney''s subsequent rulings must be vacated, and new proceedings on Mr. Rodriguez' then outstanding claims afforded to put Mr. Rodriguez "in the same position he would have been in" had the court properly granted an evidentiary hearing and disqualified himself."

In Suarez v. Dugger, 527 So. 2d at 191, the presiding judge was presented with a motion to disqualify that was filed with a Rule 3.850 motion. The judge denied the motion to disqualify and went on to conduct an evidentiary hearing. On appeal, this Court held that the denial of the motion to disqualify was erroneous and vacated the denial of Rule 3.850 relief remanding "with directions to conduct a new

proceeding" 527 So. 2d at 192. This was a clear effort to put Mr. Suarez back in the position he would have been in had the motion to disqualify not been denied. The same considerations apply equally to Mr. Rodriguez' case. This Court should reverse the lower Court's denial of Mr. Rodriguez' 1998 motion to disqualify Judge Carney and remand for new proceedings in accordance with Suarez et al.

ARGUMENT 2

MR. RODRIGUEZ WAS DENIED WAS NOT AFFORDED A FULL AND FAIR HEARING ON THE SENTENCING ORDER ISSUE IN CONTRAVENTION OF DUE PROCESS AND EQUAL PROTECTION

A. INTRODUCTION

Just like trials and sentencing proceedings, post conviction proceedings in Florida are governed by principles of due process. See e.g. Huff v. State, 622 So. 2d 982, (Fla. 19993); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996); Johnson v. Singletary, 647 So. 2d 106, (Fla. 1994). In Scully v. State 699 SO. 2d 1251 (Fla. 1990), this Court recognized the especial importance of affording due process in a death case:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 670 (Fla. 1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel Munch v. Davies, 143 Fla. 236, 244, 196 So.491, 494 (1940) In this respect, the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural right of all individuals. See art 1 S 0 Fla. Const.

Id at 1252.

The proceedings that occurred during the relinquishment period did not comport with these fundamental principles due to the State's insistence on picking the judge who would hear the proceedings, the lower court's refusal to allow Mr. Rodriguez to depose the trial judge and prosecutors, the lower court's failure to allow Mr. Rodriguez to have his full team of counsel available for the evidentiary hearing and the lower court's denial of Mr. Rodriguez' motion for rehearing. Mr. Rodriguez was denied due process and did not receive a full and fair hearing on the relinquishment issue.

B. THE CASE WAS NOT RANDOMLY REASSIGNED TO ANOTHER JUDGE

This Court's order relinquishing jurisdiction to the lower court for the purpose of holding an evidentiary hearing was entered on November 4, 2002. (Supp. PCR. 1996). On November 13, 2002 Mr. Rodriguez timely filed a motion to disqualify Judge Carney based on the fact that he is a material witness in the case. (Supp. PCR. 2131-2132E). Mr. Rodriguez requested that the case be reassigned by random selection as is the normal practice in Miami-Dade County.

A status hearing was held before Judge Carney on November 19, 2002. At that status hearing Assistant State Attorney Penny Brill told Judge Carney that he should take himself off the case only to the extent that another judge should rule if in fact Judge Carney was a material witness. (Supp. PCR. 2292). Ms. Brill further announced that the case should be assigned to Judge Victoria S. Sigler since Judge Sigler was now in the "division" that Judge Carney formerly

occupied and it was not the "division" that was the subject of the recusal. (Supp. PCR. 2292). Ms, Brill further asserted that the assignment to Judge Sigler would be "random" and therefore her selection would pass muster as Judge Sigler' appointment to the case would be just as "random" as if the wheel was used. (Supp. PCR 2293). Over Mr. Rodriguez' objection the case was assigned to Judge Victoria S. Sigler, the judge selected by Ms. Brill. Following the November 19, 2002 hearing, Ms. Brill took it upon herself to set a hearing in front of Judge Sigler, and all further proceedings during the relinquishment were conducted by Judge Sigler.

The procedure for reassigning the case that was advocated by Ms. Brill and adopted by Judge Carney is in direct contravention of that authorized by the local rules in Dade County.

Administrative order 96-25-A1 promulgated by Chief Judge Farina deals with the assignment and reassignment of cases in the Criminal Division of the Circuit Court for the Eleventh Judicial Circuit.. In pertinent part the Order reads

> Upon the disqualification or recusal of the presiding judge in any case within the Criminal Division of the Circuit Court, the reassignment of such cases shall be made by the Clerk of Court under a blind filing system historically utilization making the initial assignment or any similar method that will result in such cases being filed equally among the various Sections of the Court in an unpredictable manner.

(Administrative Order 96-25 A1)

The order makes it clear that cases should be randomly reassigned by the Clerk of Court through a blind filing method. It does not say

that the case should be assigned to the judge of choice of either the prosecutor in the case or the judge recusing himself or herself, which is what happened in the instant case. Assistant State Attorney Brill's argument that the case should be assigned to the same "division" as Judge Carney also flies in the face of Administrative Order 96-25-A1. The plain language of the Order states that the intent of the method is unpredictability of reassignment among the various sections of the Court, and not within one section. For Judge Carney to acquiesce to the request of Ms. Brill to assign the case in direct contravention of the local procedure violates Mr. Rodriguez' rights to due process and equal protection.

In addition to Ms. Brill's flagrant disregard of the local rule, it was error for Judge Carney to have any input in the matter of which judge should take the case. Fla. R. Jud. Admin. 2.160 (f) states that "If the motion is legally sufficient, the judge shall immediately enter an order granting the disqualification and proceed no further with the case" Id. Judge Carney's acquiescence to Ms. Brill's request to assign the case to Judge Sigler exceeds the scope of this remit. Assigning the case to a particular judge of the State's choice goes beyond the admonition to "proceed no further with the case" Judge Carney's action further exacerbated the appearance of bias against Mr. Rodriguez of which Mr. Rodriguez complained in his 1996 and 1998 motions to disqualify Judge Carney. See Argument 1 supra. Ms. Brill's insistence that Judge Sigler's appointment would be "random" is disingenuous to say the least. If Judge

Sigler's appointment were truly "random", the State would have no objection to the usual method of randomly reassigning cases to be used. Ms. Brill's insistence on Judge Sigler suggests that in the State's opinion, Judge Sigler would be more likely than a "random" judge to uphold Mr. Rodriguez' death sentence and rule in the State's favor. Mr. Rodriguez was denied due process and equal protection by Ms. Brill's action.

Ms. Brill's attempt to justify her departure from established procedures by distinguishing the instant case from other recusal situations is equally meritless. Ms. Brill argued that the only issue to be heard by the other judge was whether Judge Carney was a material witness. (Supp. PCR. 2292). This argument is bogus. As noted in Argument 1, supra, this Court has recognized that the testimony of the trial judge may be "necessary to establish factual circumstances not in the record" State v. Lewis, 656 So. 2d at 1250. Clearly the authorship of the sentencing order is such a fact. Moreover, the State was or should have been aware that in several other Dade County cases in which the authorship of the sentencing order was at issue, the trial judge was called to testify. See e.g. Roberts v. State 840 So. 2d 962 (Fla. 2002); Maharaj v. State, 778 So. 2d 944 (Fla. 2000); Riechmann v. State, 777 So. 2d 342, (Fla. 2000). Moreover, even if there were any real doubt as to whether Judge Carney was a material witness, those doubts were firmly dispelled by subsequent hearings in front of Judge Sigler. See T. 16, 12/12/02.

To try to circumvent the protections afforded to Mr. Rodriguez

by the Rules of Judicial Administration and the local Administrative Order, as Ms. Brill patently did, is to deny Mr. Rodriguez equal protection and due process. Relief is warranted.

C. IT WAS ERROR FOR THE LOWER COURT TO DENY MR. RODRIGUEZ DEPOSITIONS PURSUANT TO STATE V. LEWIS

On November 21, 2002, Mr. Rodriguez filed with the lower court a motion to depose Judge Carney, the trial court judge along with a motion to depose the trial prosecutors John Kastrenakis and Terrance Toner. (Supp. PCR. 1997-2005). The motions to depose were predicated upon State v. Lewis, 656 So. 2d 1248 (Fla. 1994), in which this Court held 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" In this case, Judge Carney was a central and material witness as to this issue. In Lewis, this Court further held that a capital post conviction litigant was entitled to depose the sentencing judge "when the testimony of the presiding judge is absolutely necessary to establish factual circumstances not in the record" 656 So. 2d at 1250. The need to have the trial judge testify is very limited in scope and particularly only to factual matters that are outside the record" 656 So. 2d at 1250, n.3. Mr. Rodriguez' case clearly represented such an issue, yet the lower court denied Mr. Rodriguez' request to depose Judge Carney. Mr. Rodriguez was thus forced to go ahead with the evidentiary hearing and call Judge Carney without any clear idea as to what his testimony would be, to Mr. Rodriguez' substantial

prejudice. The Court's action rendered Mr. Rodriguez' counsel ineffective. Because Mr. Rodriguez was not able to obtain proper discovery as permitted by Lewis, he was denied due process and a full and fair hearing. Relief is warranted.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING RELIEF ON MR. RODRIGUEZ' SENTENCING ORDER ISSUE

At the evidentiary hearing Judge Carney testified that he had authored the sentencing order and had it typed up by his judicial assistant. 2358). John Kastrenakis testified that he was the lead prosecutor at Mr. Rodriguez' capital trial , that he did not author, edit or review the sentencing order and that he did not direct anyone else in the State Attorneys Office to do so, that the knew that nobody in the State Attorneys Office had in fact done so, and that the format of the sentencing order was inconsistent with that used by the State Attorney's Office at that time. (Supp. PCR. 2380-2381). The lower court found both witnesses credible and thus denied relief to Mr. Rodriguez. However, the lower court's order does not address the issue of the unsigned sentencing order and why it was found in the State's file.

The lower court's credibility findings are compromised by the evident bias of Judge Carney against Mr. Rodriguez. Even during the evidentiary hearing itself Judge Carney expressed concern about being recused from the case. (PCR Supp 2054) Judge Carney's apparent desire to cling on to Mr. Rodriguez' case and uphold Mr. Rodriguez' death

sentence impacts his credibility, a fact which the lower court did not address. Additionally Judge Carney's memory is questionable, since he testified that he had presided over "in excess of forty" capital cases, of which "about twenty percent" went to penalty phase. (Supp. PCR. 2053). Similar considerations apply to the lower court's findings relating to John Kastrenakis. Again Kastrenakis testified that he had, in fact, drafted the sentencing order in the Maharaj case. Kastrenakis testified that he had tried approximately between 20 and 30 capital cases, (Supp. PCR. 2100) of which approximately seventy percent went to penalty phase (Supp. PCR. 2101) but yet he was hard pressed to name more than 7 of those cases (Supp. PCR. 2101).[8] Kastrenakis' memory is questionable at best, a fact which the lower court did not address. This is compounded by the fact that Kastrenakis admitted authoring the sentencing order in the Maharaj case (PCR. Supp. 2390). Furthermore his testimony is internally inconsistent. Kastrenakis testified that he had drafted the sentencing order in the Maharaj case (Supp. PCR. 2115) but that this was not the pattern and practice of the State Attorney's Office at that time. This flies in the face of the cases of Roberts v. State 840 So. 2d 962 (Fla. 2002), Maharaj v. State, 778 So. 2d 944 (Fla. 2000); Riechmann v. State, 777 So. 2d 342, (Fla. 2000); all of which upheld the grant of relief in Miami-Dade County capital post conviction cases as well as the cases of State v. Beltran-Lopez and State v. Espinosa also Miami Dade County capital cases in which the

[8]later during his testimony Kastrenakis recalled 3 more cases.

State drafted the sentencing orders.

In its order denying Mr. Rodriguez Rule 3.850 relief and the order denying the motion for rehearing, the lower Court did not address the pattern and practice of the Office of the State Attorney during that time period. Additionally the lower court did not address the fact that even the Office of the Attorney General has explicitly acknowledged that for the State to draft the sentencing order in capital cases "was not uncommon practice throughout the State at that time State spectacularly omitted to raise during the pendency of the proceedings before the lower court in Mr. Rodriguez' case.[9] See Defense Motion for Rehearing. The lower Court's order also omits to address the fact that the State notably did not put on any such testimony of a search of the State Attorney's word processing system. Mr. Rodriguez submits that given that his capital trial took place after 1989, such a search would show that the State typed the order, and that is why no such search was conducted. This fact would further supported by the fact that while Mr. Kastrenekas stated that Mr. Rodriguez' sentencing order was not in the format used by the State Attorney's Office, close examination of the order shows that the format certainly does not at all resemble the format used earlier by Judge Carney in the case of Henry Garcia. (Supp. PCR. 2033-2038). Rather, it is actually much closer in semblance to the type face and format used by the State Attorney's Office for all their pleadings. Therefore, the lower court failed to address

[9]Ms. Jaggard was co -counsel for the State in the Riechmann appeal

this issue in its order. Thus relief is warranted.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Rodriguez respectfully urges this Court to reverse the lower court order denial of Rule 3.850 relief, and remand Mr. Rodriguez' case to a new judge assigned by random selection for a ful and fair hearing on his Rule 3.850 claims, and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard Esq., Office of the Attorney General, Rivergate Plaza, Suite 950444 Brickell Avenue, Miami, FL 33131 on September 5, 2003.

CERTIFICATE OF COMPLIANCE

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

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