IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-879

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

GREGORY MILLS,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

BRIEF OF APPELLEE/CROSS-APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal by the State of Florida of the circuit court's granting of Rule 3.850 relief as to Mr. Mills' sentence of death, as well as an appeal by Mr. Mills of the denial of a new trial. The following symbols will be used to designate references to the record in this appeal:

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

"Supp. R" -- supplemental record on direct appeal;

"PCR [vol.]" -- record on instant postconviction appeal;

"T. " -- transcript of hearings below.

All other citations, such as those to exhibits introduced during the evidentiary hearing, are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Oral argument is scheduled for June 6, 2001.

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STATEMENT OF THE CASE AND OF THE FACTS

A. PROCEDURAL HISTORY.

Mr. Mills was indicted in the Eighteenth Judicial Circuit, Seminole County, Florida, for first-degree felony murder and related offenses, and pled not guilty.

Trial commenced before Circuit Judge J. William Woodson on Thursday, August 16, 1979, and the jury returned guilty verdicts the next day. After a penalty phase, the jury recommended that Mr. Mills be sentenced to life imprisonment without the possibility of parole for at least twenty-five (25) years. On April 18, 1980, the trial court overrode the jury's life recommendation and sentenced Mr. Mills to death, finding six (6) aggravating circumstances: (1) under sentence of imprisonment; (2) previous conviction of violent felony; (3) great risk of death to many persons; (4) felony murder; (5) pecuniary gain; and (6) heinous, atrocious, or cruel. Addressing only statutory mitigating factors,[1] the court found that no mitigating circumstances had been established.

The conviction for first-degree felony murder and sentence of death were affirmed by the Florida Supreme Court in a 5-2 decision. Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). The Court, however, vacated the

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[1]The trial judge's sentencing order stated: "there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified" (R. 642).

aggravated battery conviction because "we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shotgun blast." Id. at 177. The Court also struck three (3) of the aggravating circumstances found by the trial court. The "great risk of death to many persons" aggravating factor was struck because "[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state conceded, erroneous." Id. at 178. The pecuniary gain factor was struck due to improper doubling with the felony murder aggravating factor. Id. Lastly, the Florida Supreme Court struck the "heinous, atrocious, or cruel" aggravator as inapplicable to the facts of the case. Id.

Following the signing of a death warrant, a postconviction motion pursuant to Fla. R. Crim P. 3.850 was filed and summarily denied. On appeal, the Florida Supreme Court remanded the case for an evidentiary hearing "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental health mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). The Court also denied a request for state habeas corpus relief. Id.[2]

Following the evidentiary hearing and the lower court's order denying relief, the Florida Supreme Court, in a sharply divided

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[2]In his state habeas petition, Mr. Mills challenged, *inter alia*, the constitutionality of the Florida Supreme Court's purported harmless error analysis on direct appeal. Justice Barkett would have granted habeas relief on this issue. Mills, 559 So. 2d at 579 (Barkett, J., concurring specially).

vote, affirmed. Mills v. State, 603 So. 2d 482 (Fla. 1992).

Subsequent to the decisions in Stringer v. Black, 503 U.S. 222 (1992), and Sochor v. Florida, 504 U.S. 527 (1992), Mr. Mills sought habeas corpus relief in the Florida Supreme Court challenging both the adequacy of that Court's harmless error analysis in his case as well as the application of the "during the course of a felony" aggravating circumstance. The Florida Supreme Court held that Sochor was not new law under Witt v. State, 387 So. 2d 922 (Fla. 1980), and therefore the claim, raised for the second time, was procedurally barred. Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992). The Court ruled in the alternative that "[w]e . . . applied, and applied correctly, a harmless error analysis in Mills' direct appeal." Id. at 623. Regarding the claim that the felony-murder aggravating factor is an unconstitutional automatic aggravating circumstance, the Court held: "We considered and rejected the substance of this claim on direct appeal." Id.

Mr. Mills sought habeas corpus relief in the United States District Court for the Middle District of Florida. During the pendency of the petition, the district court entered an order requesting supplemental briefing on the jury override issues presented in the petition. Following the submission of briefs, the district court entered judgment against Mr. Mills, and the Eleventh Circuit Court of Appeals affirmed. Mills v. Singletary, 161 F. 3d 1273 (11th Cir. 1998), cert. denied, 120 S.Ct. 804

(2000).

Following the decisions by the United States Supreme Court in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and Fiore v. White, 121 S.Ct. 712 (2001), as well as the decision by this Court in Keen v. State, 775 So. 2d 263 (Fla. 2000), Mr. Mills sought habeas corpus relief. While the petition was pending, Mr. Mills' death warrant was signed. Oral argument was conducted on April 2, 2001, and a sharply-divided decision denying relief was issued in the late afternoon of April 12, 2001. Mills v. Moore, No. SC01-338 (Fla. April 12, 2001).

On April 16, 2001, Mr. Mills filed a second Rule 3.850 motion. A Huff hearing took place that same day, and an evidentiary hearing was ordered. The evidentiary hearing occurred on April 17, 2001, and an order denying relief was issued on April 18, 2001. The Court issued an opinion affirming on April 25, 2001, at approximately 5:00 PM. Mills v. State, No. SC01-775 (Fla. April 25, 2001).

Between the time of the lower court's denial of Mr. Mills second Rule 3.850 motion and the filing of his appellate brief in this Court, Mr. Mills discovered new evidence and requested that the Court relinquish jurisdiction so that he could file a new Rule 3.850 motion as this Court had no jurisdiction due to the appeal. See State v. Meneses, 392 So. 2d 905, 907 (Fla. 1981) ("while appeal proceedings or certiorari proceedings are pending in an appellate court, the trial court is without jurisdiction to

entertain a motion to vacate"). The State, however, opposed relinquishment. On April 19, 2001, the Court, over the dissent of two justices, denied relinquishment. Thus, Mr. Mills raised those issues in his brief, and the issues were the subject of extensive discussion at the oral argument before the Court on April 24, 2001. During that oral argument, the State conceded that the Court could dismiss the appeal without prejudice to allow the lower court to address the issues which had not been raised below. The Court's opinion, however, was silent on the new issues.

Mr. Mills' filed another Rule 3.850 motion on April 26, 2001 (PCR. 1-38). The State filed a written response that afternoon (PCR. 48-60), and Judge Eaton conducted a telephonic Huff hearing that same afternoon (T. Hearing 4/26/01). Judge Eaton ordered an evidentiary hearing on both issues raised in Mr. Mills 3.850 motion to take place on April 30, 2001. On May 1, 2001, Judge Eaton entered an order setting aside Mr. Mills' death sentence, ordering a resentencing on Claim I of Mr. Mills' motion, granting a new evidentiary hearing on Claim II, but denying a new trial (PCR. 283 *et. seq.*). The State appealed the granting of relief, and Mr. Mills filed a cross-appeal from the denial of a new trial.

B. THE EVIDENTIARY HEARING.

At the evidentiary hearing, Mr. Mills called three (3) witnesses: Billy Nolas, Esq., John Henry Anderson, and Nicholas Atkinson. The State called five (5) witnesses: Judge Woodson, Nichole Pyle, Dianne Thompson, Mary Ames, and Linda Bechtell.

1. **Testimony of Billy Nolas.** Mr. Nolas is a Florida licensed attorney who previously was employed by the Capital Collateral Representative and represented Mr. Mills (T. Hearing 4/30/01 at 15). He acted as sole counsel for Mr. Mills for most of his representation of Mr. Mills, which began in 1988 (T. 16). A Rule 3.850 motion had been filed, and in November of 1989, after the signing of a death warrant, an additional proffer and request for evidentiary hearing were filed (T. 16). The motion was summarily denied by Judge Woodson (T. 17). Between the filing of the 3.850 motion and the order of denial, there were no hearings, status conferences, or oral arguments (T. 17).

Mr. Nolas testified that until he had been notified by Mr. Mills' current counsel about an unsigned draft order summarily denying Mr. Mills' 3.850 motion, he had not seen any draft order, "nor had I been informed either by Judge Woodson or his staff or by anybody from the state attorney or the attorney general's office that an order had been provided to Judge Woodson by the prosecution in the case" (T. 17-18). The existence of such an order "indicates to me that there was some ex parte communication or some proceeding from which Mr. Mills and I were excluded" (T. 18).

Had he known that Judge Woodson had engaged in an ex parte communication with the State which resulted in the drafting of the order denying relief to Mr. Mills, Mr. Nolas "would have moved on that basis . . . to recuse Judge Woodson," as well as "for a

reconsideration of all of the issues in the case based on the taint of this, what I'll call for purposes today, I believe improper proceedings between Judge Woodson and the State" (T. 19).

Mr. Nolas did recall that he had filed a motion to disqualify Judge Woodson following the remand by this Court for an evidentiary hearing "on the grounds that I was aware of at the time, mainly that basically that the court had said in its written order, which I did not know that had come about from the prosecution, but the court had said that no amount of mitigation would have changed Judge Woodson's mind in the case" (T. 19-20). He explained that "obviously the fact that there had been an ex parte proceeding or some improper contact beforehand would have been a basis for the recusal motion" (T. 20).

Mr. Nolas also testified that he had filed a motion for rehearing of Judge Woodson's order in which he mentioned that he had not received the State's response to the 3.850 motion (T. 20). The reason he mentioned this was because "Judge Woodson had indicated in his order that he reviewed the State's response" (T. 21). Mr. Nolas thought either that the response had been misfiled at the CCR office, or that "given the exigency of the warrant, the state attorney probably just forgot to send it out to us" (T. 21). Thus, in the rehearing, he requested that Judge Woodson provide a copy of whatever the State had filed in response to Mr. Mills' motion (T. 21). As Mr. Nolas explained, "I obviously had no idea that there was an actual order that had been prepared for Judge

Woodson, nor did I have any idea of any communication that may have taken place" (T. 21). "[B]ased on not receiving the response, you know, I wasn't gonna make any allegation about anyone. I just simply thought it was something that fell through the cracks and we never got the response" (T. 21-22).

Mr. Nolas also explained that he had made Chapter 119 requests on behalf of Mr. Mills during the 3.850 proceedings; once the case was remanded for the evidentiary hearing, "I had no reason to make a further Chapter 119 request. The case was under active litigation, the prosecution had represented that all of the files that we were entitled to had been provided" (T. 23). "[A] further 119 request would not only have been no reason for it, it would be a bad faith request" (T. 23-24).

On cross-examination, Mr. Nolas reiterated that he was aware that the order denying the 3.850 motion referenced a response from the State (T. 25-26), but that fact alone did not give rise in his mind to any ex parte communication issue (T. 27). Mr. Nolas was sure that he eventually read the State's response, which had "certain similarities and certain dissimilarities" to Judge Woodson's order (T. 30). However, "that's a world of difference from actually having a party [] submit findings and conclusions to a judge which the judge adopts . . . especially without any input from Mr. Mills, any opportunity to object, any opportunity to be heard" (T. 31).

On redirect examination, Mr. Nolas testified that as lead

counsel, he was "very much involved in directing the investigation" of Mr. Mills' case (T. 33). The actual investigation "would have either been conducted by myself or by an attorney [or] investigator with specific instructions from me as to the investigation and what it should entail" (T. 34). The fruits of any investigation would immediately report to him as to what had been gathered, especially in a case with a warrant (T. 34). Mr. Nolas testified that he had been made aware by current collateral counsel as to the existence of John Anderson (T. 34). Prior to that time, "Mr. Anderson's name was not a name that came up in any setting. We talked to Mr. Ashley. Mr. Ashley was very uncooperative even to the extent of declining to provide us with the names of anyone. We talked to several other witnesses relating to the case, and Mr. Anderson was simply not a name that had come up in any way as someone who may have knowledge about Mr. Mills' case" (T. 34-35).

On re-cross examination, Mr. Nolas explained that while he had had conversations with Mr. Mills about his case, Mr. Anderson's name never came up (T. 37). He also explained that he did not rely exclusively on Mr. Mills for investigation due to Mr. Mills' significant mental impairments (T. 36-37). He reiterated that "[u]ntil recently," he had never heard of John Henry Anderson (T. 37).

2. Testimony of John Henry Anderson. Mr. Anderson is currently incarcerated at Polk Correctional Institution for a drug

offense (T. 43). He is originally from Seminole County, Florida (T. 43).

Mr. Anderson testified that an investigator from CCRC-South came to visit him, and he was "shocked, you know, 'cause like nobody ain't never came, you know, asked me about it" (T. 44). Anderson testified to a conversation he had with Vincent Ashley:

> And like I told him [the CCRC-investigator] one time that me and Vince Ashley was in jail together. And we wasn't in the same cell, I met him on the yard out there, I seen him on the yard. I was working out, and he was over there playing basketball. And I asked him about, about the case. I say man, what happened to you and Greg, right. And like he say John, you know, he told me what happened. He say like him and Greg went to the man house to rob him, right, told me that he . . . Greg helped him through the window, and like when he got through the window, Greg was on the front porch. And he say when he got inside, he didn't know the man was woke, and he had a gun in his hand and it went off, right, and like they left.
>
> Okay. And then like he say, man, he told me like he was feeling bad because he had put, you know, put it on Greg because he feel like if he don't tell on Greg, Greg was gonna switch it on him. And he say he did what he felt like he had did.

(T. 44-45). Anderson believed that this conversation occurred "about '80 or '81 or '82, somewhere around in there" (T. 45). He acknowledged that his memory of times was a little fuzzy "'cause it's been a while now" but that he had a specific recollection of the conversation (T. 45).

Anderson also testified that "[a]bout a year later" he saw Ashley again "in town on 13th street to Joe's Pool Room" (T. 45).

He and Ashley were shooting pool and "I asked him again about it, you know, 'cause, you know, we . . . all us growed up together. And then he just said, hey, man, you know, I just had to do what I had to do, it's me or him. And I was, you know, I rather it be him than me" (T. 46).

Anderson knew Mr. Mills and Mr. Ashley because they had grown up together; the last time he saw Ashley was "the day when we talked in the pool room" (T. 46). The last time he saw Mr. Mills was when "I was like round about fourteen years old, fourteen, fifteen, sixteen years old that last time I seen him" (T. 46). No promises or threats were made to Anderson, and he has no reason to lie (T. 47). His testimony is the truth (T. 47).

Anderson testified that he signed an affidavit which indicated that he had been in the jail in 1979, and explained to Judge Eaton about the date: "It was around that, I say round about '80. I say about '80 'cause, you know, at the time when he came to see me, you know, it shocked me because I ain't had, man, I wasn't even thinking about this here. I had other things on my mind, you know, when he talked to me. And then after he came back and seen me, then I told him. At first I said it was about '90 - about '79, right. Then I started thinking, I went back, started thinking, and then like I told him it was in about the '80's, about '80" (T. 49). His conversation with Ashley was after Mr. Mills' trial had already happened (T. 49). Anderson "ain't said nothing" about his conversation with Ashley because "I ain't had

nothing to do with it" and "nobody ain't never came" to ask him about it (T. 50). "I kept my mouth shut and went about my business, you know what I'm saying" (T. 50).

On cross-examination, Anderson reiterated that the conversation with Ashley occurred at some point between 1979 and 1981 (T. 52). No one ever suggested to Anderson that one year or another would be more beneficial (T. 53). When he was in jail at the time Ashley confessed, Anderson was in jail for driving without a license or theft, "I think, one or the other" (T. 53). Anderson has been convicted of seven or eight felonies (T. 54). As to the conversation in the pool hall with Ashley, this occurred "a year or so" after the first conversation; "I ain't say direct a year. I say a year or so" (T. 55). The pool hall conversation was not included in his affidavit because "it shocked me" when the CCRC investigator showed up. "I had to think back. I can't just, you know, about, what, twenty-one years, I just can't tell you what I know right then all of a sudden" (T. 56).

On redirect examination, Anderson reiterated that he would not lie in order to help Mr. Mills, who he has not seen since childhood (T. 60). Anderson did not even know that Mr. Mills had a death warrant signed until the CCRC investigator had mentioned it (T. 60). Anderson again acknowledged that it was difficult to remember specific years when he was in jail due to passage of time, but it is clear in his mind that these conversations occurred (T. 60).

On recross-examination, Anderson once again explained that Mr. Mills' investigator came to see him, and "I told him it been a while since that happened" (T. 63). Anderson told the investigator "to come back again 'cause, you know, I can't, you know, think right now about that because it's been a while" (T. 63). The investigator then returned and "I told him about what happened about Greg, about Vince, and the jail house" (T. 64).

3. Testimony of Nicholas Atkinson. Mr. Atkinson is employed as an investigator with CCRC-South (T. 68). Atkinson was present with the undersigned during a visit with Vincent Ashley when Ashley mentioned the name of John Anderson (T. 68). Pursuant to instructions from the undersigned, Atkinson attempted to and eventually located Anderson at Polk Correctional (T. 69). Atkinson first visited Anderson on April 12, 2001 (T. 70). During the first visit, Anderson "didn't provide much information" but soon thereafter, a correction officer at Polk Correctional contacted Atkinson (T. 71). As a result, Atkinson re-interviewed Anderson on April 18, 2001, and executed the affidavit (T. 71). He saw Anderson again on April 24, 2001, to "make sure that the information we had was sound, that he hadn't changed his position in any way" (T. 72). At that time, Anderson had recalled another conversation with Ashley at a pool hall "where Mr. Ashley had, in fact, reiterated what he'd told Mr. Anderson in the prison yard" (T. 72).

On cross-examination, Atkinson explained that his first

meeting with Anderson lasted about thirty minutes (T. 74). During the first visit, Atkinson got no information from Anderson (T. 75). On the second visit, the affidavit was executed (T. 75). It was Anderson who first mentioned that the conversation with Ashley occurred in 1979, but "[o]n that subsequent visit he thought it might have been the following year, he wasn't really sure on the time line" (T. 75). When Atkinson saw Anderson again, Anderson told him about the pool hall conversation (T. 76). Anderson did not recall the exact year of the pool hall conversation with Ashley (T. 77).

4. Testimony of Judge J. William Woodson. Judge Woodson, a retired judge, presided over Mr. Mills' trial and first Rule 3.850 proceedings (T. 87). In 1989 and 1990, he was a sitting circuit judge based in Melbourne (T. 87). Judge Woodson believed there had been an active death warrant when Mr. Mills' Rule 3.850 was filed (T. 88).

Judge Woodson testified that he received the motion, and "I called the state attorney in Seminole County and told him I received a motion, I was going to deny the motion, and would they prepare the order denying it" (T. 89). He did not have a conversation about the content of the order; "[t]he only thing I knew . . . I read the motion, I wanted to deny the motion at that time. Because the reason, I didn't think it had any merit at that time" (T. 89). At the time of the proceeding, the clerk's file would have been kept in Seminole County, but Judge Woodson did not

recall whether it had been sent to him in Melbourne (T. 91).

On cross-examination, Judge Woodson confirmed that he read Mr. Mills' motion, and called the State Attorney's Office and told them he wanted to deny the motion and wanted them to write up the order (T. 92-93).

On redirect examination, Judge Woodson denied that the order was sent to him without his request: "They wouldn't send me an order unless I told them . . . [T]hey wouldn't have done the order unless I, you know, asked for one. Normally they wouldn't do that" (T. 93). He would not have signed the order unless it reflected the ruling he wanted it to contain (T. 93).

5. Testimony of Nichole Pyle. Ms. Pyle is a records management analyst employed by the Florida Department of Corrections (T. 95). Based on a review of DOC files, Ms. Pyle testified that Vincent Ashley was incarcerated in DOC custody as of September 30, 1980, and released on January, 1984 (T. 95-96). Ashley was also incarcerated in DOC custody from November of 1974 to December of 1977 (T. 96). While he was in DOC custody between September 1980 and January 1984, the records did not reveal that Ashley had been returned to the Seminole County Jail (T. 97).

On cross-examination, Ms. Pyle explained that the records she reviewed only pertained to when an inmate is actually put into DOC custody; thus, if an inmate had been arrested, was housed at a local jail and never convicted or sentenced to state prison time, the DOC records would not reveal anything (T. 97-98). She

confirmed that the September 30, 1980, date was when Ashley was received into DOC custody, not when he was arrested or placed in local jail custody (T. 98). Prior to September 30, 1980, Ms. Pyle had no idea where Ashley was, save for when he was in DOC custody in 1974 (Id.).

6. Testimony of Dianne Thompson. Ms. Thompson is also employed by the Department of Corrections as a correctional services assistant administrator (T. 100). She testified that John Henry Anderson was first incarcerated with DOC in 1974, and was released in 1976 (T. 101). His next DOC incarceration was in 1988, after which he was released in 1991, and again in custody in 1993 (T. 101-02). The records do not reveal whether or not Anderson was in custody at a county jail (T. 102). The records also revealed that Anderson was brought back to Seminole County Jail in July, 1994 (T. 103).

7. Testimony of Mary Ames. Ms. Ames is employed by the Seminole County Clerk's Office and is the supervisor of the felony division (T. 105). In reviewing the files in her office, she determined that John Anderson had not been in the Seminole County Jail in 1979 (T. 106).

On cross-examination, Ms. Ames testified that her office would only have a file if someone had been arrested and a case had been opened (T. 106-07).

On redirect examination, Ms. Ames testified that when someone was arrested, "[w]e get the paperwork, a case is opened" (T. 107).

On re-cross examination, Ms. Ames reiterated that she only checked the records up to 1979, not after (T. 108).

During questioning by Judge Eaton, Ms. Ames acknowledged that she did not search for traffic case files, which were kept in another location (T. 109). She was "not real comfortable" answering any questions about files in the misdemeanor division (T. 110).

8. Testimony of Linda Bechtell. Ms. Bechtell is supervisor of the misdemeanor division of the Seminole County Clerk's Office (T. 113). She explained that if a person was arrested in Seminole County, "it should have been logged into" a log book that she had in her possession (T. 114). After being requested to do so by the State, Ms. Bechtell found no arrests for John Anderson under his date of birth (T. 115). While on the stand, she again reviewed the book and determined that Mr. Anderson had not been arrested in either 1979 or 1980, according to her book (T. 116).

On cross-examination, Ms. Bechtell explained that she was not working in the Clerk's Office when it used the ledger, but she had been told that it represented "people who were actually arrested" for anything that was a criminal offense (T. 121). When asked why the ledger would not reflect Mr. Anderson's arrest in 1980, however, Ms. Bechtell acknowledged that the book might not be entirely accurate (T. 122).

SUMMARY OF ARGUMENTS

1. The lower court did not abuse its discretion in granting relief in the form of a resentencing to Mr. Mills. The lower court's findings as to diligence are supported by competent and substantial evidence and are due deference by the Court on appeal. The lower court's factual findings regarding John Henry Anderson are also within the absolute discretion of the lower court, and no abuse of that discretion has been demonstrated. The State's personal disagreement with the manner in which the lower court evaluated witness credibility does not establish an abuse of discretion. The lower court applied the proper legal standards, correctly analyzed the facts with those legal standards, and his conclusion that Mr. Mills is entitled to a resentencing should be affirmed. No abuse of discretion has been demonstrated by the State.

2. The lower court did not abuse its discretion in granting relief on this claim. The lower court properly concluded that the *ex parte* communication between the State and the trial court regarding the preparation of the order denying Mr. Mills' Rule 3.850 motion in 1989 violated Mr. Mills' rights to due process and to an impartial tribunal. The lower court also properly rejected the putative procedural defenses advanced by the State. The lower court's findings are supported by competent and substantial evidence, the lower court applied the proper legal standards, and thus no abuse of discretion has been demonstrated

by the State.

3. Based on the lower court's findings of fact and conclusions of law with respect to the granting of a resentencing, Mr. Mills also asserts that he should be entitled to a new trial.

ARGUMENT I

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A RESENTENCING TO MR. MILLS.

A. INTRODUCTION.

The State argues that Judge Eaton "abused his discretion" and "erroneously" granted sentencing relief to Mr. Mills, advancing three "independently adequate reasons" (IB at 7). Given the proliferation of attacks on Judge Eaton himself contained in the State's brief,[3] it is difficult to ascertain the precise nature of the State's complaints. However, after culling through the hyperbole in the State's brief, Mr. Mills sets forth the general areas of complaint raised by the State and addresses them in turn below.

The burden on the State to demonstrate an abuse of discretion is quite high. See Mills v. State, 2001 WL 418952 (Fla. April 25, 2001) ("Absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not be overturned on appeal"). "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." BLACK'S LAW DICTIONARY. In other words, the Court would have to find that Judge Eaton carried out his judicial responsibility by way of

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[3]See, e.g. IB at 23 ("It is ironic indeed that an order which repeatedly refers to the need for the 'cold neutrality of an impartial trial judge' grants relief based upon such blatantly false testimony"); (discussing "the 'father-knows-best' view taken by the Circuit Court"). Of course, the State had no problems with Judge Eaton a few weeks ago when he denied Mr. Mills previous Rule 3.850 motion.

"unreasonable, unconscionable, and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted."

B. IMAGINARY "ABUSE OF PROCESS" DEFENSE.

The State argues that Mr. Mills' claim constituted "an abuse of process" under Fla. R. Crim. P. 3.850 (f). The State reproduces only a portion of the text of the rule. The text of the entire rule, in conjunction with the facts, establishes the meritless nature of the State's argument. Under Rule 3.850 (f), a second or successive motion

> may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

By virtue of the fact that the lower court granted relief on Mr. Mills' motion and found the evidence was newly-discovered for purposes of meeting the test set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991) (PCR. 289), it is abundantly clear that the lower court properly rejected the State's "abuse of process" argument.

Other than repeatedly stating that Mr. Mills' claim was an "abuse of process," the State fails to explain what "process" Mr. Mills allegedly abused, and how he allegedly "abused" that process. The State's failure to articulate exactly what "abuse of

process" Mr. Mills allegedly engaged in demonstrates that the State cannot demonstrate an abuse of discretion on part of Judge Eaton. The "I-know-it-when-I-see-it" standard that the State advances has no basis in law or under the facts of this case, and it was properly rejected by the lower court.

C. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE EVIDENCE WAS "NEWLY DISCOVERED."

The State argues that Judge Eaton abused his discretion in determining that the evidence from John Anderson was newly discovered because Mr. Mills made public records requests some ten (10) years ago and thus "Mills cannot establish due diligence with respect to any claim of 'new evidence'" (IB at 10-11). Mr. Mills' public records requests are irrelevant to this issue, as the information regarding Anderson was not contained in a public record. The State has not pointed to any public record which should have put Mr. Mills on notice of the existence of John Anderson, much less the content of his testimony.

The State argues that Judge Eaton "was wrong as a matter of law" in "refusing" to consider issue of timeliness (IB at 11). Judge Eaton did not "refuse" to consider whether the evidence was newly discovered; rather, he did consider it and, after applying the correct legal standard to the evidence presented, found that it was newly discovered:

> In order for newly discovered evidence to be considered for the purpose of setting aside a death sentence, it must pass the two prong test addressed in Jones v. State, 709 So. 2d 512 (Fla. 1998). The test

> requires the evidence "must have been unknown by the trial court, the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence. Additionally, the newly discovered evidence must be of such nature that it would probably produce a different sentence." To reach this conclusion, the court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and that evidence which was introduced at trial." Id. at 521.
>
> **It is clear that Anderson's testimony is newly discovered evidence. It was unknown at the time of trial and, since Ashley did not make the statements until after the trial, neither Mills nor his counsel could have discovered it with due diligence.**

(PCR. 288-89) (emphasis added).

Thus, the record establishes that Judge Eaton both considered and rejected the State's diligence argument. Mere disagreement with the lower court does not amount to an abuse of discretion. Due diligence is a factual matter and the lower court's findings on this issue are due deference by this Court. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999); Robinson v. State, 770 So. 2d 1167 (Fla. 2000).

The State argues that the information "could have been discovered" for Mr. Mills' first 3.850 motion (IB at 11), yet fails to specify how it "could have" been so discovered. The State's argument is grounded upon flawed reasoning regarding what constitutes due diligence. The State believes that due diligence

is perfection, that is, if evidence "could have been discovered" and later is discovered notwithstanding earlier reasonable efforts to discover it, then counsel has not been diligent. The State's understanding is wrong. "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." Williams v. Taylor, 529 U.S. 420, 435 (2000). "Diligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate. . . . [I]t does not depend . . . upon whether those efforts could have been successful." Id.

Due diligence is a legal standard which must be properly defined. Due diligence is not explicitly defined in Rule 3.850 case law. However, in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), this Court found that a trial attorney who did not exercise due diligence at trial rendered deficient performance under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). This suggests that due diligence is established where an attorney's performance was reasonable under the Strickland standard. Certainly it cannot require more of counsel than does the Strickland standard. Strickland itself makes clear that the analysis is not to be conducted with 20/20 hindsight, but rather from the point of view of counsel at the time he or she is conducting the investigation. Obviously, the standard for due diligence in the instant context should not he higher for nor less deferential to collateral counsel than it is toward trial

counsel. The standard is reasonableness under the circumstances, not perfection.

In Mr. Mills' case, Judge Eaton found as a matter of fact that Mr. Mills exercised due diligence as to this evidence. This factual finding is supported by competent and substantial evidence. Prior collateral counsel Nolas testified:

> Q [by Mr. Scher] [H]ave you also since been made aware of the existence of an individual by the name of John Anderson?
>
> A [by Mr. Nolas] Your office has made me aware of the existence of John Anderson.
>
> Q Prior to my letting you know about this, **was that a name that you had ever heard in terms of having any association with Mr. Mills' case?**
>
> A **Mr. Anderson's name was not a name that came up in any setting. We talked to Mr. Ashley. Mr. Ashley was very uncooperative even to the extent of declining to provide us with the names of anyone. We talked to several other witnesses relating to the case, and Mr. Anderson was simply not a name that had come up in any way as someone who may have knowledge about Mr. Mills' case.**

(T. 34-35) (emphasis added).

On cross-examination by the State, Mr. Nolas reaffirmed that Anderson had not been a name that had surfaced previously in Mr. Mills' case:

> Q [by Mr. Nunnelley] Mr. Nolas, did Mr. Mills ever mention John Henry Anderson as an individual who might have some information about him or about his case?
>
> A [by Mr. Nolas] I had several

conversations with Mr. Mills in reference to his case and his life.

Mr. Mills, both my impression and the conclusions of the mental health experts, were that he is brain damaged and mentally retarded. And my experience with him, it was like talking to a little kid. He functioned like a child. And, so, I had many conversations with him. They were on the level of talking to one of my little daughters.

He provided me with . . . I'm sure he's being honest in providing me with all the information that he had, but within the context of his limitations, I don't recall Mr. Anderson's name ever coming up.

However, I did not rely on Mr. Mills as the source for my investigation given the extent of his underlying mental health impairment.

* * *

Q **So Mr. Nolas, it's your testimony that you have never, ever heard of John Henry Anderson; is that correct? Yes or no, sir.**

A **Until recently, correct.**

(T. 36-37) (emphasis added).

Thus, this is not a situation, as falsely asserted by the State, where Mr. Mills "waited" until a death warrant "before attempting to find evidence to support an assertion he has made since the time of trial" (IB at 11). Nor is this a situation, as falsely asserted by the State, where defense counsel waited "20 years to go talk with Ashley as to whether his testimony at trial was the truth" (IB at 18 n.15). Contrary to the State's false representations to this Court, the record establishes more than

competent substantial evidence to support Judge Eaton's conclusion. Ashley had never cooperated with Mr. Mills' previous collateral counsel, despite counsel's attempts to speak with him; however, once Ashley decided to speak to counsel in 2001 and he provided the name of John Anderson, collateral counsel immediately began to conduct a search for Anderson, who was eventually located. Other than baldly asserting lack of diligence, the State has failed to articulate what other reasonable steps collateral counsel were to have taken in order to discover the existence of John Anderson. His name appeared nowhere in any public records. His name never surfaced in any witness interviews or police reports until April of 2001 when Ashley decided to inform counsel of his name. Ashley's internal reasons for telling counsel about Anderson before April of 2001 cannot be attributable to Mr. Mills or to a "lack of due diligence." Again, the test for diligence is not perfection, but rather reasonableness under the circumstances. Judge Eaton correctly determined based on the unrefuted evidence before him that Mr. Mills was diligent, and his finding should not be disturbed. As the State has argued on numerous occasions before this Court, and as it previously argued in Mr. Mills' very case, "[t]his Court should not substitute its judgment for that of the Circuit Court" (Answer Brief of Appellee at 11, Mills v. State, No. SC01-775) (citing Melendez v. State, 718 So. 2d 746, 748 (Fla. 1998); Demps v. State, 462 So. 2d 1074 (Fla. 1984)).

D. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT MR. MILLS WAS ENTITLED TO A RESENTENCING.

The State candidly recognizes that "its burden with respect to this issue is a heavy one" (IB at 22-23) (citing State v. Spaziano, 692 So. 2d 174 (Fla. 1997)). Nonetheless, the State steadfastly maintains that (1) Judge Eaton abused his discretion in crediting the testimony of John Anderson, and (2) employed the wrong legal standard in evaluating this claim. Both of the State's arguments are meritless.

The State's main complaint is nothing more than a disagreement with Judge Eaton over the credibility of John Anderson. Although acknowledging that Judge Eaton "appears to have credited the testimony of John Henry Anderson which was to the effect that co-defendant Vincent Ashley told Anderson that he (Ashley) fired the fatal shot" (IB at 14), the State falsely represents that Judge Eaton "never directly addressed Anderson's credibility" (IB at 23 n.21).[4] The utter falsity of the State's representation is borne out by Judge Eaton's order:

> The court did observe Anderson testify. His testimony is naturally suspect because he has a motive to protect Mills. **But the circumstances surrounding the discovery of his testimony lend credibility to it. His demeanor on the witness stand was much better than Ashley's. His statements were**

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[4]But in complete contradiction to its argument that Judge Eaton never addressed Anderson's credibility, the State launches into simultaneous personal attack on Judge Eaton, asserting that his "repetition of the mantra of 'credibility'" was a deliberate effort "to reach the clearly-intended result of setting aside the death sentence" (IB at 23).

> **clear and simple and stated in the language of the streets. While the state pointed out that Anderson and Ashley were in jail together only briefly on two occasions after the trial it is possible that the conversation occurred.**

(PCR. 287) (emphasis added).

It is clear that Judge Eaton, who had the opportunity to hear Anderson testify and observe his demeanor, credited Anderson's testimony. This is a matter properly determined by a circuit court and cannot be disturbed on appeal just because the non-prevailing party "disagrees." That the State believes that Anderson's testimony is "false" (IB at 23), does not come close to, and in fact is irrelevant to, the "heavy" burden the State candidly conceded it must meet (IB at 22-23). This Court has consistently held that it "will not substitute its own judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). When factual findings are made by lower courts that are against claims alleged by capital defendants, the Court has unhesitatingly deferred to those findings. See, e.g. Blanco; Melendez v. State, 718 So. 2d 746 (Fla. 1998); Johnson v. State, 769 So. 2d 990 (Fla. 2000); Porter v. State, 2001 WL 459872 (Fla. May 3, 2001).

The State's attacks on Judge Eaton and his order are simply not supported by the record. For example, the State accuses Judge Eaton of "ignoring" the fact that Anderson was a long-time friend

of Mr. Mills (IB at 22).[5] Contrary to the State's accusation, Judge Eaton clearly weighed this factor, and even acknowledged that Anderson's testimony "is naturally suspect because he has a motive to protect Mills" (PCR. 287). However, as circuit judges have the absolute discretion to do, Judge Eaton resolved this matter in favor of crediting Anderson's testimony and finding him credible. That the State disagrees with Judge Eaton's resolution of this issue does not establish a gross abuse of discretion.

The State also accuses Judge Eaton of "ignoring" the fact that Anderson "would hold information" about Mr. Mills "until the very eve of his friend's execution" (IB at 22). This accusation ignores the fact that Judge Eaton found that Anderson's testimony was newly-discovered (PCR. 289). As Anderson testified, when collateral counsel's investigator came to see him, "I was shocked, you know, 'cause like nobody ain't never came, you know, asked me about it" (T. 44). Judge Eaton also heard Anderson testify that, prior to being interviewed by Mr. Mills' investigator in 2001, he had never told anyone this information because no one had ever asked him (T. 50). Thus, it is clear that far from "ignoring" this evidence, Judge Eaton clearly considered it. Again, that the State disagrees with Judge Eaton is not enough to overturn Judge Eaton's findings. "Absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not

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[5]Of course, Anderson is also a "long time friend" of Ashley, as Judge Eaton also heard.

be overturned on appeal." Mills v. State, 2001 WL 418952 (Fla. April 25, 2001).

The State's various complaints that Anderson's testimony is "unworthy of belief" (IB at 14, 16-17), are wholly insufficient to establish an abuse of discretion on Judge Eaton's part. "The cold record on appeal does not give appellate judges that type of perspective." State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997). Whether the State believes it is "doubtful" that Anderson and Ashley would have come into contact with each other is irrelevant, as Judge Eaton found as a matter of fact that "it is possible that the conversation occurred." (PCR. 287). Anderson and Ashley were not complete strangers, but rather childhood friends. Based on the evidence that *the State itself presented,* establishing that Anderson and Ashley were in the Seminole County Jail at the same time, Judge Eaton's finding is supported by competent and substantial evidence.

The State's attempts to nitpick at Anderson's testimony regarding times and dates are similarly unavailing; during the testimony of the various records custodians, Judge Eaton acknowledged Anderson's lack of recollection of specific dates, but clearly expressed the view that, according to the testimony of the records custodians, "my notes [of their testimony] don't reflect that it couldn't have happened" (T. 119-20). Whether the State believes it is "doubtful" that it occurred, Judge Eaton found otherwise, and his finding is supported by competent

evidence and is due deference by this Court.

The State next assails Judge Eaton because he did not have the opportunity to observe the trial testimony of either Sylvester Davis or Vincent Ashley (IB at 14-15). Apparently, the State's argument is that only the judge who presided over a trial can grant postconviction relief under Jones. This, of course, is not the law. Judge Eaton did not have to personally observe the trial testimony in order to reach a conclusion. Judge Eaton's order makes perfectly clear that he "did not have the opportunity to observe or hear Sylvester Davis testify" (PCR. 287);[6] however, the court clearly considered Davis' trial testimony, including the defense impeachment of him, in conducting his legal analysis (PCR. 285). This is a proper analysis under Jones. The evidence of Davis' bias as established during his cross-examination at trial is "evidence" which must also be evaluated. See Robinson v. State, 770 So. 2d 1167, 1170-71 (Fla. 2000). Judge Eaton also considered Ashley's trial testimony, including the defense impeachment of him (PCR. 285-86). This too is entirely proper under Jones.

The State now assails Judge Eaton for his findings against Ashley, arguing that it was "not possible for the post-conviction court to determine Ashley's credibility" (IB at 15). *This is in complete contradiction to the State's argument before this Court*

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[6]The State had Davis transported to Seminole County for the evidentiary hearing (PCR. 44), but declined to call him as a witness.

in Mr. Mills' prior appeal. In its Answer Brief in Mills v. State, No. SC01-775, the State asserted on p. 13:

> The Circuit Court was in the best position to evaluate Ashley's credibility and demeanor, as well as the context of the comment at issue. [9]
>
> [9]While the "I might say anything" comment was not made in the Court's presence, Ashley did appear before the Court and engage in a colloquy with Judge Eaton when he refused to be sworn. Such can properly be considered by the court in assessing Ashley's remark.

Thus, in the prior appeal, the State was openly touting Judge Eaton's ability and discretion to judge Ashley's credibility, yet now the State attacks him. The State's gamesmanship is remarkable, and its present argument provides no basis for finding an abuse of discretion that it just weeks ago asserted properly rested with Judge Eaton.[7]

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[7]The State asserts that "it stands reason on its head" that Ashley would tell collateral counsel about Anderson, "the one person who could implicate him" and writes that Ashley's "recent behavior in court indicates that he would not do so" (IB at 18). The State fails to explain how Ashley's recent appearance in court supports its argument. In fact, Ashley's demeanor and statements in court completely support Anderson's testimony. The Court will recall that Ashley, after being asked by the State why he was refusing to testify, stated:

> MR. ASHLEY: 'Cause I don't feel comfortable. I mean, you know, back in the days, you know and all of that, you know, and I did what I did. Whatever happened happened, you know, but now that, from within, **I just don't feel comfortable, you know, not saying something, you know, that, you know, that could but a man to death or whatever, you know.** 'Cause Greg is no . . . he's no enemy of mine. I say I was just a fool, we were just fools, ah, and I did what I did, I done what I done,

Next, the State argues that Judge Eaton "employed the wrong legal standard" in granting relief to Mr. Mills (IB at 18). Although spending a number of pages repeatedly attacking Judge Eaton for using the "wrong standard," the State never addresses what it believes the standard to be. In fact, Judge Eaton specifically questioned the Assistant Attorney General on this point below, and the Assistant Attorney General espoused the same test that Judge Eaton employed, telling Judge Eaton that he "must evaluate Anderson's credibility. **Whether or not that statement would preclude an override, I suppose, may be one of the questions Your Honor wants to address**" (T. 175) (emphasis added). For the State to now attack Judge Eaton for employing the very analysis it agreed below was proper is analogous to invited error which cannot

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> you know. May God forgive me for all of that, and he have, you know. I'm not gonna make something anew, afresh. I can't do it. My soul can't live with that.
>
> MR. NUNNELLEY: **So are you telling me, sir, Mr. Ashley, that your testimony at trial was the truth?**
>
> MR. ASHLEY: **See, that's the thing. I don't even -- Man, you know, I don't even want to say nothing. I don't want to give or take, you know, 'cause if I . . . I'm frustrated about it, you know. If I say anything, it's gonna complicate the matter.**
>
> MR. CARTER: **What do you mean by complicate the matter?**
>
> MR. ASHLEY: **I might tell you anything now. I might tell you I pulled the trigger.**

withstand appellate review. Pope v. State, 441 So. 2d 1073, 1075 (Fla. 1983).

Because the State is unwilling to stand by its representations to the lower court as to the test for evaluating newly discovered evidence in an override situation, it has now turned its argument around and now accuses Judge Eaton of attempting to "overrule" the direct appeal opinion by his discussion of the sentencing order entered by Judge Woodson and "speculating" about the basis of the jury's life recommendation (IB at 18-21). Given that the State's position below was that Judge Eaton was required to determine whether Anderson's statement "would preclude an override," its attacks on him on appeal are unjustified and disingenuous.

Judge Eaton applied the correct legal standard to Mr. Mills' claim. Under Jones, the proper standard for assessing newly discovered evidence in the face of a jury recommendation of life is "whether it would probably have changed the trial judge's decision on the jury override issue." Mills v. State, 2001 WL 418952 at *2 (Fla. April 25, 2001). Accord Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992). In other words, "the overriding question today is whether Mr. [Ashley's] culpability vis-a-vis that of Mr. [Mills] might be judged differently" in light of this newly discovered evidence, Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995) (Kogan, J., concurring), and whether this information could support a reasonable basis for the jury's life

recommendation. See also Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989) ("the presentation of this mitigating evidence may have persuaded the trial judge that an override was unreasonable under the circumstances. . . [I]f the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined"); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994) (relief granted because unpresented mitigating evidence "might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation").

It is clear that Judge Eaton used the correct legal standard in evaluating the newly discovered evidence claim as it affected the override issue:

> In order for newly-discovered evidence to be considered for the purpose of setting aside a death sentence, it must pass the two prong test addressed in Jones v. State, 709 So. 2d 512 (Fla. 1998). The test requires the evidence "must have been unknown by the trial court, the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of it by the use of due diligence. Additionally, the newly discovered evidence must be of such nature that it would probably produce a different sentence." To reach this conclusion, the court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at trial." Id. at 521.
>
> It is clear that Anderson's testimony is newly discovered evidence. It was unknown at

> the time of trial and, since Ashley did not make the statements until after the trial, neither Mills nor his counsel could have discovered it with due diligence. The statement would be admissible at trial, if only for impeachment.
>
> As stated in State v. Robinson, 711 So. 2d 619 (Fla. 2d DCA 1998):
>
> > Historically, newly discovered evidence in the form of impeachment evidence was considered insufficient as a matter of law to warrant a new trial (citations omitted.)
> >
> > Recently, however, this rule of impeachment evidence has been expanded. Florida courts are now willing to consider newly discovered "impeachment" evidence as sufficient to grant a new trial in certain limited circumstances. In Jones, the supreme court stated: "[A]n evaluation of the weight to be accorded the [newly discovered] evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence." (Citations omitted).
>
> Here, the credibility of the witnesses has become a major issue in the case. Was Mills inside the house with the shotgun at the time of the murder or was he outside? The jury resolved the issue to establish he was at one place or the other. In balancing the testimony of John H. Anderson with the rest of the evidence in the case, the court concludes that the death penalty should not be imposed under the circumstances.

(PCR. 289-90).

Because Judge Eaton was required to evaluate the newly discovered evidence in order to determine "whether it would

probably have changed the trial judge's decision on the jury override issue," it was necessary for him to discuss the trial judge's sentencing order. The sentencing order is the evidence of the trial judge's findings on the issue of sentencing.[8] Because the issue under Jones when dealing with an override is whether the

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[8]At the oral pronouncement of sentence, the trial court merely stated as follows:

> THE COURT: Gregory Mills, the Court has gone through the aggravating and mitigating provisions as set forth in 921.141, and the Court finds then, under all but . . . let's see, (G), that there was aggravating circumstances under each of those except (G).
>
> The Court differs from your attorney as to the mitigating circumstances as I consider that you're above the age of majority and the Court does not consider the age of the Defendant at the time of the crime.
>
> [The] Court finds that you're above the age of majority. So, I do not consider your age as any mitigating circumstances. The Court also considered the fact that the Jury, having recommended the sentence of life imprisonment, the Court considered that in the sentence that it decided to impose upon you.
>
> The finding as the Court has written up an Order of Judgment and Sentence that the aggravating circumstances far outweigh any mitigating circumstances in that the Court did not find any mitigating circumstances at all in this particular case.
>
> So, it's the Judgment and Order and Sentence of this Court that you be electrocuted until dead in the manner directed by the laws of the State of Florida.

(Transcript of Sentencing, April 18, 1980, at 45-46).

newly discovered evidence "would probably" have changed the judge's decision to override at a retrial, assessment of the original sentencing order under now-prevailing legal standards was not only appropriate, but was *required* in order to comply with the Jones test as explained in this Court's previous decision in Mr. Mills' case. This is particularly true in this case, where the trial judge made no findings during the oral pronouncement of sentence. See supra n.8.[9]

The bottom line flaw with the State's various arguments that Judge Eaton "overruled" this Court's direct appeal opinion is that it fails to recognize that the claim upon which relief was granted was premised on newly-discovered evidence. Under the State's oxymoronic reasoning, no newly discovered evidence claim can be successful as by its very nature it would "overrule" an opinion on direct appeal affirming a conviction and/or a sentence. This argument is illogical and unprecedented in law. See Porter v. State, 723 So. 2d 191 (Fla. 1998) (granting relief based on newly discovered evidence of judicial bias despite affirmance on direct appeal of judge's decision to override jury's recommendation of life); Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994) (granting relief where, due to ineffective assistance of counsel, mitigation went undiscovered which "might have provided the trial judge with a reasonable basis to uphold the jury's life

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[9]Should the Court agree that Judge Eaton applied an incorrect legal standard, the remedy would be a remand, not outright reversal. Robinson v. State, 770 So. 2d 1167 (Fla. 2000).

recommendation"); Heiney v. State, 620 So. 2d 171 (Fla. 1993) (same). Judge Eaton's conclusion that Anderson's new testimony that Ashley had confessed to being the shooter serves as a reasonable basis for the jury's life recommendation, and thus warranting a resentencing, is fully supported by the law. See, e.g. Barrett v. State, 649 So. 2d 219, 223 (Fla. 1995) ("Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment"). While the State might not agree that Ashley was the shooter, "that is not the legal standard by which we must evaluate the override of the jury's life recommendation." Keen v. State, 775 So. 2d 263, 286 (Fla. 2000). The issue is whether a reasonable jury could have relied on this information, and whether such reliance would serve as a reasonable basis. Id. See Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) ("Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal").

The State baldly asserts that "Anderson's testimony is inconsistent with all of the other evidence at trial" (IB at 22). The State does not discuss what "all this other" evidence is. The issue arising from Anderson's testimony is who was the shooter, Vincent Ashley or Greg Mills. Ashley was the star witness and the only eyewitness to the events in question. It was Ashley, and Ashley alone, who placed Mr. Mills at the scene. To the extent

that the State relied on the testimony of Sylvester Davis at trial, his testimony must be viewed in light of the context in which it arose (as Judge Eaton discussed in his order). Both Davis and his girlfriend, Viola Mae Stafford, were accomplices (although Stafford never testified at trial). Davis and Stafford were spending the evening at Mr. Mills' apartment on the evening in question. When the police returned Mr. Mills home after he was released, the police specifically requested that Mr. Davis contact them if he had any information about the case; Davis never did so (T. 127-28). After Stafford was arrested a few days later (she was shoplifting from a store at which Mr. Mills' sister-in-law worked and Mr. Mill's sister-in-law contacted police), "the idea came up that she would give them some information for, you know, the dropping of her charges" (T. 117). At that time, Davis and Stafford took the police to where they had hidden the shells from the gun (T. 118). However, they did not at that time say anything else about Mr. Mills' involvement (Id.). About two weeks later, Davis was arrested for burglary, and was taken to the police station (T. 118-19). At that time, Davis testified that "[m]e and the police department made a deal" that "they'd drop my charges, the charges they had on me for burglary" (T. 119-20). It was only then that Davis told the police his story about having seen Mr. Mills take a rifle on the night of the Wright homicide, and that Mr. Mills later that evening had told him "about he had shot some cracker or something." That the testimony of Davis and Ashley was

critical to the State's case is evidenced by the fact that the jury, during deliberations, requested a read back of the testimony of Ashley and Davis (R. 473).[10]

The lower court did not improperly "substitute its judgment for the judgment of the sentencing judge" (IB at 21), but rather conducted a proper legal analysis of whether the newly discovered evidence, in conjunction with the evidence previously adduced in

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[10]The State, in a footnote, mentions that the gunpowder residue test results established that Mr. Mills fired the weapon, not Ashley, and thus Anderson's account is inconsistent (IB at 15 n.13). The State misrepresents the testimony on this issue. The results of the gunshot residue tests were excluded from the State's case-in-chief after the court found them to have been illegally obtained without probable cause. However, after Mr. Mills testified and denied having fired a weapon, the State was permitted, in rebuttal, to present the results of the testing. The technician, however, was unable to testify to a scientific certainty that Mr. Mills fired a weapon based on the results obtained. While the results were slightly higher than normal, they were far below the amount necessary to be conclusive (R. 384-392). Moreover, that Ashley had no residue on his hands is also not dispositive of whether he fired a weapon. The state's own witness admitted that there existed numerous factors which could effect the test results (R. 305-306). He stated that a person did not have to shoot or handle a gun for the results to be positive. Most people walking the streets have some traces of antimony, which is the element tested for (R. 388-392). The state's gunshot residue witness also testified that contact with certain metals, e.g., lead, could produce results similar to that obtained from people who had shot a firearm (R. 392-393, 395-396). Also effecting the test results is the fact that antimony particles can be wiped off; moreover, the particles dissipate over a period of time (R. 312-313). In the present case, there was testimony concerning a two-hour delay in taking Ashley's test, during which time Ashley was rubbing his hands on the grips of his bicycle and could have wiped his sweaty hands onto his clothing (R. 312-313). The police did not test Ashley's clothing or the grips of his bicycle for any antimony residue (R. 309, 313). Thus, any independent reliance on the outcome of the test results in this case would be misplaced. See Troedel v. Wainwright, 667 F. Supp. 1456, 1458 (S.D. Fla. 1986).

this case, "would have probably changed the trial judge's decision on the jury override issue." While the State would clearly prefer the standard to require the reviewing judge to imagine what the sentencing judge would have done under these circumstances, that position is also unprecedented in law and would in fact be legal error. Judge Eaton's rejection of the State's preferred standard is even more appropriate given his conclusion as to the other claim raised by Mr. Mills regarding Judge Woodson's participation in *ex parte* communications with the State during Mr. Mills' first Rule 3.850 proceedings. A proper analysis of whether the new information would probably have changed the trial judge's decision on the override issue contemplates "the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." Strickland v. Washington, 466 U.S. 668, 695 (1984). Accord Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). Just as "[a] defendant has no entitlement to the luck of a lawless decisionmaker," Strickland, 466 So. 2d at 695, the opposite is also true. "[E]vidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered. . . ." Id.

The next argument advanced by the State is a repetition of

its main argument, that is, the Judge Eaton erroneously granted relief "based upon false testimony" (IB at 23). No matter how many times the State repeats this argument and no matter how many times it attacks Judge Eaton for crediting Anderson's testimony, the State's argument remains meritless. Given that Judge Eaton determined that Anderson's testimony was credible, the State simply cannot establish an abuse of discretion. The State's argument that "mere repetition of the mantra of 'credibility' does not protect an order such as this one" (IB at 23), has been rejected on numerous occasions by the Court when it is advanced by capital defendants. Blanco; Melendez; Porter; Johnson. No different rule applies when a credibility finding results in a capital defendant being granted relief and it is the State who appeals. Were this Court to apply such an unprecedented rule at this time, all capital defendants would be entitled to reconsideration of their cases in which the Court deferred to factual findings made by lower courts on witness credibility.

The State's final argument is nothing more than a litany of *ad hominem* attacks on Judge Eaton. The State accuses Judge Eaton of having an agenda of "reach[ing] the clearly-intended result of setting aside the death sentence," of having "no doubt . . . that Mills [did not] deserve[] death" (Id), and that he "intended to correct what [he] perceived to be error, despite this Court's multiple contrary rulings" (IB at 23). These personal attacks are disturbing. But more than that, the State fails to mention that

Judge Eaton, who had, according to the State, an "agenda" regarding this case, *denied relief to Mr. Mills just weeks ago.* In that appeal, the State praised Judge Eaton's rejection of Mr. Mills' arguments and defended his discretion in denying relief to Mr. Mills. The bottom line is that the State is plainly upset by Judge Eaton's ruling, and because it has no legally sound arguments based on law or fact which establish any abuse of discretion, it has chosen instead to attack Judge Eaton and accuse him of having an agenda. This is a far cry from meeting the "heavy burden" the State conceded it must meet in this case. The lower court's order granting a resentencing on this claim must be affirmed, and Mr. Mills is entitled to a resentencing with the benefit of his life recommendation.[11]

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[11]Below, Mr. Mills argued that Judge Eaton could impose a life sentence, rather than order a resentencing (T. 166-67). Mr. Mills submits that this is an alternative remedy which the Court can and should consider in light of the facts of this case, especially the fact that Mr. Mills would retain his life recommendation at a resentencing. Based on Judge Eaton's conclusions, a life sentence would clearly be appropriately imposed by this Court at this time.

ARGUMENT II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RELIEF BASED ON THE IMPROPER *EX PARTE* COMMUNICATION WHICH RESULTED IN THE DRAFTING OF THE ORDER DENYING MR. MILLS' FIRST RULE 3.850 MOTION.

As with Argument I, the State bears a similarly heavy burden of establishing a palpable abuse of discretion by Judge Eaton in granting relief on this claim. The arguments advanced by the State are insufficient to establish any abuse of discretion, and the lower court's order should be affirmed.[12]

A. THE STATE'S ALLEGED "PROCEDURAL DEFENSES."

1. "Abuse of Process" Defense.

The State argues that Judge Eaton erred as "a matter of law" in "ignoring" the State's asserted procedural defenses (IB at 25). By granting relief, however, Judge Eaton clearly rejected the State's asserted defenses as so lacking in merit that they deserved no discussion, particularly under the exigencies of the situation as it stood on May 1, 2001.

The State first asserts that the claim at issue could and should have been raised in Mr. Mills' Rule 3.850 motion that was filed on April 16, 2001 (IB at 25). Because the State Attorney records which contained the draft order at issue had been sent to the records repository on April 6, 2001, the State asserts that

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[12]Judge Eaton correctly noted that the relief afforded for this claim would be mooted out by the resentencing granted on Claim I of Mr. Mills' Rule 3.850 motion, should that relief be affirmed by this Court (PCR. 295).

Mr. Mills failed to exercise due diligence (Id.). The State's argument is meritless. As with its argument above, the State extols a definition of diligence that is equated with perfection. Once again, Mr. Mills emphasizes that "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." Williams v. Taylor, 529 U.S. 420, 435 (2000). "Diligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate. . . . [I]t does not depend . . . upon whether those efforts could have been successful." Id.

Prior to addressing the State's specific allegations regarding collateral counsel's alleged lack of due diligence, Mr. Mills would note that the State *never addresses* its obligations under Brady v. Maryland, 373 U.S. 83 (1963), to inform collateral counsel of the existence of exculpatory information in his case. The State has an ongoing duty under Brady even when a case is in the postconviction stage. See Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996). The State has a duty to learn of evidence that might be favorable to Mr. Mills which could form the basis for relief. Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). At no time did the State ever inform counsel that documents it was forwarding to the repository contained exculpatory information, that is, information which could form the basis of a valid basis for relief. Rather, the State ignores its

own duty and shifts the responsibility to Mr. Mills to learn of exculpatory evidence in the State's possession. This is not the law, and "[t]he resolution of [capital] cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996).

The State assails collateral counsel because he did not "avail himself" of the "option" of going to the repository to review the records after they were received (IB at 25). However, under the rules created by the Court, state agencies are required to forward their records to the repository, which in turn is to copy the records and forward them to collateral counsel. This procedure applies even under death warrant situations.

The records repository is located in Tallahassee, and review of records in the repository is subject to the same rules and restrictions that apply to any member of the public wishing to review documents in the Florida State Archives. Records may only be reviewed during business hours, and certain supplies are prohibited from being brought into the facility.[13] Under procedures that govern capital postconviction records, the

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[13]The rules are as follows: patrons seeking to review materials in the archives (where the repository is located), may only bring "pencils, note cards, loose blank paper, spiral notebooks without material in the pockets, ring binders without materials in the pockets, and light wraps such as shawls and sweaters." "The following items are strictly prohibited: any form of ink or ink pens, briefcases, bags, purses, envelopes or other containers, or any material that might be confused with archival holdings." See Rules of the Florida State Archives, at http://dlis.dos.state.fl.us/barm/fsa2/html.

repository now scans the records it receives and forwards a computer disc to collateral counsel,[14] which must then be downloaded and printed with special printers that the CCRC offices had to purchase in order to expeditiously print the records.

It is logistically impossible and unreasonable to expect collateral counsel to remain stationed in Tallahassee each and every day during the pendency of a death warrant in the hope that some new documents may arrive in the mail at the repository.

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[14]The archivist who handles the capital postconviction records attested to the procedures she must go through in order to process these records:

> After the repository processes and prepares a complete automated index of the copies of records received, all records are scanned at the repository by an outside vendor, and the scanned images are then burned on to a compact disk which is forwarded to counsel for the Defendant. From the compact disk, counsel can view and print documents. The process for scanning documents can be summarized as follows:
>
> a) physical preparation of the records (staple removal, flattening folded items, etc.);
> b) scanning documents utilizing an automatic feed scanner;
> c) quality assurance, i.e., comparison of all documents to all scanned images to ensure completeness and readability of scanned images;
> d) output (preparation of files containing scanned images); and
> e) burning scanned images to compact disk.
>
> Once these steps are completed, the vendor delivers (hand carries) the disks to me, and I label, pack, and ship them.

(Record on Appeal, No. SC 01-775, at 346).

Because of the various legal claims that can arise out of a particular document, an experienced lead attorney must be the one to review the documents. Moreover, once documents are reviewed, they must be compared and contrasted with documents already in the possession of collateral counsel in order to determine whether anything new has been disclosed. The State would have the undersigned immediately fly to Tallahassee when a death warrant is signed, with all of the boxes and records that are in his possession already, and sit in Tallahassee every day waiting for documents to be mailed to the repository. If documents were to arrive, the undersigned would then have to take all the materials in his possession (boxes, etc.), into the repository itself in order to compare and contrast what is received and what is already in his possession.[15] This exercise, of course, would have to be repeated every day that the United States Mail brings new records to the repository. This is totally unreasonable and impractical, as demonstrated below.

In Mr. Mills' case, the State Attorney records were shipped to the repository on Friday, April 6, 2001. The State argues that counsel should have gotten the records and reviewed them in time to file this claim by April 16 (10 days later), when Mr. Mills' Rule 3.850 motion was due to be filed by order of Judge Eaton. First of all, although the records were shipped to the repository

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[15]Of course, the Florida State Archives would not permit the undersigned to bring dozens of boxes of files into the building. See supra n.13.

on April 6, they were not received by the repository until April 9 (Record on Appeal, No. SC01-775, at 350).[16] Communication of such transmittal was only made to collateral counsel upon receipt of the filing by the State which was *mailed* to counsel on April 6 (Record on Appeal, No. SC 01-775, at 277). Thus, the State is essentially arguing that at some point after Monday, April 9, and before Friday, April 13, counsel, should have immediately flown to Tallahassee, all of Mr. Mills' boxes in tow, and remained at the repository to review the records; because he did not do so, counsel acted unreasonably and lacked "due diligence." This is ludicrous.[17]

Mr. Mills' counsel exercised more than reasonable diligence in attempting to immediately secure copies of the State Attorney records once they were received in Tallahassee. He filed a motion to compel, requesting that the repository immediately copy the materials. That request was denied. When counsel returned from the evidentiary hearing in the Wayne Tompkins' case in the evening

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[16]The Archives designated the State Attorney files as boxes 1657-59.

[17]During that week, counsel had to, among other things, conduct a Chapter 119 hearing in the Tompkins' case in Tampa, the Chapter 119 hearing in Mr. Mills' case in Sanford, review the records that had been received in counsel's office, prepare two Rule 3.850 motions for filing by the beginning of the following week, and prepare for the Huff hearing in the Mills case scheduled for 9:00 AM, April 16, 2001. Counsel could hardly spend his time sitting in Tallahassee when in fact he was traveling between Ft. Lauderdale, Tampa, and Sanford that entire week. Co-counsel and investigators, if not with the undersigned, were handling investigative matters on the road, and attempting to keep both Mr. Mills and Mr. Tompkins informed of what was happening.

of April 18, he immediately began to review the records which had been received from the repository the previous day. On April 19, 2001, counsel filed a motion to relinquish with the Court, which the State opposed and which was denied. At that point, counsel was unable to file a Rule 3.850 motion while this Court had jurisdiction. State v. Meneses, 392 So. 2d 905 (Fla. 1981). And the day after this Court denied relief on Mr. Mills' prior appeal, he filed the 3.850 motion upon which relief was granted. Mr. Mills submits that his actions were not unreasonable and that due diligence is established. Certainly, Judge Eaton did not abuse his discretion by not addressing a patently meritless procedural defense.

To be sure, Mr. Mills had one year from the discovery of this information to file a Rule 3.850 motion. Because Judge Eaton had already imposed a filing deadline of April 16, 2001, at 9:00 AM to file any Rule 3.850 motion, the undersigned did not and could not have waited to receive all the records from the repository before the filing deadline. Mr. Mills did file a motion to compel, and did inform the Court that records were at the repository that had not been provided to counsel; that motion was denied. Surely, Mr. Mills and his collateral counsel, laboring under a death warrant cannot be put in a Catch-22 situation when attempting to comply in good faith with a court-ordered filing deadline. The flurry of deadlines and records requests all came about as a result of the signing of a death warrant which only occurred after the Governor

checked with the Attorney General's Office. There is no indication that the Attorney General's Office informed the Governor not to sign a death warrant. Certainly, had the State informed the Governor of the undisclosed claim, a death warrant would not have been signed. Because Mr. Mills filed his claim well within a year from discovery of the information, the process was not "abused."

2. "Lack of Diligence" Defense.

Next, the State argues that the claim "has not been brought in a timely fashion as required by Jones and its progeny" (IB at 26). The entirety of the State's argument is premised on the fact that the order signed by Judge Woodson in 1989 referred to his having reviewed the State's Response to Mr. Mills' Rule 3.850 motion, a response which prior collateral counsel had not received at the time of the entry of the order. Prior collateral counsel filed a motion for rehearing, noting that he had not received a response from the State and requested that it be provided to him. According to the State now, this fact alone should have put Mr. Nolas on notice that Judge Woodson and the prosecutor had engaged in *ex parte* communications. Judge Eaton properly rejected this argument because it is patently frivolous.

The frivolity of the State's diligence argument is evidenced by its own actions in Mr. Mills' case when the unsigned orders were discovered by collateral counsel. In responding to Mr. Mills' relinquishment motion in this Court, the State took the

position that Mr. Mills "has not shown, by any evidence, however speculative, that the State prepared the 'unsigned drafts.' Based upon Mills' pleading, **the reasonable conclusion is that the drafts were prepared by Judge Woodson"** (State's Response to Motion to Relinquish, Etc., No. SC01-775, at p.1) (emphasis added). Mr. Mills' counsel assumes, as one must, that the State's argument that the drafts were prepared by Judge Woodson was made in good faith and that at that point the State did not know that the *ex parte* communication in fact occurred. However, by the time of the Huff hearing on the instant motion, the State announced:

> MR. NUNNELLEY: Your Honor, with respect to the second claim, the drafting of the order claim, **based upon the investigation . . . the best we can tell is the Attorney General's Office, or a member of the Attorney General's Office, prepared a proposed order with respect to the first 3.850 motion and delivered that to the State Attorney's Office, along with a proposed response to the motion itself.**
>
> If the order and the response were not served on CCR, they should have been, but the State's position is going to be that it is not a basis for relief regardless. I do want to get that out in the open right now, though.

(T. Hearing 4/26/01 at 4) (emphasis added). Of course, at the evidentiary hearing, Judge Woodson himself testified that he personally contacted the State Attorney's Office (not the Attorney General's Office), and told them to draft an order denying Mr. Mills' motion (T. Hearing 4/30/01 at 89-93).

Thus, the State's own actions belie its diligence argument it

has raised as to collateral counsel. If the attorneys for the State who are presently on the case had to investigate this issue after Mr. Mills discovered the draft orders, and only through discussions with their own staff did they discover that the order had in fact not been written by the judge, then how can Mr. Nolas (who did not have or know about the draft orders), be held to a higher standard? The reality is that the discovery of the draft orders prompted the State to look into this matter, and when it did, it discovered that what Mr. Mills alleged was in fact true. Mr. Nolas cannot therefore be deemed to lack reasonable diligence for not knowing about the issue when in fact the State never disclosed its *ex parte* communication to him in 1989 or 1990. If it took the discovery of the draft order to prompt the State into investigating, then no greater standard can apply to collateral counsel. The State's diligence argument is meritless. Because Mr. Mills could not have discovered the *ex parte* and due process issue previously, he must now be put in the position he should have been in in 1989 when this information should have been disclosed to him. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) ("Our remand after Provenzano's initial 3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested. Given that Provenzano's ineffectiveness claims have arisen as a result of the disclosure of the file, we find that they are timely raised").

Moreover, as he testified, Mr. Nolas did file a motion for rehearing based on the reference in the order to the state's response. At no time did either the State or Judge Woodson disclose to Mr. Nolas that an *ex parte* communication had occurred. Is the State suggesting that it is unreasonable attorney performance for counsel to assume that the State and the judge abided by the governing ethical rules and judicial canons prohibiting *ex parte* contact? Such a suggestion would be highly problematic for a number of reasons. A presumption of regularity attaches to judicial proceedings. Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995).[18] Based on the evidentiary hearing testimony below, the witness called by the State to establish that *ex parte* contact occurred was in fact Judge Woodson. Because he had knowledge of the *ex parte* contact, he had the obligation to disclose it, particularly in response to the motion filed by Mr. Nolas. Judge Woodson did not disclose, and the failure cannot be attributable to Mr. Mills or his collateral counsel.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RELIEF ON THIS CLAIM.

After considering the testimony of Judge Woodson, the

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[18]The State's suggestion would require that collateral counsel presume unethical behavior and thus investigate every judge and every prosecutor to determine if they have violated the law and the ethical canons. The undersigned can only imagine the response from the judiciary, the State, and most likely the legislature, were counsel to act on the State's apparent suggestion that collateral counsel are to presume that judges, prosecutors, and Assistant Attorneys General are acting unethically as a matter of course.

arguments of the parties, and the relevant case law, Judge Eaton concluded that Mr. Mills' due process rights were violated by Judge Eaton's *ex parte* communication with the State about the denial of Mr. Mills' Rule 3.850 motion and his request for the State to prepare the order. The fact of the *ex parte* communication was never disclosed to prior collateral counsel, nor was a copy of the proposed order served on prior collateral counsel. Based on Judge Woodson's candid acknowledgement that this had occurred, Judge Eaton concluded:

> The testimony on this claim is uncontroverted. An improper ex parte communication occurred between the state attorney and the trial judge. This communication was for the purpose of requesting the state to prepare an order denying the defendant's Motion for Post Conviction Relief filed November 14, 1989. Even though the denial of the motion was reversed by the Florida Supreme Court, such a due process violation becomes a matter of substance and actual prejudice is not required to be shown. However, as counsel for the defendant pointed out, knowledge of the ex parte communication would have resulted in the ultimate recusal of the trial judge if for no other reason than because he would have become a witness in the hearing to determine the propriety of the ex parte communication. Thus, the defendant reasons, he would have received that to which he is entitled, the cold neutrality of an impartial judge.

(PCR. 294). Judge Eaton's factual findings are supported by more than competent and substantial evidence, and are due deference on appeal. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999); Robinson v. State, 770 So. 2d 1167 (Fla. 2000).

Moreover, Judge Eaton properly applied the law, notwithstanding the State's convoluted arguments to the contrary. "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." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). Here, as Judge Eaton concluded, Mr. Mills' due process rights were violated by Judge Woodson's *ex parte* communication with the state which resulted in the judge requesting the state to prepare the order summarily denying Mr. Mills' first Rule 3.850 motion.

As Judge Eaton noted, "this situation has arisen time and time again" (PCR. 293). In Rose v. State, 601 So. 2d 1181 (Fla. 1992), this Court granted relief under nearly identical (and arguably less egregious) circumstances than presented in this case. In Rose, the defendant argued that "he was denied due process of law because the trial court, without a hearing and as a result of an ex parte communication, adopted the State's proposed order denying relief without providing counsel notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents." Id. at 1182. Because Rose's collateral counsel had not received a copy of the proposed order or provided an opportunity to file objections, the Court "assume[d] that the trial court, in an ex parte communication, had requested the State to prepare a proposed order." Id. at 1182-83. In Mr. Mills' case, the Court does not even need to speculate about whether

there was an *ex parte* communication because Judge Woodson acknowledged that it occurred (as Judge Eaton found).

The Rose Court noted that the practice of having a party prepare a proposed order "is fraught with danger and gives the appearance of impropriety." Id. at 1183. The most significant danger associated with the practice is that it entails an *ex parte* communication:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Id. As the Court also held, "[w]e are not here concerned with whether an *ex parte* communication *actually* prejudices one party at the expense of the other. **The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal."** Id. (emphasis added).

In Huff v. State, 622 So. 2d 982 (Fla. 1993), the Court again addressed this issue. There, Huff's Rule 3.850 motion was denied without any hearings being afforded; the state submitted a proposed order denying relief. CCR received a copy of the proposed order on a Friday, and the judge signed it on the

following Monday "before Huff had the opportunity to raise objections or submit an alternative order." Id. at 983. Concluding that "the same due process concerns expressed in Rose are also present in this case," the Court found a due process violation "because the court did not give him a reasonable opportunity to be heard." Id. The Court did express that there did not appear to be an assumption of an *ex parte* communication like in Rose. That distinction, however, was not fatal to the Court's disposition of the issue:

> However, even if the State submitted the order on its own initiative, the court's wholesale adoption of the unsolicited order, without an opportunity for Huff's counsel to object to its contents, leaves the impression that Huff's arguments were not considered. Moreover, the State's cover letter anticipated that Huff would be given an opportunity to participate in the decision-making by the judge. **The effect on the appearance of the impartiality of the tribunal is precisely the 'insidious result' that this Court condemned in Rose.**

Id. at 984 (emphasis added).

Thus, it is clear that the underlying concern in this series of cases is a defendant's due process right to notice and an opportunity to be heard, as well as his right to an impartial tribunal. The State relies solely on Swafford v. State, 636 So. 2d 1309 (Fla. 1994), as establishing Judge Eaton's abuse of discretion (IB at 27). This was a matter of debate by the parties below, and Judge Eaton properly rejected the State's reliance on Swafford. The reason that Swafford is distinguishable precisely

grounded in the reasons that relief was afforded in Rose and Huff -- lack of due process, opportunity to be heard, and an improper *ex parte* communication. In Swafford, the Court itself noted the difference between the situation raised by Swafford and the issues addressed in both Rose and Huff:

> Swafford relies on Huff [] and Rose [], in arguing issues 1 and 2, **but those cases are factually distinguishable from the instant one. Rose changed counsel during the pendency of a postconviction motion, and it appears from the opinion that he received no hearing on his motion at all. Similarly, the trial court denied Huff's motion without any hearing. Such is not the case here, however, where Judge Hammond listened to the parties in October 1990 and subsequently decided that an evidentiary hearing was not needed.**

Id. at 1311 (emphasis added). Thus, the Swafford opinion makes clear that Rose and Huff are distinguishable by the fact that Swafford at least had the opportunity to appear and argue his case. Swafford was "given an opportunity to participate in the decision-making by the judge." Huff, 622 So. 2d at 984. While the State believes that Mr. Mills "had all of the due process to which he was entitled" (IB at 29), Rose and Huff (and even Swafford, by negative implication) establish otherwise, as Judge Eaton correctly concluded. See also Smith v. State, 708 So. 2d 253 (Fla. 1998).

Nonetheless, the State argues that Mr. Mills' rights to due process and an impartial judge are outweighed by the fact that Judge Woodson "was operating under the exigencies of a death

warrant when the events at issue occurred,"[19] and likens the situation to that addressed in Glock v. Moore, 776 So. 2d 243 (Fla. 2001). Glock addressed situations where, over defense objections, the court signed the State's proposed order when a death warrant was pending. In Glock, however, notice was afforded to the defense that the State had proposed an order and the defense was provided an opportunity to object. This is not the situation that Mr. Mills alleges, which involves an *ex parte* communication about the order denying Mr. Mills relief. This situation is exactly like, and in fact is more egregious, than that addressed in Huff and Rose.

The State also attempts to excuse the due process violation because Judge Woodson "received and considered both the defendant's allegations and claims for relief in the 3.850 motion and the State's response thereto" (IB at 28). However, the State ignores the fact that Mr. Mills was not served with the State's response until well after the order denying was entered; in fact, it was not served on counsel until January 5, 1990, *after* Mr. Mills' motion for rehearing was denied. Thus, this situation is even more egregious, as the judge (supposedly) reviewed the State's response, a pleading to which Mr. Mills was never provided or given the opportunity to respond to either before the judge denied the 3.850 motion or in a motion for rehearing. This is the

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[19]Mr. Mills' 3.850 motion was not filed under warrant, but rather over a year and a half before the warrant was signed.

epitome of a one-sided procedure which resulted in the denial of due process. As the State explained below, Judge Woodson essentially maintained the attitude of "this is what I'm gonna do, you [State] do it" (T. 151). While the State might believe this is due process, the law establishes otherwise.[20]

Next, the State argues that Huff "was not decided until well after Mills' postconviction motion was concluded" and that "the procedure" which occurred in Mr. Mills' case "had not been held improper" (IB at 29). The rights to due process and to an impartial tribunal are not concepts which suddenly emerged in the State of Florida following the Court's decision in Huff, or for that matter in 1992 when Rose was decided. See State ex. rel Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Importantly, however, the events leading up to the 1992 opinion in Rose occurred in early 1989, even before the events in Mr. Mills' case. The situation addressed in Rose is nearly identical to the instant case; in fact, unlike Rose, the instant case involves a conceded *ex parte* communication. The State's argument that the "procedure" employed by Judge Woodson was not "improper" in December, 1989, is meritless.

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[20]Moreover, Judge Woodson testified that he did not recall having the files in Mr. Mills' case. At the time of the proceeding, the clerk's file would have been kept in Seminole County, but Judge Woodson did not recall whether it had been sent to him in Melbourne (T. 91). This fact, particularly coupled with the fact that the judge reviewed a responsive pleading never served on Mr. Mills' counsel, more than establishes the one-sided nature of Mr. Mills' first 3.850 proceeding before Judge Woodson.

The State's next argument is that "this claim must be analyzed as newly discovered evidence" under the Jones test (IB at 30-31). This is incorrect. This claim is one involving newly discovered evidence of previous misconduct, not a claim of newly discovered evidence such as addressed in Argument I. The Jones test applies to evidence previously unknown to the parties, including the State. Here, the evidence was known to the State but not to Mr. Mills because it was suppressed. This is akin to the situation in Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), where the Court remanded for a hearing on whether newly discovered evidence of a Brady violation (*i.e.* evidence known to the State but not the defense), undermined confidence in the outcome. See also Porter v. State, 723 So. 2d 191 (Fla. 1998) (newly-discovered evidence of judicial bias known to the State but not to the defense not subjected to the Jones analysis). Because the draft orders which led to the discovery of this claim were improperly suppressed by the State and Judge Woodson,[21] Mr. Mills must be put back in the position he should have been in had this information been disclosed in 1989. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) ("Our remand after Provenzano's initial

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[21]Clearly, Judge Woodson had the obligation to disclose the *ex parte* communication to Mr. Mills' counsel in 1989. "Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate *whether challenged or not*. Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (emphasis in original). The State also had an obligation to disclose. Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996).

3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested. Given that Provenzano's ineffectiveness claims have arisen as a result of the disclosure of the file, we find that they are timely raised"). Mr. Mills should not be held to the stringent Jones standard when the State all along possessed the information which provided the basis for this claim.

Moreover, the test espoused by the State demonstrates its complete inapplicability to these facts. According to the State, Mr. Mills must establish that "this Court would not have sustained his death sentence had a different judge heard the initial Rule 3.850 proceeding" (IB at 32). See also IB at 36 ("Absent a conclusion this Court would not have denied relief on the ineffective assistance of penalty phase counsel claim had another judge heard the Rule 3.850 evidentiary proceeding, there is no basis for relief"). Mr. Mills cannot meet this standard, according to the State, because he cannot establish "that the evidence would have somehow been different had another judge presided at the evidentiary hearing" (IB at 33). The State's arguments ignore the meaning of an impartial tribunal (a lack of understanding which is clearly evidenced by the argument that due process and the right to an impartial tribunal are not issues of a constitutional dimension (IB at 36)). When a judge who lacks impartiality presides over a case, the fruits of the proceedings are vitiated because lack of impartiality cannot be assessed under the

"harmless error" analysis advanced by the State. Rose, 601 So. 2d at 1183. That the "evidence would have been different" is not the issue, the issue is that the evidence that was presented was funneled through a judge lacking in impartiality. That judge then issued an order which this Court relied upon in rejecting Mr. Mills' claim following the evidentiary hearing. In Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), this Court was faced with the issue of whether the postconviction judge, after conducting a full evidentiary hearing, erred in not disqualifying himself. The Court found that the judge did err, and remanded for a new evidentiary hearing before a new judge. See also Rogers v. State, 630 So. 2d 513 (Fla. 1994) (same); Smith v. State, 708 So. 2d 253 (Fla. 1998) (same). The Court did not attempt to analyze the facts adduced at the hearing notwithstanding the presence of the judge who should have disqualified himself; the mere presence of a judge who lacked impartiality warranted the proceedings conducted before that judge to be done again. No different rule applies to Mr. Mills, the State's arguments notwithstanding.

It is a fundamental precept of our justice system that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). The right to an impartial judge is one of the most, if not *the* most, fundamental right guarantees of our Constitution. See, e.g. In Re Murchison, 349 U.S. 133 (1955); Marhsall, 446 U.S. at 242; Bracey

v. Gramley, 520 U.S. 899 (1997). See also Porter v. Singletary, 49 F. 3d 1483, 1487-88 (11th Cir. 1995) ("[t]he law is well-established that a fundamental tenet of due process is a fair and impartial tribunal"). As Justice Scalia recently wrote for a unanimous Supreme Court, "[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." Edwards v. Balisok, 117 S. Ct. 1584, 1588 (1997). See also Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (while "most constitutional errors have been held amenable to harmless-error analysis, . . . some will always invalidate the conviction") (citing, *inter alia*, Tumey v. Ohio, 273 U.S. 510 (1927), for proposition that "trial by a biased judge" is error that always invalidates the conviction). This fundamental principle stems from the paramount constitutional precept that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1966), and "[t]he right to an impartial adjudicator, be it judge or jury, is such a right." Grey v. Mississippi, 481 U.S. 648, 668 (1987). See also Johnson v. United States, 117 S. Ct. 1544, 1550-51 (1997) ("[w]e have found structural errors only in a very limited class of cases" and citing "lack of an impartial trial judge" as such error); Brecht v. Abrahamson, 507 U.S. 619, 629 (1993) (structural defects "require[] automatic reversal of the conviction because [it] infect[s] the entire trial process"); Arizona v. Fulminante,

499 U.S. 279, 290 (1990) ("Chapman specifically noted three constitutional errors that could not be categorized as harmless error: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge").

In Fulminante, Chief Justice Rehnquist explained that the types of trial error to which a harmless error analysis can be properly and constitutionally applied can be "qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. at 308 (Rehnquist, C.J., dissenting in part). However, as to errors such as "a judge who was not impartial," id. at 309, "[t]hese are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." Id. at 309-10. As the Court noted in Vasquez v. Hillery, 474 U.S. 254 (1986):

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Id. at 265 (emphasis added).[22]

The Court in Rose v. Clark, 478 U.S. 570 (1986), similarly acknowledged that "some constitutional errors require reversal without regard to the evidence in the particular case" because those errors "necessarily render a trial fundamentally unfair. Id. at 577. As Justice Powell wrote:

> The State of course must provide a trial before an impartial judge, . . . with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, . . . and no criminal punishment may be regarded as fundamentally fair.

Id. (citations omitted). In distinguishing structural errors from trial-type errors, the Court in Rose explained that "if the defendant had counsel and was tried by an impartial adjudicator,

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[22]Numerous circuit courts of appeal have adhered to the longstanding rule that harmless error review is inapplicable to issues of judicial impartiality. See, e.g. Scarpa v. Dubois, 38 F. 3d 1, 14 (1st Cir. 1994) ("[e]xamples of structural errors [] include . . . permitting a trial to proceed before a biased adjudicator"); Anderson v. Sheppard, 856 F. 2d 741, 746 (6th Cir. 1988) ("Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding"); Cartalino v. Washington, 122 F. 3d 8, 10-11 (7th Cir. 1997) (the right to be tried by an impartial judge "is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant"); Duest v. Singletary, 997 F. 2d 1336, 1338 n.3 (11th Cir. 1993) (structural errors not remedied by harmless error analysis include "deprivation of trial counsel or the presence at trial of a biased judge").

there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Id. at 579. The Court made it very clear, however, that a trial by a biased adjudicator remained without a doubt an error which results in the denial of the basic trial process "altogether." Id. at 578 n.6 (citing Tumey v. Ohio, 273 U.S. 510 (1927)). See also Rose, 478 U.S. at 592 (Blackmun, Brennan, and Marshall, JJ., dissenting) ("effective defense counsel and an impartial judge play central roles in the basic trial process").

Justice O'Connor's majority opinion in Satterwhite v. Texas, 486 U.S. 249 (1988), again reiterated the Court's unwavering stance that structural errors can never be harmless:

> Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category.

Id. at 256. Because "the scope of a violation" such as presence of a biased judge at a criminal trial "cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative." Id. It is for this reason that harmless error analysis is especially inappropriate for judicial bias claims, and Mr. Mills does not have to identify "any purportedly erroneous rulings by the circuit court in the first evidentiary hearing in this cause" (IB at 35-36). The right to an

impartial judge "is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant." Cartalino v. Washington, 122 F.3d 8, 10-11 (7th Cir. 1997). Accord Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988) ("Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding"). See also Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988) (following evidentiary hearing, Court decides that judge should have disqualified himself, and reversed for a new evidentiary hearing); Rogers v. State, 630 So. 2d 513 (Fla. 1994) (same); Smith v. State, 708 So. 2d 253 (Fla. 1998) (same).

That the summary denial order was subsequently vacated by this Court does not establish the harmlessness of the constitutional violations, as the State argues (IB at 33). First of all, this Court only remanded for a limited evidentiary hearing on penalty phase issues; the guilt phase issues were summarily denied by Judge Woodson and not reversed for a hearing. Mills v. Dugger, 559 So. 2d 579 (Fla. 1990). More importantly, *Judge Woodson remained on Mr. Mills' case and denied relief following the evidentiary hearing.* As prior counsel Nolas testified, had he been aware of the *ex parte* communications, he would have sought to recuse Judge Woodson; and as Judge Eaton noted, "knowledge of the

ex parte communication would have resulted in the ultimate recusal of the trial judge if for no other reason than because he would have become a witness in the hearing to determine the propriety of the ex parte communication" (PCR. 294). See Swafford, 636 So. 2d at 1310-11 (Judge Hammond removed from case and testified at evidentiary hearing). And the State's argument that it is "wholly speculative" that Judge Woodson would have been a witness on the *ex parte* communication issue (IB at 34), is completely belied by the fact that *the State called Judge Woodson as a witness at the evidentiary hearing on the ex parte communication issue.*[23] The State has advanced no cogent argument which comes close to establishing that Judge Eaton abused his discretion in granting relief on this claim.

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[23]Assuming he had had any notice of an *ex parte* communication in 1989, Mr. Mills' collateral counsel would have been precluded from speaking to the trial judge to investigate the issue. State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

ARGUMENT III

MR. MILLS IS ENTITLED TO A NEW TRIAL IN LIGHT OF THE LOWER COURT'S FINDINGS AND CONCLUSIONS WITH RESPECT TO THE SENTENCING PHASE.

Mr. Mills asserted below that, in light of the newly-discovered evidence of Ashley's confession to being the shooter, he was entitled to a new trial, as well as to sentencing relief. Judge Eaton, while granting sentencing relief, declined to grant Mr. Mills a new trial. In light of the factual findings made as to Anderson and his credibility, Mr. Mills submits that a new trial is also warranted.

The State's case at the guilt phase relied largely on Ashley's eyewitness account of what occurred. It was Ashley, and only Ashley, who placed Mr. Mills at the scene and who identified him as the shooter. In light of the new credible evidence that Ashley, not Mr. Mills, was the triggerman, there is more than a reasonable likelihood of an acquittal on retrial. In light of the new evidence indicating that Ashley was the shooter, and the arguments set forth in Argument I, supra, the facts of this case should be subject to the adversarial testing of a new trial. Jones v. State, 591 So. 2d 911 (Fla. 1991).

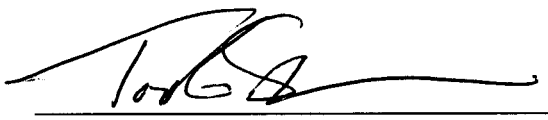
CONCLUSION

In light of the foregoing arguments, Mr. Mills submits that a new trial is warranted and the order granting a resentencing should be affirmed.

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Federal Express to all counsel of record on May 17, 2001.



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