

In the Supreme Court of Florida

ANDREW R. LUKEHART,

Appellant,

v.

Case No. SC12-628

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ANDREW RICHARD LUKEHART, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by the appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court order denying a successive postconviction motion in a capital case. The facts of the crime are recited in the Florida Supreme Court's direct appeal opinion. *Lukehart v. State*, 776 So.2d 906, 910-911 (Fla. 2000). The complete procedural history of this case is recited in the Florida Supreme Court's postconviction appeal opinion. *Lukehart v. State*, 70 So.3d 503, 510-512 (Fla. 2011).

On June 20, 2002, Lukehart filed a motion to vacate judgment of conviction and sentence pursuant to rules 3.850 and 3.851, raising seventeen claims. *Lukehart*, 70 So.3d at 510, n.3 (listing the claims raised in the initial postconviction motion filed in the trial court in a footnote). Claim III in the initial motion was various claims of ineffective assistance of counsel at guilt and penalty phase. None of the various claims was a claim that counsel was ineffective for not filing a motion to cease medication of Lukehart prior to his trial testimony. The State agreed to an evidentiary hearing regarding claim III. *Lukehart*, 70 So.3d at 511.

The trial court conducted an evidentiary hearing on those claims of ineffectiveness on May 9-10, 2007. During the evidentiary hearing, Lukehart called twelve witnesses including Dr. Barry M. Crown. *Lukehart*, 70 So.3d at 511. Dr. Crown testified that Lukehart was being given Sinequan, an antidepressant; Vistaril, a sedative; and Mellaril, an antipsychotic. Dr. Crown

testified as to the possible side effects of these drugs on Lukehart's memory. At the evidentiary hearing, trial counsel also testified that he was aware that Lukehart was being medicated but did not know the particular drugs or the side effects of the drugs.

The Florida Supreme Court affirmed the postconviction court's denial of rule 3.850 relief. *Lukehart v. State*, 70 So.3d 503, 508 (Fla. 2011). In his brief to the Florida Supreme Court, Lukehart asserted that his trial counsel was ineffective for failing to file a motion requesting that the medication of Sinequan, Vistaril, and Mellaril be stopped. The Florida Supreme Court addressed this claim, stating:

Motion to Amend

In his second claim, Lukehart contends that the postconviction court erred in denying his motion to amend the pleadings to conform with the evidence. There, Lukehart alleged that trial counsel was ineffective for failing to file a motion to cease Lukehart's medication and a motion for a continuance. Lukehart contends that the trial court erred in denying his motion because information that serves as a basis for this claim did not surface until the evidentiary hearing. We disagree.

"The standard of review for a trial court's determination regarding a motion to amend a rule 3.850 motion is whether there was an abuse of discretion." *Huff v. State*, 762 So.2d 476, 481 (Fla.2000) (citing *McConn v. State*, 708 So.2d 308, 310 (Fla. 2d DCA 1998)). Because Lukehart's motion for postconviction relief is governed by rule 3.850, we review the postconviction court's denial of Lukehart's motion to amend for an abuse of discretion.

Pursuant to rule 3.850(f), evidence revealed after the conclusion of an evidentiary hearing is proper in a successive motion for postconviction relief, not in a

motion to amend the initial motion for postconviction relief. In his 2007 motion, Lukehart requested that claim three in his motion for postconviction relief be amended to include the additional subclaims that defense counsel was ineffective for failing to (1) inform the trial court prior to trial that Lukehart was under the influence of prescribed medication, which altered his ability to remember accurately, (2) request that Lukehart's medication be withheld, and (3) request a continuance until such time as the effects of the medication wore off. Lukehart did not raise this claim in his initial or amended rule 3.850 motions. Rather, Lukehart raised this claim in his motion to amend the pleadings to conform with the evidence, filed on June 1, 2007. In its order denying relief, the postconviction court acknowledged the existence of Lukehart's motion to amend the pleadings to conform with the evidence, but did not discuss the substance of the motion. This claim may be properly raised in a successive motion for postconviction relief. Thus, we conclude that the postconviction court did not abuse its discretion in denying this claim.

Lukehart, 70 So.3d at 514-515.

On December 19, 2011, Lukehart filed a successive postconviction motion raising three claims relating to his medication taken during trial. (PC. Vol. 1-75). Lukehart asserted that 1) counsel was ineffective for failing to file a motion to have his medication ceased prior to his trial testimony; 2) that the medication rendered him incompetent to testify at trial; and 3) his being medicated with Sinequan, Vistaril, and Mellaril was a violation of *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). The State filed an answer. (PC. Vol. 76-88). The trial court denied the successive motion. (PC. Vol. 104-111). Lukehart filed a motion for rehearing. (PC. Vol. 112-117). The

trial court denied rehearing. (PC. Vol. 116-117). Lukehart now appeals the denial of his successive motion.

SUMMARY OF ARGUMENT

As the trial court properly found, Lukehart's successive motion was untimely. The successive motion did not allege facts "unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence" as required to met one of the exceptions to the time limitations in rule 3.851. Furthermore, the successive motion does not comply with the pleading requirements of the rule governing successive motions because there was no explanation in the successive motion of why the three claims were not raised in the first postconviction motion. Nor do any of the three claims raised in the successive motion warrant relief. Thus, the trial court properly summarily denied the successive motion and this Court should affirm that denial.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING THREE CLAIMS NOT RAISED IN THE INITIAL POST-CONVICTION MOTION? (RESTATED)

The trial court properly summarily denied the successive motion. The motion was untimely because it did not allege that the medication was unknown to Lukehart or his attorney. Additionally, the successive motion did not give any reason why the claims were not raised in the initial postconviction motion as required by the rule governing successive motions. Contrary to registry counsel's claim and regardless of his admission of neglect, the successive motion did not include any reason why the three claims were not raised in the initial postconviction motion. On this basis alone, the trial court was entitled to summarily deny the successive motion. Furthermore, neglect is not a valid reason because there is no such thing as ineffective assistance of postconviction counsel in Florida. Moreover, none of the three claims raised in the successive motion have merit and therefore, the trial court properly summarily denied the successive motion.

Standard of review

The standard of review is *de novo*. *Gore v. State*, 2012 WL 1149320, 4 (Fla. 2012)(citing *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)). "A successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case

conclusively show that the movant is entitled to no relief." *Gore v. State*, 2012 WL 1149320, 4 (Fla. 2012)(citing Fla. R.Crim. P. 3.851(f)(5)(B) and affirming the trial court's denial of a successive motion). Additionally, a postconviction motion may be summarily denied as a matter of law. If, for example, there is controlling precedent against a claim raised in a postconviction motion, the trial court may properly summarily deny such a claim.

The trial court's ruling

The trial court concluded that rule 3.851, not rule 3.850, governed the successive motion because the successive motion was filed in 2011, years after the effective date of rule 3.851 (PC Vol. I 107-108). The trial then determined that the successive motion was untimely because it did not allege facts establishing that the medication was "unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence" as required by rule 3.851. (PC Vol I 108). The trial court found the motion was "time-barred" because the facts upon which the claim were predicated were known to the movant and/or could have been ascertained by the exercise of due diligence. (PC. Vol. I 108). The trial court noted that Lukehart himself was obviously aware that he was taken medication. (PC Vol. I 109-110). The trial court also found the postconviction counsel was not diligent in inquiring regarding medications during the

postconviction proceedings. (PC. Vol. I 110). The trial court noted that it was "unacceptable" that such readily ascertainable facts were being raised for the first time in a successive motion "especially considering the length of time the defendant's initial postconviction motion was pending." (PC Vol. I 110). The trial court summarily denied the successive motion. (PC Vol. I 111). The trial court denied the successive motion without conducting a case management conference.

Pleading requirements of rule 3.851

Registry counsel asserts that the successive motion was filed pursuant to rule 3.850(f), not rule 3.851. It is rule 3.851, however, that governs any postconviction motion in this case. The scope provision of rule 3.851(a), provides:

This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

Because this successive postconviction motion was filed on December 16, 2011, which was years after the effective date of rule 3.851, the provisions of that rule govern this successive motion, not rule 3.850. The rule governing successive motions, rule 3.851(e)(2), provides:

Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:

(A) all of the pleading requirements of an initial motion under subdivision (e)(1);

(B) the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions;

(C) if based upon newly discovered evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972), the following:

(i) the names, addresses, and telephone numbers of all witnesses supporting the claim;

(ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;

(iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and

(iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

The rule clearly requires that any successive postconviction motion explain why the claim was not included in the initial postconviction motion. Lukehart must establish due diligence and explain why the information and claim was not included in the initial postconviction motion or the successive motion is untimely. Lukehart must establish that any new evidence revealed at the

evidentiary hearing was a true surprise that he could not have known about.

Here, Lukehart knew that he was taking medication and postconviction counsel knew this as well. Registry counsel never explained in his successive motion why these claims were not included in the initial motion. Registry counsel admits that Dr. Crown informed him that Lukehart was taking medication during the preparation for his testimony. (P.C. Vol. I 6). He seems to be claiming that his original expert for the evidentiary hearing, Dr. Krop, who was hospitalized and could not appear at the evidentiary hearing, did not tell him that the medications could cause memory problems, but there is no such claim as ineffective assistance of postconviction mental health expert. Nor did registry counsel include an affidavit from Dr. Krop in an attempt to establish his diligence.

Moreover, this case pended for years in postconviction before the evidentiary hearing. The postconviction phase of this case started in June of 2001 when the United States Supreme Court denied Lukehart's petition for certiorari review and the original postconviction motion was filed in June of 2002 but the evidentiary hearing was not held until May of 2007. In other words, postconviction counsel had nearly six years to timely discover the medication issue. Registry counsel Reiter, who was with CCR-N, which was originally designated postconviction counsel in this

case, was appointed registry counsel in July of 2003. Registry counsel does not explain why he did not discover the medication issue in those many years and either include the claim in the original postconviction motion or amend with the claim 30 days before the evidentiary hearing. While the Florida Supreme Court stated that "[t]his claim may be properly raised in a successive motion for postconviction relief," this Court did not say that Lukehart was excused from the pleading requirements governing a successive motion. The trial court properly summarily denied the successive post-conviction motion for failing to comply with the pleading requirements.

Registry counsel, for the first time on appeal, relying on rule 3.851(d)(2)(c), asserts that his lack of due diligence is the equivalent of neglect. IB at 13. The rule does not apply to a successive motion. The rule governing initial postconviction motion provides that the initial motion be "filed by the prisoner within 1 year after the judgment and sentence become final." The rule then provides for three exceptions to this time limitation including that "postconviction counsel, through neglect, failed to file the motion." This, however, is referring to the first initial motion, not a successive motion. And that rule is referring to counsel's failure to file any motion, not merely the omission of a claim. This exception to the time bar is not a means of securing an untimely amendment. Rule 3.851(d)(2)(c) does not apply.

Rather, it is the rule governing successive motions, rule 3.851(e)(2)(B), that applies and requires that registry counsel provide the reasons "the claim or claims raised in the present motion were not raised in the former motion or motions." Registry counsel is really attempting to use ineffective assistance of postconviction counsel as a means of end rounding the pleading requirements of the applicable rule. This Court has recently reaffirmed that this Court does not recognize claims of ineffective assistance of post-conviction counsel in the wake of *Martinez v. Ryan*, - U.S. -, 132 S.Ct. 1309, - L.Ed.2d - (2012). See *Gore v. State*, - So.3d -, 2012 WL 1149320 (Fla. April 9, 2012)(holding that *Martinez* provides "no basis for relief in this Court" rather *Martinez* was designed and intended to address issues that arise in the context of federal habeas corpus proceedings). Post-conviction counsel's "neglect" or lack of diligence is not a proper reason for omitting a claim in the initial motion under 3.851(e)(2)(B).

Substantive claims

Registry counsel does not raise any of the three substantive claims that he raised in his successive motion in the trial court in his initial brief to this court and therefore, has waived all appellate review of those claims. *Barwick v. State*, - So.3d -, 2011 WL 2566310, *10 (Fla. 2011)(finding numerous claims waived when the claims were raised in the initial brief but were not supported by

any argument); *Hall v. State*, 823 So.2d 757, 763 (Fla. 2002)(concluding that issues that are not raised in the initial brief are deemed abandoned). The State, however, in an abundance of caution will address the merits of all three claims raised in the successive motion.

Claim I - ineffectiveness

Lukehart asserted in his successive motion filed in the trial court that his trial counsel, Mr. Edwards, was ineffective for failing to file a motion to have Lukehart's medications discontinued prior to his trial testimony. (PC Vol. 4). Lukehart asserts that his lawyer should have filed a motion to have his being medicated with Sinequan, Vistaril, and Mellaril ceased prior to his trial. He claims these medicines resulted in his trial testimony being confused and "conflabulated." Lukehart claims that his original version of events, given to law enforcement shortly after the murder, given when he was not on medication, that he dropped the child on her head rather than his trial testimony, given when he was on medication, that he pushed the infant down on the floor while changing her diaper, was the "true" version of events and that the medication caused him to have memory gaps and conflate the two versions.

There was no deficient performance. Trial counsel testified at the evidentiary hearing that he was aware that Lukehart was

being medicated but did not know the particular drugs or the side effects of the particular drugs. At the evidentiary hearing, registry counsel did not ask trial counsel if he saw any manifestations of confusion from the medications in his conversations with Lukehart before or during the trial. Trial counsel is not deficient for not filing a motion to cease medication if he observed no adverse manifestations as a result of the medication during his interactions with his client.

Nor was there any prejudice. Lukehart's "unmedicated" version of how the infant was injured was not any more credible than his "medicated" trial version. The jury would have convicted Lukehart of the infant's murder regardless of which of the two versions Lukehart testified to during his trial testimony. Trial counsel was not ineffective for failing to file a motion to cease the medication.

Claim II - competency to testify

Lukehart asserted in the successive motion filed in the trial court that he was incompetent to testify at trial due to the medication. (PC Vol. I 15). Lukehart, however, does not cite a single case where a defendant was found incompetent to testify based on being medicated with such medications as Sinequan, Vistaril, and Mellaril. Indeed, as one court observed, the "mere fact that a defendant is taking Mellaril does not establish that he

is incompetent or incapable of understanding or waiving his constitutional rights." *Tate v. True*, 264 Fed.Appx. 314, 319, 2008 WL 410285, 4 (4th Cir. 2008)(rejecting a claim that the taking of Mellaril which made the defendant drowsy made his waiver of the right to be present during the trial involuntary citing *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000)).

In *Whittaker v. McDaniel*, 268 Fed.Appx. 594, 2008 WL 565024 (9th Cir. 2008), the Ninth Circuit held that a defendant was not entitled to an evidentiary hearing on the claim that his plea was involuntary because he was taking Sinequan. The Court noted that the petitioner "offered no evidence explaining how his medication affected his ability to consult with a lawyer or understanding the plea proceeding." Here, the same observation applies. Dr. Crown did not testify as to the amounts of these drugs or to any documented adverse reaction of Lukehart to any of these three medications. Indeed, Dr. Crown was probably not qualified to testify regarding these matters because he is not a medical doctor.

Lukehart's reliance on *State v. Reutter*, 644 So.2d 564 (Fla. 2d DCA 1994), and *Bonge v. State*, 53 So.3d 1231 (Fla. 1st DCA 2011), is misplaced. In *Reutter*, the Second District held that the plea was involuntary. *Reutter* was a state appeal where the trial court determined that, as a result of psychotropic drugs, Reutter's plea was not knowingly and voluntarily entered. The majority stated:

We are tempted to reject this finding, especially because it appears that the trial judge relied almost exclusively on the testimony of Reutter and two of his jail house acquaintances. However, it is axiomatic that appellate judges, who review only the cold record, are not in a position to fully determine the credibility of witnesses and are not at liberty to simply reweigh the evidence that was presented to the trial judge. Even though we might want to perform these functions here, there is record support for the trial judge's findings and we are bound by law to accept those findings.

Furthermore, while the dissent noted that the defendant was taking Sinequan, a month prior to the plea, the dissent also pointed out that "treatment with antipsychotic drugs does not per se render a defendant incompetent to stand trial" citing *Sheley v. Singletary*, 955 F.2d 1434 (11th Cir. 1992). The dissent also referred to the testimony of a psychiatrist "with extensive experience in treating patients with Sinequan" that the prototypical side effect of Sinequan was drowsiness.

In *Bonge*, the First District held that the State did not establish a prima facie case of battery for the defendant removing his elderly mother from a nursing home and taking her to a hospital. While the Court quoted the defendant's motion to dismiss which included the statement that "the State took the position, upheld by the Court, that Ms. Andree is not competent to testify," this was not the holding of the case. Moreover, the mother's "memory gaps" seem to have arisen from her age of 94 years old, not from any medications. The mere taking of medication does not render a defendant incompetent to testify.

Claim III - violation of *Riggins*

Lukehart asserted in the successive motion filed in the trial court that his Fifth, Sixth and Eighth Amendment rights to a fair trial was violated when he was tried while taking medication in violation of *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). (PC Vol. I 15). In *Riggins*, the defendant was tried while being medicated with the antipsychotic drug Mellaril against his will and without a finding that the medication was medically appropriate. The Supreme Court reversed because the state court "failed to make findings sufficient to support forced administration of the drug." *Riggins* was originally given Mellaril at a level of 100 milligrams per day but because he continued to complain of voices and sleep problems, the dosage of Mellaril was increased to 800 milligrams per day.

Defense counsel filed a motion requesting that the administration of Mellaril and Dilantin be suspended until the end of *Riggins'* trial. Defense counsel "stressed that *Riggins* received a very high dose of the drug." *Riggins*, 504 U.S. at 133, 112 S.Ct. at 1814. At the hearing on the motion, a doctor testified that *Riggins* would be competent to stand trial even without the administration of Mellaril. Another doctor testified that Mellaril made the defendant calmer and more relaxed but that an excessive dose would cause drowsiness. The trial court denied *Riggins'* motion to terminate medication with a one-page order that gave no

indication of the court's rationale. Riggins continued to receive 800 milligrams of Mellaril each day of his trial which was "within the toxic range."

On appeal, Riggins asserted that his Sixth Amendment right to a fair trial was violated because he was medicated without the trial court making any findings or considering any less intrusive options. The Court listed the side effects of Mellaril including acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes, and Tardive dyskinesia, a neurological disorder, characterized by involuntary, uncontrollable movements of various muscles, especially around the face. *Riggins*, 504 U.S. at 134, 112 S.Ct. at 1814-1815. The Court noted that Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. The Court observed that it was "clearly possible" that such side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel. *Riggins*, 504 U.S. at 137, 112 S.Ct. at 1816.

The Court determined that due process allowed a mentally ill inmate to be medicated involuntarily with antipsychotic drugs where there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Riggins*, 504 U.S. at 135, 112 S.Ct. at 1815. But "once Riggins

moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug." The Court continued: "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." The Court reversed, however, because "the District Court allowed administration of Mellaril to continue without making any determination of the need for this course or any findings about reasonable alternatives" and because "the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary." *Riggins*, 504 U.S. at 136, 138, 112 S.Ct. at 1815-1816, 1817.

Lukehart refers to original trial counsel, Assistant Public Defender Lewis Buzzell's handwritten note that the defendant "doesn't want med" but registry counsel does not include any documents to establish that Lukehart informed the jail that he did not want to take the medication. For Riggins to apply, the defendant must be involuntarily medicated. *Ferguson v. Singletary*, 632 So.2d 53, 56 (Fla. 1993)(finding *Riggins* inapplicable because the medication was not "forced upon him" rather, "the medication was given to Ferguson in his cell, and he could take it or not - it was completely up to him."). Nor did registry counsel attach the

jail records establishing the dosage of Mellaril that Lukehart was given during the trial. There is no allegation that Lukehart was receiving a "very high dose of the drug" that was in the "toxic" range as was the case in *Riggins*.

Failure to conduct a case management conference

Registry counsel also faults the trial court for not conducting a case management conference prior to summarily denying the successive motion. IB at 15. The failure to conduct a case management conference was harmless error. *Marek v. State*, 14 So.3d 985, 999 (Fla. 2009)(holding that the failure to hold a hearing on a successive postconviction motion which is legally insufficient is harmless error citing *Davis v. State*, 736 So.2d 1156, 1159 n.1 (Fla. 1999) and *Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997)). This Court should not require case management conferences for successive motions. Case management conferences are only warranted for initial postconviction motions and for successive motions filed after a warrant has been signed. Indeed, the applicable statute prohibits registry counsel from filing successive motions at all. During the oral argument of the initial postconviction appeal, this Court inquired the reasons for the delays in this case. Requiring case management conferences for all successive motions regardless of the merits of the successive motion is one of the reasons for delays in capital cases.

Accordingly, the trial court properly summarily denied the successive 3.851 motion.

CONCLUSION

The State respectfully requests this Honorable Court affirm the trial court's denial of Lukehart's successive post-conviction motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been furnished by U.S. mail to Michael P. Reiter, 4 Mulligan Court, Ocala, FL 34472, (352) 292-3698 on this 17th day of May, 2012.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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