IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,134

DAVID COOK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF FONT

Appellant hereby certifies that this reply brief is typed in 12 point Courier font.

ARGUMENT IN REPLY

ARGUMENT I

MR. COOK DID NOT WAIVE HIS RIGHT TO A HUFF HEARING

> **"I'm going to let the Supreme Court tell me what to do. I'm sure you will appeal to them. The motion is denied, as I said."**

(PCR.329)(emphasis added).

With these words, the lower court, Judge Thomas Carney denied Mr. Cook's Rule 3.850 motion. The hearing at which this occurred was the first hearing of any kind in Mr. Cook's Rule 3.850 proceedings. Mr. Cook had been afforded no chance to litigate his outstanding public records issues. He had had no opportunity to amend his Rule 3.850 motion with materials from public records he had collected. Furthermore, he had never been given proper opportunity to argue his case pursuant to Huff v. State, 623 So. 2d 982 (Fla. 1993). Despite this gross violation of Mr. Cook's rights, Appellee contends that the denial of Mr. Cook's Rule 3.850 motion was proper.

Appellee first maintains that counsel for Mr. Cook should have been prepared to argue the Rule 3.850 motion because the single hearing which occurred in the case was noticed as a Huff hearing. Appellee's argument is refuted by the record, which shows that the only hearing held in the case was not noticed as a Huff hearing. The Notice of Hearing prepared by the State merely stated:

> YOU ARE HEREBY notified that the following pleading herein, to wit Defendant's Motion to Vacate Judgment etc. is scheduled for hearing.

(PCR.258).

Appellee's interpretation of this as meaning a specific Huff hearing is strained. The notice does not follow the common practice of making specific reference to Huff. The wording in and of itself is, at best, ambiguous. It could equally well mean any type of hearing related to the Rule 3.850 motion, from a status conference to a fully fledged evidentiary hearing.

Furthermore, the timing and context of the hearing indicate that a Huff hearing was simply not appropriate at that juncture. Both the original Rule 3.850 motion and the supplement thereto made reference to the fact that there were many outstanding public records issues (PCR 100, 202). As a result of several agencies' failure to comply with Mr. Cook's requests, Mr. Cook sought the lower court's assistance in obtaining the public records he had requested by filing a motion to compel in April 1996 (PCR.251). The hearing was set for July 1996. No hearing of any type whatsoever had previously been held in the case. The timing of the hearing, as well as the procedural status of the case indicated that public records issues needed to be resolved. Logic alone dictated that a Huff hearing was premature, since a Huff hearing is only held once a final amended Rule 3.850 motion has been filed. Furthermore, the state of the law also dictated that the public records issues needed to be resolved by the lower court before any Huff hearing was due. This Court has determined that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Further, this Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. In these cases, sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Mr. Cook had neither been given such an extension of time nor been allowed to amend

his Rule 3.850 motion. Based on the both the law and the status of the case, the only logical assumption was that the hearing on November 22, 1996, which had been continued from July 1996, should have dealt with the public records issues rather than the merits of the case.

Appellee makes much of the fact that counsel for Mr. Cook filed a Motion to Transport him to the hearing, and contends that "a defendant's presence is not required for status conferences". (Answer Brief at 9). Appellee seems to be implying a constructive knowledge on the part of Mr. Cook's counsel that the hearing was a Huff hearing. Appellee's logic appears to be that counsel for Mr. Cook would not have filed a Motion to Transport Defendant for a status conference, but would have done so for a Huff hearing. In fact, Rule 3.850 plainly states that "a court may entertain and determine the motion without requiring production of the prisoner at the hearing". Fla. R. Crim. P. 3.850 (e).(emphasis added). It is at the sound discretion of the lower court as to whether a defendant is required at Rule 3.850 hearings. Counsel for the defendant may or may not choose to file a motion to transport the defendant to either a status conference or a Huff hearing. The decision to file such a motion depends on a plethora of circumstances particular to the client concerned, including the client's own desire to assist in his or her representation. The fact that counsel for Mr. Cook requested her client's presence at the hearing in no way reflects a constructive knowledge of the nature of the hearing intended by the State.[1]

Even assuming arguendo that the hearing was properly noticed as a Huff hearing, events at the hearing itself should have indicated to the lower court and the State that a Huff hearing was

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[1] Appellee further attempts to justify its position by reference to the State's objection to Mr. Cook's Motion to Transport. Although the objection refers to Huff, it neither constitutes a separate notice of a Huff hearing, nor cures the ambiguity of the original notice. As noted above, the notice of hearing was generically worded, and the law and status of the case indicated that public records issues needed to be resolved.

premature. The lower court was clearly unfamiliar with public records law in capital post conviction cases as evidenced by his insistence on ruling on the Motion to Vacate.

> THE COURT: Insofar as I'm aware, this case came on today for an argument from you on whether I should have actually a formal hearing on the Motion to Vacate. That's what we were supposed to do, not anything on a Motion to Compel.
>
> I don't want to put you in a bad position because you're here basically as a stranger. And what I have to say is nothing of a personal nature, but this is as far as the Court is concerned too little too late.
>
> Insofar as the motion itself is concerned I have read the Motion to Vacate, the supplement and your response. And I'm going to rule on the merits of the motion now. And the motion is denied.

(PCR.328)

Counsel for Mr. Cook attempted to correct the court as to the need to address public records issues:[2]

> MS. DAY: ...[C]apital defendants are entitled to public records in order to complete the Rule 3.850 motion. Mr. Cook's Rule 3.850 motion is incomplete and remains incomplete until such time as those public records are disclosed.
>
> * * *
>
> Mr. Cook is entitled to a hearing on his public records requests.

(PCR.329)

The State further contends that Mr. Cook, through counsel, waived the right to a <u>Huff</u>

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[2]It is noteworthy that while counsel for Mr. Cook sought to correct the lower court's ignorance about the public records procedure, counsel for the State made no such attempt to persuade the court to follow the correct procedure. Whether the Assistant State Attorney's silence was the result of his failure to know the law or of a cynical attempt to deny Mr. Cook his rights to due process, he was apparently happy to let the lower court compound its errors in this matter.

hearing. However the record is clear that Mr. Cook made no such waiver - he merely attempted to inform the lower court that a Huff hearing was inappropriate before public records had been resolved and Mr. Cook afforded the chance to amend his Rule 3.850 motion. Furthermore the lower court's assertion that Mr. Cook's counsel's substitution by her second chair attorney constituted a waiver of the right to argue the merits of the case, "if not openly contemptuous"(PCR.292), is equally flawed. Had Mr. Cook's lead attorney appeared, she would have made the same arguments that were made by her second chair lawyer. The time was simply not ripe for a Huff hearing, and no waiver occurred.[3] Mr. Cook should be given the chance to argue the merits of his case, once all requested public records have been disclosed, and he has been given time to amend his Rule 3.850 motion.

ARGUMENT II
SUMMARY DENIAL OF MR. COOK'S RULE 3.850 MOTION

A. SUMMARY DENIAL WAS IMPROPER

Appellee contends that the lower court did not err in failing to attach portions of the record in his order denying Mr. Cook post conviction relief because the order was based on "procedural bars and insufficiency of the pleading". (Answer Brief at 14).

As to the insufficiency of the pleadings of ineffectiveness of trial counsel, Mr. Cook has clearly met the burden under Fla. R. Crim. P. 3.850. As noted by this Court, "[w]hile the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no

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[3]Certainly any such "waiver" would need to be made by Mr. Cook himself in a knowing, intelligent and voluntary fashion. See e.g. Garcia v. State, 493 So. 2d 360 (Fla. 1986), Amazon v. State, 483 So. 2d 8 (Fla. 1986)

relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). See also Peede v. State, 24 Fla. L. Weekly 5391 (Fla. 1999. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. Id Here, the lower court dismissed Mr. Cook's Rule 3.850 claim of ineffective assistance of trial counsel at the guilt phase by asserting that:

> ...In view of the evidence in this case, the full confession of the defendant and the testimony of his co-defendant, tactical concessions do not give rise to the level of professional incompetence.

(PCR.293)

Furthermore, the lower court completely failed to address Mr. Cook's claim of ineffective assistance of counsel at penalty phase, merely stating that it was "an inflation of the material presented at trial. It is again rejected" (PCR Supp.295). The lower court completely failed to address Mr. Cook's specific allegations as to trial counsel's ineffectiveness and failed to attach specific portions of the record to support his summary denial. This is plainly erroneous.

B. THE SYSTEMIC FLAWS AND CONFLICT OF INTEREST CLAIM

In his motion for rehearing the lower court's denial of Mr. Cook's Rule 3.850 motion, Mr. Cook set forth the systemic flaws and conflict of interest which prevented Mr. Cook's trial counsel from fully investigating and developing Mr. Cook's case. Mr. Cook laid out the details of the shockingly small amount of time billed devoted by his trial counsel, and demonstrated that even this figure was inflated from the true amount of time spent on the case. Appellee contends that the issue was improperly raised in Mr.

Cook's motion for rehearing, and is untimely. Appellee however overlooks the body of Florida law which allows amendment of a defendant's Rule 3.850 motion once the court has ruled on his public records issues. See e.g, Ventura v. State, 673 So. 2d 479 (Fla. 1996) ; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano v. Dugger, 561 So. 2d 54 (Fla. 1990). Here, Mr. Cook was precluded from amending his Rule 3.850 motion with the few records he had managed to collect by the time of the precipitous action of the lower court in summarily denying his original unamended Rule 3.850 motion. The only option available to Mr. Cook was to raise the issue in his motion for rehearing, both to preserve it, and to attempt to persuade the lower court that he had the right to amend his Rule 3.850 motion. Had the lower court granted the motion for rehearing, Mr. Cook would then have amended his Rule 3.850 motion accordingly.

As to Appellee's allegation of untimeliness, Mr. Cook would note that he has consistently raised the impossibility of effectively litigating his case in a piecemeal fashion. In his original Rule 3.850 motion, filed with the trial court in January 1993, Mr. Cook noted that:

> It is counterproductive to proceed with the investigation when it would have to be redone after reviewing the files. CCR cannot afford the luxury of duplicative effort, particularly in the light of the present budget limitations. Unless and until counsel have had an opportunity to review all of the

records and fully develop all of his claims, Mr. Cook will be denied his rights under Florida law and the eighth and Fourteenth Amendments.

(PCR 102-103, emphasis added)

In addition, the information supporting the claim of conflict of interest was not, as Appellee asserts, available to counsel in 1992. As detailed in his motion for rehearing, the claim originated with billing records, found within the records supplied by the Dade County Clerk's Office. As noted in Mr. Cook's original Rule 3.850 motion, the Dade County Clerk's Office had not complied with Mr. Cook's request for records as of the date of the Rule 3.850 motion (PCR.102). Only after the Clerk's office had supplied some records to Mr. Cook could he research and develop any claim based on the materials in the Clerk's file.[4] Appellee's allegation of untimeliness and procedural bar is thus meritless.[5] See

[4] Indeed, as noted in Mr. Cook's motion for rehearing, the Clerk's office was still not in full compliance with his records requests in December 1996. See PCR Supp. 17.

[5] Appellee's position that the facts raised in Mr. Cook's motion for rehearing should not be considered is refuted by plain precedent. In Thompson v. State, 731 So. 2d 1235, (Fla. 1998) the identical procedural posture was presented. Mr. Thompson had originally filed a Rule 3.850 motion with only claim headings alleging the inability to file a complete motion due to the State's failure to produce public records. The judge denied the motion and Mr. Thompson subsequently filed a 124 page motion for rehearing alleging the facts in his possession which established his entitlement to relief. The motion for rehearing was subsequently denied. On appeal, the State sought enlargement conceding error with respect to the public records issue. Following subsequent proceedings, this Court granted relief to Mr. Thompson regarding an issue raised in the original motion for rehearing (penalty phase ineffective assistance of counsel). Thompson, 731 So. 2d at 1236. Mr. Cook's case is in an identical procedural posture, and any finding of waiver, default or bar would therefore be unfairly and inconsistently applied to Mr. Cook. Mr. Cook's claims are also in a similar procedural posture as those addressed in Ventura v. State, 673 So. 2d

Provenzano v. State, 616 So. 2d 928 (Fla. 1993)"Given that Provenzano's ineffectiveness claims have arisen as a direct result of the disclosure of the file, we find that they are timely raised."

C. PENALTY PHASE INEFFECTIVENESS AND AKE CLAIM

Appellee asserts that Mr. Cook's claim of ineffectiveness of his counsel at penalty phase is without merit and justifies the lower court's summary denial. Appellee similarly attempts to dismiss Mr. Cook 's claim pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). Appellee's argument concentrates on the small quantum of testimony that was presented at the penalty phase. However, Appellee's argument is more significant for its total failure to acknowledge the last minute timing of the penalty phase investigation, the lack of preparation by counsel, and the failure to present adequate mental health evidence to the jury. All of these omissions were substantially prejudicial to Mr. Cook. Appellee does admit that "Dr. Haber had examined the Defendant on the morning prior to the commencement of the penalty phase." (Answer Brief at 34) (emphasis added)), and inferred that Dr. Haber had adequate background information because she had "listened to the background testimony from the defendant's family, friends and employer"(Id at 34). Dr. Haber was placed on the stand without

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479 (Fla. 1996) and a different rule cannot be applied to Mr. Cook.

adequate time to prepare her testimony, and without trial counsel having any clear idea of what she would say.

Appellee makes no reference to the fact that the law requires that an attorney charged with the responsibility of conducting a capital trial begin investigating for the penalty phase before the guilt phase of the trial and not wait until the guilt phase is over. Blanco v. Singletary, 943 F. 2d 1477 at 1501-02. In addition, this court has found prejudice where trial counsel failed to investigate mitigation until the guilt phase is over. In Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), trial counsel was found ineffective during the penalty phase for failing to present available mitigation evidence during a capital penalty phase. In a post conviction evidentiary hearing, Deaton's trial counsel admitted that he habitually did not prepare witnesses for penalty phase until after the guilt phase was over, and consequently had very little time to locate witnesses and prepare them adequately. This Court concluded that Deaton's trial counsel was ineffective because his "shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. The record of Mr. Cook's capital penalty phase indicates that did not investigate and prepare for the penalty phase in advance. This is objectively deficient performance.

In an attempt to refute the obvious prejudice to Mr. Cook, Appellee makes much of the fact that some minimal family member testimony was presented, including that of Mr. Cook himself. While

it is true that defense counsel presented limited mitigation testimony at the penalty phase in this case, this case is like Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), where this Court found prejudice despite a unanimous death recommendation and also found that "Hildwin's trial counsel did present some evidence in mitigation at sentencing" but that it was "quite limited." Id. at 110 n.7. This Court has often found prejudice despite the presentation of limited mitigation at the penalty phase. For example, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), the Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. Mr. Cook should be allowed the opportunity to do likewise.

The type of evidence that Mr. Cook pleaded and could have presented at an evidentiary hearing is similar to that which has given rise to penalty phase relief in several instances. In Rose v. State, 675 So. 2d 567 (Fla. 1996), this Court granted penalty phase relief to a capital defendant when the record reflected that "counsel never attempted to meaningfully investigate mitigation" and also did not hesitate to find prejudice: See also Hildwin, (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially

unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). Given an evidentiary hearing, Mr. Cook can similarly establish statutory and non statutory mitigation which could and should have been presented at his penalty phase. He can thus establish prejudice.

Appellee's argument that Mr. Cook's counsel should be absolved from the duty to investigate because Mr. Cook had concealed his drug and alcohol abuse from his family borders on the facetious and fails to accept the allegations set forth below as true. There has been no testimony whatsoever as to whether counsel had a tactical reason for failing to investigate. See Gaskin, 737 So. 2d at 515, n.12 (evidentiary hearing warranted to resolve the "factual dispute of trial strategy on the one hand, and one of lack of investigation and presentation of mitigating evidence by counsel on the other"). If Mr. Cook's trial counsel had bothered to investigate and develop Mr. Cook's drug and alcohol history, he would have sought out and presented readily available independent testimony to corroborate it. He would have fully investigated all the ramifications of Mr.

Cook's drug and alcohol abuse, including organic brain damage, and thus would have been able to present specialist neuropsychological and other expert testimony to support statutory and non statutory mitigation. Appellee's reliance on Correll v. Dugger, 558 So. 2d 422 (Fla. 1990) is misplaced in this context. The type of abuse alleged in Correll case was childhood abuse, perpetrated by a deceased parent, which both Correll and his mother denied during penalty phase. Both the family members and the defendant testified as to the absence of abuse. Here, Mr. Cook freely admitted his alcohol and drug abuse at penalty phase and to Dr. Haber. It is thus distinguishable from Correll in which family members and the defendant all denied the abuse. The fact that Mr. Cook chose not to reveal his the extent of his drug and alcohol to his family does not absolve trial counsel form the duty to investigate and develop this mitigation.

Appellee's argument is completely at odds with this court's opinion in Gaskin, which case bears striking similarities to Mr. Cook's. As with Gaskin, Mr. Cook's trial counsel presented only limited evidence in mitigation. As in Gaskin, Mr. Cook's Rule 3.850 motion presented "an extensive litany of important facts in his motion for post conviction relief which paint an entirely different picture of [Mr. Cook's] family, background and mental condition than the meager picture presented at trial. Id

Mr. Cook has clearly met his burden in establishing a factual basis for an evidentiary hearing. Appellee's argument is simply

frivolous, and highlights the length that the State will go to defend a clearly indefensible summary denial. Mr. Cook should be given an evidentiary hearing based on this issue.

ARGUMENT III

THE JUDICIAL BIAS ISSUE

Mr. Cook filed a motion to recuse the lower court on the basis of its evident bias and prejudice against Mr. Cook and his counsel. In the lower court's December 6, 1996 order summarily denying Mr. Cook's Rule 3.850 motion, the lower court characterized Mr. Cook's attempts to gain access to the public records as a "sham" and "just another tool to delay resolution".[6] Moreover he labelled Mr. Cook's counsel's substitution by a second chair attorney as "a waiver of the right to argue the merits, if not openly contemptuous". (PCR.292). Appellee asserts that the trial court's failure to recuse himself on Mr. Cook's motion is proper. Appellee's rationale for this conclusion appears to be that the lower court's order was merely an "adverse ruling", and that the delay between the summary denial and the denial of Mr. Cook's motion for rehearing is somehow Mr. Cook's fault and further justifies the court's position.

Appellee's position is seriously flawed. There is a major difference between an "adverse ruling" and the personal attacks on

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[6] The record reflects that the vast part of the delay in Mr. Cook's case is attributable to the lower court and not to Mr. Cook.

Mr. Cook's counsel by the lower court. The assertion that Mr. Cook's legitimate efforts to obtain public records were "a sham" and a "tool to delay resolution" implies frivolity, bad faith and a lack of professionalism on the part of Mr. Cook's counsel, an attorney whom had never previously appeared before him. Such comments are clearly improper. See Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998)(comments that capital defendant's claims are "bogus and a sham"and are "abject whining"are unnecessary and [do] nothing to further the interests of justice") Mr. Cook submits that the comments made by the lower court in this case are more serious than those at issue in Ragsdale and warrant recusal. Furthermore, the court's accusations are not, as Appellee suggests, borne out by the record. They are not mere "disagreements with the judge's ruling". As explained infra, Mr. Cook properly raised and preserved the public records issue in his motion for rehearing, filed in December 1996 (PCR Supp .16). It was the lower court and not Mr. Cook who was responsible for the subsequent delay by failing to rule on the motion for rehearing until July 1998.

Appellee's attempt to distinguish the instant case from Town Center of Islamorada v. Overby, 592 So. 2d 774 (Fla. 3d DCA 1992) is illusory. In Town Center, the motion to disqualify the judge was made following the judge's comment that the threat of a lawsuit might "warrant disciplinary measures by the Florida Bar." 592 So. 2d at 775. In Mr. Cook's case, the trial court characterized Mr. Cook's counsel' legitimate attempts to pursue public records as a

"sham". Both cases involve personal attacks on counsel which could not but taint the impartiality required of the trial court. "Bias or prejudice against a litigant's attorney is grounds for disqualification where the prejudice is of such a degree that it adversely affects the client". Town Center at 775. The fact that Town Center involved the threat of a collateral action by counsel against the judge is irrelevant. It is the judge's bias and prejudice, against individual counsel, not the specific actions leading to that bias that are grounds for disqualification.

Similarly, the lower court's characterization of counsel's substitution by a second chair attorney as "a waiver...if not openly contemptuous" further demonstrates the state of his prejudice against Mr. Cook's counsel. It indicates that the court's mind was made up against Mr. Cook even as he realized that counsel had delegated the hearing to a second chair lawyer, and before that second chair lawyer had even uttered a single word. As argued supra, the circumstances leading up to the hearing indicated the need for a hearing on public records - a hearing which lead counsel could reasonably delegate to a second chair attorney.[7]

The combination of personal attack and prejudgment of the issues constitutes actual and apparent bias against Mr. Cook and his counsel. It was error for the lower court to fail to recuse

[7] Indeed the fact that counsel chose to send a second chair attorney rather than cause further delay by rescheduling the hearing further refutes Appellee's contention that Mr. Cook intentionally delayed the proceedings.

himself. However, in this case the judge not only failed to recuse himself, but also failed to make <u>any ruling at all</u> on the motion to disqualify him! He then proceeded (after a delay of some twenty (20) months to deny Mr. Cook's motion for rehearing on the denial of Mr. Cook's Rule 3.850 motion. This was a blatant disregard of Rule 2.160 of the Rules of Judicial Administration which provides that "[i]f the motion is legally sufficient, the judge shall <u>immediately</u> enter an order granting disqualification and <u>proceed no further in the action</u>." Rule 2.160(f).(emphasis added). Here the court completely disregarded Mr. Cook's motion to disqualify him and then proceeded to make a further ruling in the case - the denial of Mr. Cook's motion for rehearing. The record of these actions further support Mr. Cook's assertion of the trial court's bias and prejudice against him.

Because the motion was not ruled upon and a delay in excess of thirty days occurred, the lower court automatically should have been be disqualified. <u>See</u> Florida Rule of Judicial Administration 2.160(f); <u>See also Anderson v. Glass</u>, 727 So. 2d 1147 (Fla. 5th D.C.A. 1999). In <u>Anderson</u>, the district court held that the trial court was required to rule upon the motion to disqualify immediately rather than sit on the matter for more than thirty days. As a result, petitioner's writ of prohibition was granted. <u>Id</u>. The district court reasoned that delayed rulings not only slow the litigation process, but undermine confidence in the trial judge's impartiality. <u>Id</u>. The district court's rationale applies

equally to Mr. Cook's situation. Confidence in the lower court's impartiality has been further undermined by his failure to rule on the motion to disqualify it. On remand, Judge Carney should be removed from Mr. Cook's case and an impartial judge selected randomly.

ARGUMENT IV

MR. COOK DID NOT WAIVE HIS THE PUBLIC RECORDS CLAIMS AND IS ENTITLED TO AMEND HIS RULE 3.850 MOTION ONCE THE REQUESTED RECORDS ARE DISCLOSED

The lower court summarily denied Mr. Cook's Rule 3.850 motion without having heard Mr. Cook's outstanding public records claims, and without having permitted Mr. Cook any opportunity to amend his Rule 3.850 motion. The lower court simply ignored the body of law that permits capital post conviction defendants to seek public records in order to develop claims for their Rule 3.850 motions. Indeed the lower court characterized Mr. Cook's public records requests as a "sham", and "just another tool to delay resolution" (PCR.292). At the hearing on November 22, 1996, counsel sought to correct the court's misperception and litigate the public records issue, only to have the lower court deny the issue without any hearing or evidentiary development. Reversal is warranted. See Peede, 24 Fla. L. Weekly at 5391 (Because we are unable to determine the merits of this claim on the present record...we

remand without prejudice for Peede to again present this claim to the trial court").

At the November 22, 1996 hearing, counsel brought the court's attention to two categories of public records - those relating to agencies within Dade County and those relating to agencies outside Dade County. Mr. Cook had filed a motion to compel production of the Dade County public records in April 1996,(PCR.250-259) and argued at the November 22, 1996 hearing that the lower court should hear and rule on this motion to compel. The lower court however did not permit either argument or evidentiary development as to Mr. Cook's Dade County public records demands. Without any hearing on Mr. Cook's motion to compel, the lower court had simply no basis other than personal bias for his conclusion that the public records issue was a "sham", and "just another tool to delay resolution".

Appellee's assertion that the records had been received through the State Attorney's office is irrelevant to Mr. Cook's claim.[8] This Court has consistently characterized the public records process in capital post conviction litigation as a discovery tool. See e.g. In Re Amendment to Florida Rules of

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[8] Appellee notes that "the purpose of public records rules is to facilitate the Defendant's investigation of his post conviction case." Answer Brief at 11 n.3. Mr. Cook entirely agrees with this interpretation. Mr. Cook was not however, as the Appellee contends "complain[ing] that the State has assisted in obtaining and providing records to the Defendant in a timely manner", but rather taking the steps required to ensure completeness, accuracy and validity of the records supplied to him. Counsel for Mr. Cook had the duty to seek and obtain every public record in existence in this case. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S.Ct. 1816 (1995).

Criminal Procedure --Capital Post Conviction Public Records Production, 673 So. 2d 483(Fla. 1996). It is the process of comparison of records from different sources which leads to claims pursuant to, inter alia Strickland v. Washington, 466 U.S. 668 (1984) and Brady v Maryland, 373 U.S. 83 (1963). Mr. Cook is entitled to receive the records from all sources he considered necessary for the development of his post conviction motion, regardless of whether there is some overlap of records supplied by different agencies.

Similarly, Appellee's argument that Mr. Cook somehow waived the chance to litigate public records issues involving out of county agencies is simply absurd. Appellee maintains that Mr. Cook should have pursued the out of county public records via civil suits in their various jurisdictions. This is simply an attempt to confuse the issue. Counsel for Mr. Cook informed the lower court of the newly promulgated Fla R. Crim. P. 3.852 both at the November 22, 1996 hearing and in Mr. Cook's motion for rehearing. Had counsel for Mr. Cook filed civil suits elsewhere, such suits would automatically have been transferred to Dade County upon commencement of Rule 3.852, only to be denied with the motion for rehearing. Mr. Cook consistently maintained that it was the responsibility of the Dade County lower court to hear the Rule 3.852 public records issues - a duty which the lower court strenuously avoided.

Appellee also chides Mr. Cook for not having filed an amended

motion to compel based on the agencies newly within the lower court's jurisdiction. It is difficult to see exactly when Appellee envisages this should have happened. At the date of the hearing, Mr. Cook had until November 30, 1996 in which to file the motion.[9] On November 26, 1996 however, before the time originally set for Mr. Cook to file such a motion to compel, this Court issued an Order tolling the commencement of the new rule. Just four (4) days later, on December 4. 1996 the lower court issued its order summarily denying Mr. Cook's Rule 3.850 motion. This precluded Mr. Cook's counsel from following up with her stated intention. Since the Rule 3.850 motion was no longer pending, Rule 3.852 no longer applied.[10] The only vehicle left for Mr. Cook to preserve his public records claims was a motion for rehearing of the denial of the Rule 3.850 motion, which Mr. Cook timely filed with the lower court.

In Mr. Cook's motion for rehearing he specifically pleaded the forthcoming rule:

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[9] In Re Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production. 683 So. 2d 475 (Fla. 1996), promulgating Fla. R. Crim. P. 3.852 was promulgated by this Court on October 31, 1996. Under this version of Rule 3.852 (d)(2)(D), Mr. Cook had thirty days from October 31, 1996 to pursue additional demands for public records not hitherto within the jurisdiction of the circuit court in which the Rule 3.850 motion was pending.

[10] Under the then newly promulgated version of Rule 3.852 (d)(2)(D),provision was made "In respect to cases in which a capital postconviction defendant has a pending Rule 3.850 or 3.851 motion and counsel for the defendant has been designated on the effective date of this rule.." See In Re Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production. 683 So. 2d 475 (Fla. 1996) In Mr. Cook's case no Rule 3.850 motion was pending as of December 4, 1996 when the lower court had denied it.

> In addition, on October 31, 1996, the Florida Supreme Court promulgated a new rule of criminal procedure to be known as Rule 3.852. According to the dictates of the new rule, defense counsel were allowed 30 days in which to review cases, such as that of Mr. Cook, where public records issues may exist, to decide a course of action in properly litigating these claims under the new rule.[11] See Rule 3.852(d)(2)(A), 3.852(d)(2)(D), 3.852(f)(2), 3.852(i)(2). Under the new rule, this court is now responsible for ruling on public records requests made to state agencies which were previously outside this court's jurisdiction. (PCR.Supp 13)(emphasis added).

He then proceeded to list the agencies that henceforth fell within the Dade court's jurisdiction.

In summary the stated intent to file an amended motion to compel production of public records was not waived but superseded by both this Court's November 26, 1996, tolling of Rule 3.852 and by the lower court's summary denial of Mr. Cook's Rule 3.850 motion. Mr. Cook preserved the issue through his motion for rehearing. To argue otherwise, as Appellee does, would be to make Mr. Cook the victim of a unique accident of timing and deny him due process and equal protection.

The lower court's failure to rule on the motion for rehearing until August 1998 does not impute any waiver of public records issues to Mr. Cook. As noted supra, he properly preserved the public records issues in his motion for rehearing. Moreover the

[11] In an Order dated November 26, 1996,this Court tolled the time period for compliance with the relevant portions of the rule.

court's delay in addressing the motion for rehearing in no way vindicates Appellee's contention that Mr. Cook's public records requests were "just another tool to delay resolution"

The fact that "the defendant has never scheduled any hearing on public records either" as asserted by Appellee (Answer Brief at 12), does not imply any waiver of Mr. Cook's public records requests either. See Jones v. State, 24 Fla. L. Weekly 5290 (Fla. 1999), Wells J. concurring ("The State has the responsibility to have hearings timely scheduled, matters timely called to the attention of the circuit court and records timely and adequately produced"). Mr. Cook had strenuously pursued his public records requests with the various agencies concerned. He then sought the assistance of the lower court in obtaining the records. In April 1996, when the motion to compel the Dade records was filed, no rule of criminal procedure existed requiring Mr. Cook to set a hearing on his motion. The practice throughout Florida at that time was for the trial court to set hearings on motions to compel production of public records. Mr. Cook duly filed a motion to compel and was prepared to litigate this at the first opportunity that presented itself. Appellee's reliance on Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993) is misplaced in this context, since Mr. Cook did exactly what was required of him to put the issue before the trial court.

Furthermore, the fact that Mr. Cook did not set a hearing on public records requests involving the out of county agencies does

not indicate waiver of those requests. Mr. Cook properly preserved the issue in his motion for rehearing. No provision as to responsibility for setting hearings was promulgated in Fla. R. Crim. P. 3.852 (1996)[12]

Even assuming arguendo as Appellee asserts, that Mr. Cook had waived his chance to litigate his outstanding public records issues, this does not in itself constitute waiver of the right to amend his Rule 3.850 motion with material developed from such records as he had so far been able to collect. This Court has consistently remanded cases back to circuit courts and extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Ventura ; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano v. Dugger, 561 So. 2d 54 (Fla. 1990). In these cases, additional time was afforded to litigants to amend Rule 3.850 motions with new claims in light of newly disclosed Chapter 119 materials. Mr. Cook should likewise be given an extension of time and allowed to amend once the requested records have been disclosed.

CONCLUSION

Mr. Cook submits that relief is warranted in the form of a new

[12]However, as demonstrated by later versions of Rule 3.852, this Court has subsequently held it to be the responsibility of the trial court to set a hearing on such motions. See e.g. Fla. R. Crim. P. 3.852 (l)(2)((1999)" The trial court shall hold a hearing on the objection or motion on an expedited basis."(emphasis added).

trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Cook relies on the arguments set forth in his Initial Brief and on the record.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 15, 1999.

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