IN THE SUPREME COURT OF FLORIDA

GREGORY ALAN KOKAL,

Appellant,

vs. CASE NO. 90,622

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

Kokal attacks his conviction and death sentence, contending primarily that his trial counsel was ineffective at both the guilt and penalty phases of his trial. Because analysis of the ineffectiveness claims requires examination of both the evidence presented at the original trial and the evidence presented at the 3.850 hearing, the State will refer to both trial and postconviction records in its brief. The original trial record will be cited as TR 1 through TR 9. The record on appeal in this 3.850 proceeding will be cited as R 1 through R 5.

STATEMENT OF THE CASE

Kokal was found guilty of first degree murder in October of 1984 (TR2 228). Following a sentence hearing, the jury unanimously recommended a death sentence (TR2 236). The trial judge imposed a death sentence, finding four aggravators: (1) murder during a robbery, (2) murder committed to avoid arrest, (3) murder was heinous, atrocious or cruel, and (4) murder was cold, calculated and premeditated (TR2 254-56, 258). On appeal, this Court affirmed both conviction and sentence. Kokal v. State, 492 So.2d 1317 (Fla. 1986).

On September 26, 1988, Kokal filed a motion for postconviction relief pursuant to Rule 3.850. An amended motion was filed on May 18, 1992. The denial of this amended motion forms the basis of this appeal.[1] Judge Hugh Carithers was assigned to preside over this case in 1996. Subsequently, on October 28, 1996, Kokal's original postconviction counsel, the Office of the Capital Collateral Representative, was granted leave to withdraw, and Jeff W. Morrow was appointed to represent Kokal (R 297). Following a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), Judge Carithers determined that Kokal's claim I was moot, that claims II,

[1] Kokal also filed two supplemental motions later in 1992, raising, first, a Chapter 119 claim and, second, for the first time ever, a claim that the HAC jury instruction was unconstitutional. The 119 claim is now moot, State v. Kokal, 562 So.2d 324 (Fla. 1990), and the HAC claim was procedurally barred for failure to object at trial or on appeal and also for failure to raise it within two years after the judgment and sentence became final. These supplemental motions are not at issue on this appeal.

V, VI, VII, X, and XI were procedurally barred, that claims VIII and XIII required no additional evidence, and that claims III, IV and XII required additional evidence (with the exception of that portion of claim III complaining about trial counsel's failure to object to the HAC and CCP jury instructions, which was procedurally barred). Order of July 30, 1996, as clarified by order of February 4, 1997).[2]

An evidentiary hearing was conducted February 11 and 12, 1997. Following the hearing, both parties submitted memoranda. In a 12-page order dated April 11, 1997, Judge Carithers rejected Kokal's claim that his trial counsel was ineffective at either phase of the trial, and found that Kokal had failed to show that the grand jury which had indicted him was improperly impaneled, or that his rights under Brady v. Maryland, 373 U.S. 83 (1963) were violated. Judge Carithers denied the motion to vacate (R 296-307).

STATEMENT OF FACTS

A. The evidence presented at trial

1. The guilt phase. At 7:15 a.m. on the morning of September 30, 1983, navy diver Robert Garon discovered a body lying on the beach at the Hanna Park Recreational Facility (TR7 454-55). There was a pool of blood under the victim's head. A broken cue stick lay nearby (TR7 475, 515). Garon checked for identification on the

[2] These two orders and other matters are not at this time included in the record on appeal. Concurrently with the filing of this brief, the State is filing a motion to supplement the record.

body and found none (TR7 456). Police were called to the scene. The victim was identified when police discovered his wallet, containing a Navy identification card with his photograph on it, lying on the park exit road (TR7 472). Nothing but his identification card was in the wallet (TR7 472).

The victim had suffered multiple blunt impacts to the head, inflicted while he was still alive and trying to defend himself (TR7 517, 523). In addition, it was discovered during the autopsy that the victim had been shot in the head and that the gunshot wound was the cause of death (TR7 517). Police had not known this beforehand, and did not release this information (TR7 546-47). The bullet was recovered from the victim's clothing (TR7 520).

At 11:45 a.m. of the day the victim's body was discovered, Jacksonville police officer David Mahn stopped a 1975 Ford pickup truck with Arizona tags (TR7 524-25). Kokal was the only occupant of the truck (TR7 526). Officer Mahn obtained from Kokal a current Florida driver's license in Kokal's name, a New York driver's license belonging to the victim and the Colorado driver's license of William O'Kelly (TR7 526-27). Under the seat of the truck, officer Mahn found a Reuger .357 revolver (TR7 528).

On October 5, 1983, Eugene Mosley called the police to report that he had information about someone having been shot in the head at the beach (TR7 547-48). After talking to Mosley, police obtained an arrest warrant for Kokal and arrested him (TR7 548).

Mosley testified that he had been Kokal's friend at the time of the crime and that he had stopped by Kokal's house the evening of September 30, 1983 (TR7 550). Kokal told him that he had "wasted a guy ... over a dollar" and that he and his buddy were preparing to flee to Canada (TR7 551). Kokal stated that he and William O'Kelly had picked up the victim on Mayport Road, driven to Hanna Park, got out of the truck, and then Kokal--with O'Kelly's assistance--had beaten the victim on the head with a cue stick (TR7 552). According to Kokal, the "guy wouldn't ... hardly go down." They just kept beating him, finally got him on the ground, and continued to kick him and beat him, while the victim pleaded for his life (TR7 552-53). Then Kokal just "took a gun and held it to [the victim's] head and shot him" (TR7 552). Kokal stated that he had killed the victim because "dead men can't tell lies" (TR7 554). Kokal thought the bullet would go into the sand and that no one would be able to identify the gun, and that the sand would prevent any fingerprints from getting on the cue stick (TR7 553-54). Kokal admitted that the purpose of the attack had been to rob the victim (TR7 553).

A tire on the Ford pickup Kokal had been driving was matched to a tire track at the scene of the murder (TR7 607). Kokal's Nike shoes were matched to prints found at the scene (TR7 614); one of his shoes had human blood on it of the same type as the victim's (TR7 636-37). Kokal's fingerprints were found on the .357 Magnum revolver recovered from the Ford pickup truck (TR7 619), and the

.357 was identified by ballistics examination as the murder weapon (TR7 648).

Two witnesses testified for the defense at the guilt phase of the trial: William O'Kelly and Kokal himself. O'Kelly acknowledged during his testimony that he had written a letter to Kokal in November of 1983 in which he (O'Kelly) admitted being the triggerman (he claimed the shooting was an accident) and admitted having taken the victim's drivers' license after shooting him (TR8 694-95). On cross-examination, he claimed that he had written the letter in an effort to get both Kokal and himself "off the hook" (TR8 696). The truth, O'Kelly testified, was that they had picked up a sailor and that Kokal had robbed him of his wallet, beaten him with a cue stick and shot him in the head with O'Kelly's .357 (TR8 703-05). On redirect, O'Kelly acknowledged that, in the last paragraph of the letter, he had sworn that the facts therein were true (TR8 710). He also acknowledged that if he was going to lie to get both of them "off the hook," it would have been just as exculpatory if O'Kelly had said that Kokal had shot the victim accidentally instead of stating that he (O'Kelly) had done so (TR8 711-12).

Kokal testified that he had met O'Kelly in the summer of 1983 and that they had been friends since (TR8 715-16). O'Kelly owned a .357 firearm and had let Kokal fire it on maybe a "dozen" occasions (TR8 717). Kokal testified that on the day of the shooting, he had awakened at 2:00 p.m. and had spent the day

drinking and smoking (TR8 719-20). Around midnight, he and O'Kelly left the house, headed for the beach. Kokal drove (TR8 720). They brought a bottle of rum and some marijuana (TR8 721). Sometime early in the morning, after drinking half the bottle of rum and smoking three joints, they picked up a hitchhiker (TR8 721-22). The hitchhiker wanted to smoke pot, too, so they went to Hanna Park to "get high, to drink and to listen to music" (TR8 723). After parking on the beach, Kokal left the truck to relieve himself on the beach. When he returned, O'Kelly had his pistol "in the guy's face" (TR8 724). Kokal testified that by this time, he was "Pretty drunk" and "quite stoned" (TR8 725). When he saw the gun, he was scared, because he had seen O'Kelly shoot at people before (TR8 726). O'Kelly told the victim to turn around, struck him in the back of the head with the gun, and reached into his back pocket and took his wallet (TR8 727-28). Then O'Kelly grabbed Kokal's cue stick out of the truck and hit the victim over the head with it (TR8 728-29). The cue stick broke. O'Kelly picked up one of the pieces, and forced the victim to march to the beach and to lie down (TR8 729-31). Kokal watched him repeatedly strike the victim with the cue stick (TR8 731). After the stick broke again, Kokal stated to O'Kelly that he was "getting the hell out". He and O'Kelly walked back to the truck. After Kokal started the truck, however, O'Kelly ran back to the victim (TR8 732). Kokal "heard a blast and seen a flash." Then O'Kelly ran back to the truck. According to Kokal, "[O'Kelly] said he just wasted the fucker, to be more

specific he said I smoked the fucker" (TR8 733). As they left, O'Kelly went through the victim's wallet. He found only some identification and a dollar. He tossed the wallet out the window (TR8 733-34).

Kokal claimed that he had not called the police to report this crime that he had witnessed because he was scared and because he was on probation (TR8 736). He did tell Mosley about the crime later, but he had not stated "I" killed the guy; instead, he had said "we" had killed the guy. Mosley was mistaken because he had been drinking (TR8 738). Kokal had said "we" killed the victim only because he was trying to make himself "look big" (TR8 738). Although O'Kelly's letter was not accurate to the extent that O'Kelly claimed that the shooting was an accident, O'Kelly had correctly identified himself as the shooter (TR8 744).

On cross-examination, Kokal admitted that he had been stopped by officer Mahn because he had driven away from a gas station without paying for the gas. He acknowledged that stealing gas was a violation of the terms and conditions of his probation (TR8 746-47). He insisted, however, that his probationary status was a reason he didn't report the crime O'Kelly had committed (TR8 749). He denied telling Mosley that he had "wasted" a sailor; he insisted that he had used the word "killed" to Mosley (TR8 752). He denied having said most of the other things Mosley testified he had said (TR8 753-57).

2. The penalty phase. On October 12, 1984--eight days after the jury returned its October 4, 1984 guilty verdict--the presentation of the penalty-phase evidence began. The State recalled the pathologist, who gave further testimony as to the wounds inflicted to the victim. Initially, the pathologist testified, the victim was conscious and face-to-face with his assailant, fending off the attack. At the very end of the attack, he was struck in the head hard enough to render him unconscious. He was probably unconscious (and incapable of defending himself) when he was shot. The beating itself, the pathologist testified, fractured the victim's skull and could have caused the victim's ultimate death even if he had not subsequently been shot (TR9 863). The shooting itself was execution style, the muzzle of the gun being less than two centimeters from the victim's head when the gun was fired (TR9 867).

The defense called Kokal's mother. She testified that she and Kokal's father had divorced seven years earlier, when Kokal was thirteen or fourteen (TR9 875). Kokal's father had physically abused him (TR9 876). She described an instance when the father had struck Kokal with a tennis racket, severely gashing his head (TR9 877). Another time, the father had locked Kokal in his room for a week, chained to his bed, with nothing to eat except sweet potatoes (TR9 877). She testified that the abuses were frequent and severe (TR9 878). She finally left her husband in 1977 (TR9 878). She testified that she had sought counseling for her son

(TR9 879), but that he kept getting into trouble; although Kokal had “love, compassion and ... a lot to offer (TR9 879), he “mostly would do what he wanted to,” which was to drink (TR9 881). On cross-examination, she acknowledged that her son had attended counseling for several years and that since 1977 her son had not suffered any physical abuse (TR9 883).

B. The evidence presented at the 3.850 hearing in 1997

Kokal first presented the testimony of Dr. Barry Crown, a neuropsychologist (R3 316). Dr. Crown examined Kokal in prison on June 20, 1996 (R3 316). He also reviewed the pretrial psychiatric evaluation of Dr. Virzi, conducted in 1984, as well as medical records from Memorial Hospital of Jacksonville (R3 316-17). In his opinion, Kokal had suffered brain damage in a 1983 car wreck and that brain damage, coupled with the consumption of a large quantity or 151 proof rum on the evening of the murder, would have diminished Kokal’s ability to conform his conduct to the requirements of the law, and would also have put him under extreme mental or emotional disturbance at the time of the crime (R3 317-19).

On cross-examination, Dr. Crown acknowledged that he had not issued a written report (nor did he produce copies of the results of the neuropsychological tests he administered to Kokal) (R3 332, 338). He acknowledged that Kokal’s brain damage was not severe enough that it alone would have significantly impaired Kokal at the time of the crime; it would have been the “combination” (R3 332).

Dr. Crown gave “no significance whatever” to Kokal’s apparent ability to give a detailed recitation of the facts of the crime to Dr. Virzi in 1984 (R3 345). Kokal’s apparent good memory of the events of the crime would have no bearing on Dr. Crown’s conclusion that Kokal suffered organic brain disorder at the time of the crime (R3 347). Dr. Crown agreed with Dr. Virzi’s 1984 report that Kokal had a clear idea of what had happened (R3 352-53). However, in Dr. Crown’s opinion, one can have organic brain disorder and be under the influence of alcohol and drugs during the commission of a crime and still remember everything in detail (R3 347). Although Dr. Crown also agreed with Dr. Virzi’s opinion that Kokal had understood the consequences of his actions, he nevertheless thought that Kokal had difficulty understanding long-term consequences (R3 352-53). However, Dr. Crown did not agree that Kokal’s post-crime preparations to flee to Canada were necessarily significant to any evaluation of Kokal’s difficulty understanding long-term consequences (R3 357).

Dr. Crown acknowledged that Kokal had successfully completed his G.E.D. and that he had successfully completed junior college courses (R3 360). These facts were not inconsistent with his opinion that Kokal was brain-damaged. Kokal could function normally; sometimes his switch just needed to be jiggled a bit (R3 360-61). The “casual observer” might not realize that Kokal had any problems (R3 361).

Although Dr. Crown's only information about how much Kokal had been drinking came from Kokal himself, and although Dr. Crown earlier had stated that it was the combination of brain damage and alcohol intoxication that would have impaired Kokal on the night of the crime, nevertheless, Dr. Crown testified that it would not have been significant to his analysis if Kokal had lied to him about how much he had had to drink the night of the crime (R3 366).

Dr. Crown had never seen any of the trial transcripts (R3 367), any of the affidavits that CCR had obtained from family members (R3 371), or any of the jail records, and was not aware that Kokal had feigned illness in order to receive preferential treatment in jail (R3 369). Such matters, like virtually all of the circumstances of the crime and of Kokal's behavior before and after the crime, were irrelevant to Dr. Crown (R3 368-69). Likewise, Dr. Crown found no significance in the fact that Kokal had taken a cross-country motorcycle trip soon after his 1983 automobile accident that supposedly was so severe that it caused brain damage, and he attributed no significance to hospital records of the accident that (a) ruled out significant head injury, (b) indicated that Kokal's condition after the accident was due to alcohol, not head injury, and (c) reported that Kokal was doing well when discharged (R3 382-85). Finally, Dr. Crown did not deem it significant that prison evaluations found that Kokal was not suffering from any mental disorders and did not need counseling (R3 389).

Next, Dr. Virzi testified. He stated on direct examination that he has been a psychiatrist since 1966 (R3 395). He examined Kokal in 1984 at the request of Dale Westling, Kokal's attorney at trial, for an "insanity type of evaluation" (R3 396). To Dr. Virzi's knowledge, Westling gave him no background information (R3 396). Dr. Virzi testified that he had not conducted an independent background investigation, and that Westling had not asked him to evaluate Kokal for mitigation (R3 399-400). After trial, Dr. Virzi was supplied background information about Kokal and found out about his alcohol and substance abuse problems (R3 402-03). Dr. Virzi was now of the opinion that Kokal's alcohol and drug abuse disturbed him emotionally at the time of the crime, and that Kokal had "diminished capacity" to understand right from wrong (R3 404-05).

Dr. Virzi acknowledged on cross-examination that his addiction specialty was "not around" in 1983 (R3 408). He acknowledged that his file had been lost, and that he could have had conversations with Westling about the case that he no longer recalls (R3 411-12). In fact, it was "standard" practice, and Dr. Virzi's "assumption" that Westling gave him at least some information over the telephone (R3 422). Furthermore, he acknowledged that he had sufficient skills to obtain relevant background information from a patient like Kokal (R3 466), that he was aware of Kokal's history of drug and alcohol use when he conducted his original evaluation in 1984 (R3 453), and that he had enough information even then to conclude

that Kokal could have suffered diminished capacity due to alcohol abuse (R3 451-52). He acknowledged that Westling had not asked him to do an incomplete evaluation (R3 420), and that it would have been his normal practice in 1984, as a psychiatrist with (even at that time) over 15 years experience, to do a psychosocial evaluation and to consider any prior traumatic events or accidents that might affect a person's capacity to commit the crime (R3 421-22). Dr. Virzi was not sure whether or not he had conducted the follow-up MMPI examination referred to in his written 1984 report (R3 456-61). He had testified in his deposition that his recollection was that he had administered an MMPI, but "right now" he did not think that was a correct recollection (R3 468). Dr. Virzi explicitly acknowledged that his examination of Kokal was on potential mitigation as well as sanity and competence (R3 426-27). He also acknowledged that one's memory generally is more impaired the more one drinks (R3 437) and that if a defendant is able to give a detailed and accurate description of the events surrounding a crime, "then there would be no evidence of any diminished capacity" (R3 446); if Kokal could walk, talk, strike someone, drive a car and give precise details of an event, that would have a "tremendous effect" on Dr. Virzi's findings (R3 448). Dr. Virzi still agreed with everything he had found in his original report (R3 469). When he examined Kokal in 1984, he saw no evidence of organic brain disorder (R3 473); Kokal was functioning normally (R3 475).

Kokal's father testified briefly. He could not recall whether or not he had told trial counsel about Kokal's car accident a few months before the murder (R4 527). He did recall that he had told Westling that he did not want to be involved at all in the trial (R4 527-28).

Kokal's trial attorney Dale Westling testified that he has been a member of the bar since 1975 (R4 595). He was an assistant state attorney until 1978 (R4 532), prosecuting, as he recalls, some 76 cases (R4 595). In 1984, his practice was probably 85 to 90 percent criminal law (R4 596). He had handled first-degree murder and death-penalty cases as a prosecutor and, as a private practitioner, had handled four or five first-degree murder cases in which he had been successful in avoiding a death-penalty phase (R4 532-33). He was retained, not court appointed, to represent Kokal (R4 598).

At the outset of his representation of Kokal, Westling collected all the police reports and read them (R4 599). He investigated Kokal's medical, criminal and social background (R4 545), visited Kokal "numerous times" and also talked to him by telephone almost every day (R4 599). Westling took many depositions (which disappeared after Westling turned his file over to CCR) (R4 600), and reviewed and indexed all the depositions in preparation for trial (R4 600-01). Westling discussed this evidence with Kokal (R4 617). Although Kokal initially claimed that O'Kelly had beaten the victim with the cue stick, when

confronted with “all the evidence that [the State] had,” Kokal confessed, and gave a detailed recounting of the crime and of his role in it (R4 615-17). Kokal knew “every step that occurred that evening with great specificity (R4 619), and his description of the crime was perfectly consistent with the physical evidence (R4 626).

Westling testified that he had asked Kokal why he had done it. Kokal answered: “Dead men tell no lies. That’s why I did it.” Then he said, “and you know what, the mother fucker only had a dollar.” Westling stated that Kokal showed no emotion and no remorse when making these statements (R4 623). It was, Westling testified, “chilling at the time” (R4 618).

Westling testified that, overall, his strategy at the guilt phase of the trial was to stress the alcohol as much as he could along with the fact that O’Kelly had been allowed to plead guilty to second-degree murder, and to urge a theory that although the crime had occurred much as the State contended that it had, O’Kelly had been the triggerman (R4 614). Put another way, “our defense at trial was everything the government witnesses were going to say was true except you had to take the word O’Kelly and exchange it for Kokal and take the word Kokal and exchange it for O’Kelly” (R4 534). Kokal not only agreed with this approach, he insisted on testifying personally that he had not murdered the victim (R4 621). Westling drafted a document which he asked Kokal to sign, stating:

> I, Gregory Kokal, acknowledge the fact that my attorney has advised me against testifying untruthfully in my trial. He has specifically told me that perjury is a

> felony and that it is a crime. Nevertheless I have instructed him to call me as a witness and to "ask what happened." He has asked me to sign this statement as evidence that I acknowledge his advice.

(R4 621-22). Kokal's trial testimony was in fact contrary to his confession to Westling and contrary to what he had told Dr. Virzi (R4 622).

Asked how these matters affected any potential strategy of pursuing a voluntary intoxication defense, Westling answered, "Well, besides the fact that I have never seen in 25 or 22 years that defense work, besides the fact that it was our defense that he didn't do it and you don't plead alternative theories in a criminal trial like we do in civil cases, the fact that he was so specific in his memory and so articulate in telling me exactly what occurred and why he did it showed to me that there was no way in the world he was intoxicated" (R4 623-24). Kokal never gave the "slightest indication" that he had been "in any way impaired" at the time of the crime (R4 619).

As for his failure to object to the gun when it was admitted in evidence, counsel explained that, although he did not recall whether or not he had objected at trial, not objecting would have been consistent with the defense strategy of not disagreeing with the facts presented by the State, but arguing instead that those facts were not inconsistent with the defense theory of the case that the codefendant, and not Kokal, had killed the victim (R4 591). The same was true of his cross-examination of Mosley;

instead of attempting to portray Mosley as a liar, he attempted to show that Mosley was mistaken about whether Kokal had said “I” did this or “we” did this because he had been intoxicated when he had talked to Kokal (R4 628-31). As for his decision to call O’Kelly as a defense witness, Westling explained that although O’Kelly was not a completely favorable witness, calling him as a defense witness allowed Westling to get O’Kelly’s letter in evidence in which O’Kelly had admitted being the killer, which, of course, was precisely the defense theory of the case. Without O’Kelly’s letter, there was no evidence to corroborate Kokal’s own testimony that O’Kelly was the real killer; therefore, the benefits of O’Kelly’s testimony, Westling concluded, outweighed the risks (R4 635-38).

Westling testified that he began thinking about penalty-phase strategy from the moment he was retained to represent Kokal (R4 643). He asked Kokal at the outset if he had any physical or mental disabilities or handicaps and Kokal told him no (R4 556). He talked to both Kokal’s mother (R4 545) and to his father (R4 531-32). The father refused to get involved (R4 532). However, Westling “spent a lot of time with Mrs. Kokal” (R4 548). He told her that she could testify to just about anything in mitigation (R4 546). However, despite spending a considerable amount of time with both Mrs. Kokal and with the defendant, and reminding both of them of the importance, for mitigation, of any background evidence that might explain why Kokal had turned out bad, neither of them told

Westling about a near-drowning episode in 1977 (R4 579-80) or about an automobile accident occurring six months before the murder (R4 555-56).

Kokal was “very astute” (R4 545), “incredibly bright, responsive, always appropriate in his remarks and responsive in responses, interested in the case” (R4 580). He was mature for his age, being in fact an accomplished criminal at age 20 (R4 581). Westling knew from Kokal’s rap sheet that he had “an incredibly extensive criminal history” and concluded that it would not be a good idea to place that history before the jury (R 581-84. Although Westling knew from talking to Kokal that he had committed the crime and that he had not been intoxicated at the time of the crime, he obtained a confidential expert mental-health evaluation “just on the off chance that a person that causes murder hopefully cannot be what we call normal” (R4 562). Westling gave Dr. Virzi background information (R4 564), including information that Kokal “had been drinking all night [and] using marijuana” (R4 565). Westling got “no psychiatric help” from Dr. Virzi. After receiving Dr. Virzi’s written report, Westling telephoned Dr. Virzi. He asked, is “this all you have to offer, is there anything else, and he said no” (R4 562-63). Dr. Virzi told him that Kokal “knew exactly what he was doing” (R4 563). Westling persisted, asking Dr. Virzi if he had “anything that can help me;” did he think Kokal had been “real drunk that night” (R4 653). Dr. Virzi again answered no, that he had found no evidence of that. Dr. Virzi even

"got a little snotty" about the question, pointing out that he had stated in his report that Kokal "had a clear idea of what happened" during the murder (R4 653). Moreover, if Westling had called Dr. Virzi as a witness, his report would then have been discoverable by the state (R4 567). Even if Dr. Virzi had changed his mind and tried to testify about diminished capacity at the penalty phase, there was still the written report to the contrary--that Kokal had a very clear understanding of what had occurred the evening of the murder and had no delusions (R4 561, 653), which the state could have used against Kokal. Furthermore, Dr. Virzi's report "would have given the state three or four aggravating circumstances in and of itself" (R4 548, 561). Any benefit from Dr. Virzi's testimony would have been outweighed by what the State could have done with the report and in its cross-examination of Dr. Virzi (R4 567). In Westling's opinion, Dr. Virzi would have been a "devastating witness" against the defense (R4 561).

The final witness to testify at the hearing below was Kokal's mother. She could not recall telling Westling about Kokal's near-drowning experience at the Slippery Dip in 1977 (R4 689), and she "really" did not think she had told him about her son's automobile accident in 1983 (R4 690). She acknowledged that her son had taken a long motorcycle trip after the 1983 car accident, and that he had been in trouble with the law before 1983 (R4 693-94).[3]

[3] Attorney Charles Cofer also testified, over objection by the State, as a defense expert witness (R3 487 et seq). The State

C. Judge Carithers' order

Judge Carithers first addressed Kokal's claim of ineffective assistance of counsel at the guilt phase. He concluded that Westling had not performed deficiently in failing to raise a formal defense of voluntary intoxication because Kokal had a clear memory of the events surrounding the killing, because his own expert would not have corroborated such a defense, and because such defense would have been inconsistent with the defense strategy of blaming someone else for the shooting. Furthermore, Kokal had failed in any event to demonstrate prejudice from trial counsel's failure to pursue a voluntary intoxication defense (R 298-99). Other alleged shortcomings at the guilt phase (not objecting to the gun, calling O'Kelly as a defense witness, and cross-examining Mosley) were a matter of sound and acceptable strategy, Judge Carithers found (R 300-01).

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insisted below and insists now that his testimony was irrelevant. Whether or not an attorney's trial tactics are reasonable "is a question of law," not fact. Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992). The test for reasonable attorney performance "has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial .... [W]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately." White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992). See Jefferson v. Zant, 431 S.E.2d 110, 112 (Ga. 1993)(trial court "correctly determined that opinion testimony from other attorneys concerning the performance of [defendant]'s trial attorneys was irrelevant").

As for the penalty phase, Judge Carithers first expressed doubt that the admission of Dr. Crown's testimony would in reasonable probability have resulted in a different sentence, but found that Kokal had failed in any event to demonstrate a reasonable likelihood that such testimony could reasonably have been developed in 1984 (R4 303-04).

Although Judge Carithers questioned whether reasonable counsel would wait until after the guilt phase was completed to begin preparations for the penalty phase (R 304), he found that Kokal had "in the end" failed to prove either deficient attorney performance or prejudice as to trial counsel's use of Dr. Virzi (R 306). Judge Carithers noted that, despite what Dr. Virzi had learned since 1984 about this case, including information about possible brain damage provided by Dr. Crown, Dr. Virzi's "opinion regarding the Defendant had not changed." His opinion was, and is, that although Kokal may generally have had some diminished mental capacity as a result of his history of drug and alcohol abuse, his "apparent ability to vividly recall the events of the murder, combined with his ability to function in terms of walking, talking, and driving a car, militated against any concept of specific diminished mental capacity with regard to this crime" (R 305). Had Westling called Dr. Virzi as a witness, the State could effectively have cross-examined him, especially in light of Dr. Virzi's own report indicating his belief that Kokal understood the consequences of his

actions (R 305). Thus, trial counsel's decision not to call Dr. Virzi as a witness was neither unreasonable nor prejudicial.

"Likewise," Judge Carithers noted, "the Defendant has failed to adduce any other evidence as to how he may have been prejudiced by any supposed deficiency in preparation for the penalty phase" (R 306).

SUMMARY OF ARGUMENT

There are four issues on appeal: (1) and (2) Judge Carithers properly determined that Kokal had failed to prove that he was denied effective assistance of counsel at either the guilt or penalty phases of his trial. Kokal's trial counsel, Dale Westling, was an experienced criminal-law attorney with significant capital-murder trial experience, both as a prosecutor and as a defense attorney. Faced with a case in which the state had strong evidence of guilt and a client who Westling in fact knew was guilty because he had confessed to him, but who insisted on testifying in his own behalf, Westling pursued a theory of defense that Kokal was present at the scene of the crime, but his co-defendant (who had been allowed to plead to second-degree murder) had killed the victim. This strategy clearly was not so unreasonable under the circumstances that no reasonable attorney would have pursued it. Furthermore, Kokal has not demonstrated that any witnesses could have been presented to support a theory that Kokal was so intoxicated that he could not have formed the intent to commit the crime. In fact, his own experts--Dr. Virzi and attorney Charles Cofer--acknowledged that Kokal's clear memory of the crime would have been inconsistent with intoxication, and, furthermore, the manner in which the crime was committed is inconsistent with any theory that Kokal was so impaired he was unable to form the intent required for committing murder. As for the penalty phase, Kokal has failed to demonstrate that a reasonably diligent attorney could

have discovered and presented testimony about possible brain damage. Kokal manifested no mental impairments at all, either to Westling or to the psychiatrist who evaluated Kokal in 1984. Nor did Kokal or any member of his family bother to tell Westling about an automobile accident he was in 1983. Furthermore, Dr. Crown's testimony that Kokal had suffered brain damage in an auto accident in 1983 is not supported by medical records or other facts and circumstances of the crime or by Kokal's behavior before and after the crime--all of which Dr. Crown considered irrelevant to his analysis. And Dr. Virzi's testimony shows that his conclusions about Kokal's mental condition at the time of the crime are the same as they were in 1984. Kokal has failed to demonstrate either deficient attorney performance or prejudice. (3) and (4) These issues are both procedurally barred as matters that could have been, should have been, or were raised on direct appeal. In addition, they are clearly without merit.

ARGUMENT

ISSUES I AND II

KOKAL HAS FAILED TO PROVE THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE AT EITHER THE GUILT OR THE PENALTY PHASE OF HIS TRIAL

In his first two issues on appeal, Kokal contends that his trial counsel was ineffective at the guilt and penalty phases of his trial. The test for judging ineffectiveness claims is set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The defendant must make both showings, i.e., both deficient performance and prejudice. Ibid;, Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). This standard is, and is supposed to be, "highly demanding." Kimmelman, 477 U.S. at 382. Only those defendants who can prove "that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Ibid. The test is not "how present counsel would have proceeded" to represent the defendant, Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995), but whether any reasonable attorney

could have proceeded as did trial counsel. Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) ("Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied). Trial counsel is presumptively competent, and second-guessing counsel's performance through the filter of hindsight should be avoided. Strickland v. Washington, supra, White v. State, 664 So.2d 242 (Fla. 1995); Phillips v. State, 608 So.2d 778 (Fla. 1992).

Kokal's trial counsel was an experienced criminal-law attorney with significant capital-murder trial experience. See Gates v. Zant, 863 F.2d 1492, 1498 (11th Cri. 1989) (the more experienced the attorney, the more deference is owed to his judgment about how much investigation is sufficient and what defenses to pursue). It is the State's contention that Kokal has done no more than to second-guess his trial counsel's decisions through the filter of hindsight; he has failed to meet the "highly demanding" burden of proving deficient attorney performance or prejudice. Although Kokal addresses the penalty phase first in his brief, the State will present argument as to trial counsel's guilt phase performance first, and then his penalty-phase performance.

A. Trial counsel was effective at the guilt phase.

As Judge Carithers noted at the evidentiary hearing, Kokal presented very little testimony relating to ineffectiveness at the guilt phase. In fact, when assistant state attorney Plotkin questioned Westling about the pre-trial hearing on the motion to suppress, Judge Carithers asked Plotkin, "Why are we going into all this?" (R4 608-09). Although there were allegations in the 3.850 motion about Westling's performance at the hearing on the motion to suppress, the defendant had not elicited any testimony in support of those allegations, and Judge Carithers was under the impression that "unless and until the defendant raises testimony tending to indicate that there is any kind of issue whatsoever in this 3.850, the fact that it's in the motion doesn't have anything to do with it. . . . [I]f it's something that I have ruled requires evidence and there is no evidence on it then it's waived" (R4 609-10). Kokal's postconviction attorney then stated:

> "I don't have anything on the suppression issue other than he didn't object to the entrance of the gun at trial which the Supreme Court said it wasn't preserved. That's the only thing I asked him about. I don't know why this is--we need to go into all of this.

(R4 610). Despite this statement, Kokal now devotes several pages of his brief on appeal to a claim that Westling performed deficiently at the hearing on the pre-trial motion to suppress. Initial Brief of Appellant, pp 41-44. The State would contend that any such issue has been explicitly waived. Postconviction counsel had every opportunity to offer evidence on this issue, and declined to do so, even in the face of an explicit warning that his failure

to present evidence on the issue would amount to a waiver. The State would note, however, that Westling testified that he had allowed Kokal to testify at the hearing on the motion to suppress only for the very limited purpose of establishing his standing; it would have been "stupid," Westling testified, to have allowed Kokal to be cross-examined about the facts of the case at the hearing on the motion to suppress (R4 607-08). In addition, at the time of the hearing on the motion to suppress, the co-defendant was unavailable to testify for Kokal (R 612). No deficient attorney performance has been demonstrated here.[4]

As for Westling's failure to object to the gun when it was introduced at trial, Westling legitimately could have concluded that, given the trial court's denial of the motion to suppress, further objection not only would have been futile, but, worse, would have conveyed to the jurors that he was trying to keep relevant evidence from them. Objecting to the gun in the presence of the jury would have been inconsistent with the defense theory

[4] Kokal claims that counsel could have put on evidence to refute officer Mahn's testimony that he had become suspicious when he found three pieces of identification in the truck. First of all, Mahn became suspicious because Kokal had driven off from a gas station without paying for the gas. The .357 magnum he found under the seat of the truck did nothing to allay suspicion. Second, Kokal had ample opportunity to present evidence contradicting Mahn's testimony about the ID's at the 3.850 hearing and chose not to do so. Thus, he has failed even to offer evidence, much less to prove, that Mahn's testimony about the ID's could have been refuted; therefore, he has failed to prove prejudice.

that the only thing wrong with the state's case was its identification of Kokal rather than O'Kelly as the real killer.

"Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is with the range of what is expected of reasonably competent counsel." Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982). Westling's decision not to object to the gun at trial was not "so patently unreasonable that no competent attorney would have chosen it." Haliburton v. State, 691 So.2d 466, 471 (Fla. 1997) (quoting federal cases). Moreover, Kokal can demonstrate no prejudice, because although this Court found on direct appeal that trial counsel had not preserved for appeal any issue of the seizure of the gun, this Court held in the alternative that there was no merit to Kokal's claim that the gun had been illegally seized. Kokal v. State, supra, 492 So.2d at 1320. Thus, and objection would have been fruitless.

Westling's decision not to present mental-health expert testimony at the guilt phase was not deficient performance. First of all, voluntary intoxication is a defense to first-degree murder only if the intoxication renders the defendant incapable of forming the intent to commit the crime. Gardner v. State, 480 So.2d 91 (Fla. 1985). Westling testified that Kokal had a "very clear" memory of the crime; "[t]he fact that he was so specific in his memory and so articulate in telling me exactly what occurred and why he did it showed to me that there was no way in the world he

was intoxicated" (R4 618, 624).[5] Kokal's own witnesses at the 3.850 hearing acknowledged that a clear memory of the crime would be inconsistent with intoxication; both Dr. Virzi and attorney Charles Cofer agreed that a good, clear recollection of the crime by Kokal would be inconsistent with intoxication (R3 448-49, 507-08). Furthermore, nothing in Dr. Virzi's report back in 1984 would have supported a conclusion that Kokal was so intoxicated as to be incapable of forming the intent to commit murder. Even now, when postconviction counsel has enjoyed "the luxury of time and the opportunity to focus resources on specific parts of a made record," Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), Dr. Virzi still has not been furnished any information to indicate that Kokal was so intoxicated as to be incapable of forming the intent to kill; Dr. Virzi testified that "[t]here is no change in my diagnosis," and he still agrees with everything he said in his initial 1984 report (R3 469).

Second, the difficulty with an intoxication defense is that as a practical matter it amounts to a confession and avoidance, and insisting on such a defense tends to undermine any argument that the defendant was not the killer. Even if it is not legally

[5] At page 17 of his brief, Kokal suggests it was improper for Westling to have revealed in his 3.850 testimony the contents of his pre-trial conversations with the defendant. The State would note that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." Strickland v. Washington, supra, 466 U.S. at 691.

inconsistent to argue that "my client didn't do it, but if he did, he was drunk," it is likely to sound that way to a jury. Westling testified that in his experience, he has never seen a jury accept a voluntary-intoxication defense (R4 568, 614), and that he considered it a defense of "last resort" (R4 615). Even Kokal's own "expert" attorney witness acknowledged that jurors have a "hard time" accepting the intoxication defense (R3 507). Westling's theory of this case was that Kokal had not shot the victim--O'Kelly had. In view of Dr. Virzi's opinion that Kokal "knew exactly what he was doing" (R4 563), the defense theory of the case that Kokal was not the killer, the reluctance of juries to accept the voluntary-intoxication defense, and the inconsistency that would have ensued from the presentation of both defenses, Westling was not ineffective for failing to pursue a voluntary-intoxication defense. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (counsel not ineffective for failing to pursue an intoxication defense where that defense would have been inconsistent with defense of innocence and with defendant's own testimony); White v. State, 559 So.2d 1097 (Fla. 1990) (counsel not ineffective for failing to pursue an intoxication defense where that defense was incompatible with the deliberateness of the defendant's actions and his testimony).

Moreover, Kokal has demonstrated no prejudice from Westling's decision not to pursue voluntary intoxication as the main defense. Trial counsel did in fact present testimony about, and obtain a

jury instruction on, voluntary intoxication; he merely did not present the testimony of anyone other than Kokal himself on this issue at trial. However, notwithstanding his contention in his 3.850 motion that a "wealth of evidence was available to counsel which would have clearly established a compelling intoxication defense" (R1 85), Kokal presented no testimony at the hearing below from any witness who had personally observed Kokal's state of intoxication at the time of the crime, and who could have presented any testimony at trial in support of a voluntary intoxication defense. The evidence which was presented at trial did not demonstrate that Kokal was so severely intoxicated as to be incapable of forming the intent to kill, and Kokal's own clear memory of the crime, as evidenced by his trial testimony, was inconsistent with such severe intoxication. Finally, the means of inflicting death were inconsistent with an intoxication defense. The victim was repeatedly bludgeoned in the head with a pool stick until he was unconscious, and then shot in the head. It would seem only reasonable to infer that at some point during this attack that Kokal consciously formed an intent to take the life of the victim. White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (no prejudice from failure to pursue voluntary intoxication defense where facts of crime were not "consistent with a person so impaired as to be unable to form the intent required for committing the crime charged). Kokal has not demonstrated a reasonable probability that, if trial counsel had more vigorously pursued an

intoxication defense at the guilt phase, the jury would have reached a different verdict.

The remaining guilt-phase allegations of ineffectiveness may be addressed summarily. As for the allegation that Westling should not have called O'Kelly as a defense witness, Initial Brief of Appellant at 46, O'Kelly may not have been a completely favorable witness, but calling him as a defense witness allowed Westling to get O'Kelly's letter in evidence in which O'Kelly had admitted being the killer, which, of course, was precisely the defense theory of the case. Without O'Kelly's letter, there was no evidence to corroborate Kokal's own testimony that O'Kelly was the real killer; therefore, the benefits of O'Kelly's testimony, Westling legitimately concluded, outweighed the risks. Postconviction counsel's speculation that Kokal's testimony would have been more believable if O'Kelly had not testified is just that: speculation. Deciding whether or not to call a witness who can both help and hurt one's case is precisely the kind of judgment call that reasonably effective attorneys must make. Even with the benefit of hindsight, Westling's judgment was not demonstrably wrong; certainly it does not fall outside the wide range of reasonably effective assistance of counsel.

The record does not support Kokal's allegations about any "massive" pretrial publicity. Moreover, although the State does not agree that the "current state of affairs for indigent criminal defendants" is "scandalous," Initial Brief of Appellant at 49, the

State would note that Kokal was not indigent; Westling was retained, not appointed.

Judge Carithers correctly found that Kokal had failed to prove ineffective assistance of counsel at the guilt phase of his trial.

B. Trial counsel was effective at the penalty phase.

At the outset, the State would take issue with Kokal's assertion that Judge Carithers found "that trial counsel was ineffective but he did not prejudice the Petitioner." Initial Brief of Appellant at 11. The State does acknowledge that Judge Carithers stated in his order that "the defense lawyer's over-all preparation for the penalty phase of the trial may have fallen below that expected of reasonably competent counsel ... [because he] did little more than simply think about the penalty phase until after the guilt phase was completed" (R2 304)(emphasis supplied). However, the State does not think it is nitpicking to point out that there is a difference between merely suggesting that trial counsel "may" have performed deficiently in one or more respects, and actually making a finding of deficient attorney performance. See Strickland v. Washington, supra, 466 U.S. at 697 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies). Moreover, even if Judge Carithers had found deficient attorney performance, ineffectiveness has two components: deficient performance and prejudice. Both components must be established before it can be concluded that trial counsel

was ineffective, Washington v. Strickland, supra. Therefore, it also is not nitpicking to insist that deficient performance alone does not amount to ineffective assistance of counsel. Thus, Judge Carithers could not have found that trial counsel was ineffective but that there was no prejudice (as Kokal asserts in his brief), and in fact Judge Carithers did not do so. On the contrary, Judge Carithers found that trial counsel was not ineffective at the penalty phase.

As for when Westling began to prepare for the penalty phase, the State acknowledges that, when Westling was asked whether "it would be better to do a penalty phase investigation prior to the ending of the guilt phase," Westling answered "No." However, regardless of how many attorneys (or courts) would agree with this answer, Westling also testified that he "did" in fact begin his penalty phase investigation before the guilt phase (R4 575); he insisted that any time "you take on" a first-degree murder case, you have to "consider" the penalty phase "from the very beginning" (R4 643). Furthermore, it is undisputed that Westling had talked to Dr. Virzi before the guilt phase began, and had spent a considerable amount of time with both Kokal and his mother, exploring at the "outset" whether Kokal had any mental or physical handicaps (R4 643), and investigating his medical, criminal and social background (R4 545). Although the State recognizes that Judge Carithers' findings are due some deference, the State does not agree that Westling "did little more than simply think about

the penalty phase until after the guilt phase was completed." Nevertheless, whether or not this portion of Judge Carithers' order is correct does not matter; Judge Carithers' ultimate conclusion that Kokal has failed to prove ineffectiveness of counsel is manifestly correct because, as Judge Carithers found, Kokal has failed to demonstrate (a) that additional attorney preparation could have developed any additional favorable testimony (R2 304-05), or (b) that Westling's decision not to use Dr. Virzi as a witness at the penalty phase was unreasonable or (c) that such decision was prejudicial to the defendant (R2 306). These dispositive findings are amply supported by the record.

The State would next take issue with Kokal's assertion that "[i]t is clear from the records that this is a case where counsel failed to make an investigation altogether." Initial Brief of Appellant at 21. At the very least, Westling talked to Kokal and his mother and secured the services of an independent psychiatrist. In addition, although Kokal alleged in his 3.850 motion (R1 50) that Dr. Virzi was not asked about mitigation or diminished capacity, Westling testified that he had asked Dr. Virzi if he had "anything" that could help the defense, and whether he though Kokal had been drunk the night of the crime. Even Dr. Virzi explicitly acknowledged that his examination of Kokal was for mitigation as well as sanity and competence.

Kokal's primary assertions are that Westling failed to discover and present evidence that Kokal has brain damage, and

failed properly to educate and question Dr. Virzi or to call Dr. Virzi as a defense witness. The evidence he has presented, however, fails to demonstrate ineffectiveness of trial counsel at the penalty phase.

First, it should be noted that Dr. Crown's testimony concerning the presence of statutory mitigation due to organic brain damage combined with alcohol consumption the night of the crime was not especially credible in view of Dr. Crown's insistence that (a) although it was the combination of alcohol and brain damage that caused significant impairment, it did not matter to Dr. Crown's analysis that Kokal might have lied to him about how much he had had to drink, (b) Kokal's clear memory of the crime had no relevance to any question of his intoxication and state of mind at the time of the crime, (c) it was not significant that hospital records of the accident which supposedly had caused Kokal's brain damage ruled out significant head injury and reported that Kokal was doing well when discharged,[6] (d) it was not significant to Dr. Crown's analysis that Kokal had taken a cross-country motorcycle trip shortly after this accident, (e) Kokal's successful completion

[6] Kokal asserts that his medical records show that he suffered broken "facial bones" in the 1983 auto accident. Initial Brief of Appellant at 20. An examination of defendant's exhibit 2 (records from the Memorial Medical Center of Jacksonville) contradict this assertion. The reports of Dr. Gunther indicate that, while Kokal suffered a concussion (discharge summary), the only broken bones were in Kokal's right hand and in his shoulder (document entitled "History and Physical Examination" filed by Dr. Gunther). Dr. McCormick specifically reported that there were no skull fractures (X-Ray report of Dr. McCormick).

of his GED and of junior college courses did not contradict Dr. Crown's conclusion of brain damage, (e) the facts of the crime were irrelevant to his analysis, and (f) none of the circumstances of the crime nor any of Kokal's behavior either before or after the crime was relevant to Dr. Crown's analysis or conclusions. See Parker v. State, 611 So.2d 1224, 1228 (Fla. 1993) (trial counsel not ineffective for failing to present testimony of available psychiatrist whose opinion about brain damage was not supported by medical records).

Moreover, Kokal has not demonstrated that any reasonable investigation in 1984 would have produced Dr. Crown as a defense witness. First of all, Kokal has not established that any medical records about Kokal's 1983 automobile accident were discoverable by due diligence. Kokal himself did not testify at the hearing, but his mother could not recall telling Westling about either of these accidents, and Westling testified that neither Kokal nor his mother had told him anything about either of these accidents, even though Westling specifically had asked about physical or mental problems.[7] Second, Kokal showed absolutely no signs of any impairment. Even Dr. Crown acknowledged that Kokal's alleged impairment would not be apparent to the "casual observer," and Dr. Virzi (who was not a

[7] At page 37 of his brief, Kokal suggests that Westling could have discovered this information if only he had talked to Kokal's brother. The brother did not testify at the 3.850 hearing, however, and what, if anything, Westling might have learned from Kokal's brother is pure speculation.

casual observer) testified that he had seen no signs of organic brain damage. In Westling's observations, Kokal was very astute and incredibly bright. Kokal has not shown any reason why Westling might have looked for medical records of accidents he did not know about for brain damage he had no reason to suspect, or how he might have found such records if he had decided to look. Mills v. State, 603 So.2d 482, 483-86 (Fla. 1992) (trial counsel was not ineffective for failing to seek mental health examination when counsel had no reason to suspect that mental-health mitigation could have been developed, notwithstanding counsel's knowledge that defendant had suffered two head injuries as a child); Rose v. State, 617 So.2d 291, 295 (Fla. 1993) (defendant not entitled to postconviction relief simply because new mental health expert concluded that defendant had minimal brain damage when there was no indication that original expert ignored "clear indications" of mental health problems). Merely producing Dr. Crown years after trial is not sufficient to warrant postconviction relief. Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987) ("Merely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort."); Bottoson v. State, 674 So.2d 621, 625 (Fla. 1996) (judge

entitled to discount opinion of psychiatrist who examined defendant eleven years after the murder).

As for Kokal's claim that, having secured the assistance of Dr. Virzi before trial, Westling failed to provide him with sufficient background material and failed to ask him the right questions, the State would first note that many of the allegations made in the 3.850 motion are completely unsupported by any testimony. For example, affidavits by Candace Lynn Wurster and by codefendant O'Kelly are repeatedly referred to in the motion (e.g., R1 81-3, 102-03, 105, 113), but neither of these persons testified. See Routly v. State, 590 So.2d 397, 401 (fn. 5) (Fla. 1991) ("Absent stipulation or some other legal basis, we cannot see how the affidavits can be argued as substantive evidence."). Other allegations are contradicted by the testimony. For example, Kokal alleged in his motion (R1 90) that Dr. Virzi was not asked about mitigation or diminished capacity. However, Westling testified that he had asked Dr. Virzi if he had "anything" that could help the defense, and whether he though Kokal had been drunk the night of the crime. Even Dr. Virzi explicitly acknowledged that his examination of Kokal was for mitigation as well as sanity and competence. Kokal also alleged in his motion that Westling gave Dr. Virzi no information (R1 136). However, Westling testified to the contrary, and Dr. Virzi acknowledged that he could have had conversations with Westling which he no longer recalls, and, moreover, his "assumption" was that Westling had given him at least

some background information over the telephone.[8] Furthermore, Kokal cites no authority for the proposition that trial counsel had the obligation to find for his expert witness all of the personal and background and medical history information that an expert might need. Some attorneys might choose to present such information to the expert in an attempt to influence the expert in a favorable direction, but competent attorneys might well rely upon the expert to conduct any necessary investigation of background, and there is no authority that such an election falls below constitutional requirements. Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992) (trial counsel no ineffective simply because he relied on what might have been less than complete psychiatric evaluations; fact that defendant recently secured more favorable expert opinions not a sufficient basis for relief).

In any event, even with the benefit of many years to discover and present additional information to Dr. Virzi, Kokal has not managed to discover and present anything which would have made any difference to Dr. Virzi's opinion. Dr. Virzi acknowledged that he had sufficient background information in 1984 to make the same diagnosis he was making now; he had reached the "same conclusion"

[8] Had all of Dr. Virzi's files and two-thirds of Westling's files not been "lost" when turned over to CCR (Kokal's previous postconviction counsel) (R4 541-43), we would not have to speculate about some of these events. It should be noted, of course, that the burden to prove ineffectiveness is on the defense. Strickland v. Washington, supra.

back then; there was “no change in my diagnosis” (R3 469). Thus, any deficiency in trial counsel’s presentation of background information did not adversely affect Dr. Virzi’s evaluation. All Dr. Virzi seems to be saying now is that he had thought back in 1984 that the information he had furnished to Westling was important to “the penalty,” and had expected trial counsel to have used this information (R3 480). But although Dr. Virzi might have thought he had furnished something useful, Westling disagreed. He had asked Dr. Virzi about mitigation and there was none; Dr. Virzi had not thought that Kokal was drunk and had been of the opinion that Kokal had known exactly what he was doing. Dr. Virzi’s written report from 1984 strongly corroborates Westling’s testimony. In the report, Dr. Virzi referred to Kokal’s history of alcohol abuse, but said nothing about Kokal being intoxicated at the time of the crime. Moreover, he had stated: “Recent and remote memory were clear. The patient had a clear idea of what had happened prior to the above incident and during the above incident. He understands the consequences of his behavior.” Dr. Virzi, like trial counsel, saw no indication of impairment. The record does not support the contention that Westling failed to present sufficient background information to Dr. Virzi to obtain a valid evaluation, or that Westling failed to ask Dr. Virzi the “right” questions. Correll v. Dugger, 588 So.2d 422, 426 (Fla. 1990) (despite presentation of new psychiatric opinions at the postconviction hearing seriously questioning defendant’s mental

capacity, defendant not entitled to new penalty hearing where mental-health expert used at trial had been alerted to defendant's drug and alcohol use and found no indication of mental impairment).

In order to prove that Westling's performance was outside the wide range of professional assistance, Kokal must establish "that the approach taken by defense counsel would not have been used by professionally competent counsel." Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1989). This he has not done. "At most, he has established that his present counsel would not have pursued the same strategy, a showing which misses the target by a wide mark." Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994).

Nevertheless, even if trial counsel's performance was in any way deficient, Kokal can demonstrate no prejudice. Had Westling called Dr. Virzi as a defense mitigation witness to testify about diminished capacity and emotional distress, he would still have been faced with the report in which Dr. Virzi had stated that Kokal had known what he was doing at the time of the crime, had understood the consequences of his actions, and had known the difference between right and wrong, which the State surely would have exploited in any cross-examination of Dr. Virzi. Furthermore, Kokal's clear memory of the crime is inconsistent with any contention that he was impaired at the time of the crime. As Dr. Virzi acknowledged, as Charles Cofer acknowledged, as Westling maintained, and as the Florida Supreme Court explicitly noted on appeal, such detailed memory about the crime "contradicts the

notion that [Kokal] did not know what he was doing." Kokal v. State, supra, 492 So.2d at 1319. Furthermore, this was a highly aggravated case: the murder was found to have been heinous, atrocious and cruel; to have been cold, calculated and premeditated; to have been committed during a robbery; and to have been committed to avoid arrest. Kokal has not demonstrated a reasonable probability that if Dr. Virzi had been called as a defense witness at the penalty phase of the trial, the result of the proceeding would have been different. Williamson v. Dugger, 651 So.2d 84, 87-8 (Fla. 1994) (court need not consider whether trial counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial).

Kokal has not established that his trial counsel performed deficiently, or that there is a reasonable probability that a different sentence would have been imposed if trial counsel had performed differently. Haliburton v. State, supra.

ISSUE III

KOKAL'S "CALDWELL" CLAIM IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT

As noted in the State's Response to Motion for Postconviction Relief, filed December 2, 1992, any issue of the trial court or the prosecutor having informed the jury the judge was the actual sentencer is procedurally barred as the result of Kokal's failure to raise such issue at trial or on appeal. Response at p. 4.

Although Kokal fails to acknowledge it, Judge Carithers agreed with the State's assertion of procedural bar, finding that Kokal's Claim II and Claim X of his 3.850 motion (in each of which he raised an issue under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985)) were both procedurally barred. Order of July 30, 1996, as clarified by order of February 4, 1997. Kokal's insistence that Caldwell issues are fundamental error and cannot be procedurally defaulted is contradicted by this Court's case law. See, e.g., Bottoson v. State, 674 So.2d 621, 622 fn. 1 (Fla. 1996). The State would note, however, that his argument is patently meritless. Indeed, similar claims have been rejected repeatedly. Johnson v. State, 660 So.2d 637, 647 (Fla. 1995).

ISSUE IV

THE CLAIM THAT THE TRIAL COURT FAILED PROPERLY TO WEIGH AGGRAVATION AND MITIGATION IS BOTH PROCEDURALLY BARRED AND MERITLESS

Here, Kokal contends the original trial judge's consideration of the aggravators and mitigators was deficient in that he failed expressly to evaluate all mitigating factors and to conduct a reasoned weighing of those factors against aggravating factors. Nowhere in his brief does Kokal identify where in his 3.850 motion he raised such an issue or what Judge Carithers' ruling on such issue might have been. The State is unable to find where such a claim was raised anywhere in his 3.850 motion, and is not aware of any ruling on such issue by Judge Carithers. If this issue was

neither raised in the 3.850 motion nor ruled on below, this Court has no jurisdiction to review the issue--there simply is no judgment to review.

In any event, this issue is procedurally barred because Kokal complained about the trial court's mitigation findings on direct appeal. 492 So.2d at 1319. Matters that have been raised on direct appeal of the conviction and sentence cannot be relitigated in a postconviction motion. Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Remeta v. Dugger, 622 So.2d 452 (Fla. 1993).

CONCLUSION

For all the foregoing reasons, Judge Carithers below properly denied Kokal's motion to vacate his judgment and death sentence. The judgment of the court below should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jefferson Morrow, 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207, this 12th day of December, 1997.

_____
CURTIS M. FRENCH
Assistant Attorney General