IN THE SUPREME COURT OF FLORIDA

CHARLES MICHAEL KIGHT,

Appellant,

v.

CASE NO. 75,086

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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STATEMENT OF THE CASE AND FACTS

The details of Kight's crime are reported in **Kight** v. **State,** 512 So.2d 922 (Fla. 1987), and will not be repeated.

Mr. Kight filed an untimely Rule 3.850 petition in circuit court after obtaining an extension of time (under Rule 3.851), from this Court by means of a motion that was **never** served on the State and was **mistitled** as a "joint motion".

Inasmuch as most of Mr. Kight's claims were procedurally barred or clearly refuted by the record, they were denied without a hearing. (R 565-570). A hearing was granted, however, on Mr. Kight's claims of "subornation of perjury" and **Brady**[1] violations. A full evidentiary hearing was conducted over a period of two weeks during which Mr. Kight was allowed to call every single desired witness.

Mr. Kight's case can be summarized as follows.

Kight claimed that the four inmates who testified to hearing him confess (in jail) at various times were all part of a conspiracy with the State. The inmates, Ellwood, Sims, Hugo and Moody, were allegedly coached and then later "paid" according to secret pretrial agreements with the State.

Mr. Williams Sheppard, Kight's first witness (TR 38), speculated at length as to how he "could have used" evidence of any "deals" had it existed or had it been known to him. Mr. Sheppard was not presented with, nor did he identify, any "**Brady**" documents which he "was not given". At one point, counsel for

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[1] **Brady** v. **Maryland,** 373 **U.S.** 83 (1963). See also **United States** v. **Bagley,** 473 **U.S.** 667 (1985).

Mr. Kight showed Mr. Sheppard a note (obtained from the State's file through Chapter 119), which was misrepresented as being some sort of "investigative" note even though CCR took it from the prosecutor's trial notes. (TR 132). Sheppard misread the note, drawing a State objection to his insertion of a word. (TR 132).

Mr. Kight's next witness was Richard Ellwood. (TR 168). Ellwood was a convict with an intense desire to "burn" the State any time he could. (TR 228). Ellwood claimed that he, not the State, put the conspiracy together to help Mr. Hutto (the co-defendant) at Kight's expense. Later, however, Ellwood discovered that Hutto was an ex-guard and he began fearing for his safety as a "state witness". (See TR 194). Ellwood alleged he was coerced to testify and that he was promised a reduction of his sentence. (See TR 234-237). The State did not fulfill its promise so he threatened to "screw the State". (TR 239).

Unfortunately for Ellwood, his attorney, Ray David, testified next. (TR 260). Mr. David testified that it was he, not the State, that pushed for the elimination of part of the retention of jurisdiction on Ellwood's case. (TR 262). In fact, Mr. David may have contacted Denise Watson first. (TR 264). He filed a motion because Ellwood's life was in danger. (TR 266). The State merely agreed. (TR 266-267). The "retention" was reduced but Ellwood's sentence was not. Since them, Mr. David had filed other motions. (TR 267-268). Mr. David, as Ellwood's lawyer, knew of no pretrial "deals" and has never sought to enforce such a deal despite all of his motions. In fact, he had to talk Ms. Watson into agreeing to his earlier motion. (TR 272-273).

Charles Sims was totally useless. First he said that Hutto confessed and also offered him money to lie. (TR **281-300**). Then he said the State offered him a "deal" - but tacitly and without making a promise at the time. (TR **284**). Then Sims said he heard Kight confess as he testified at trial and maintained that he did not lie at trial. (TR **308-315**). Sims also said he never told anyone except Ms. Watson about Hutto's bribe offer. (TR **314**).

Sims said that his life was in danger during Kight's trial because he testified for the State. (TR **303**).

Mr. Baker King was called as the next witness by Mr. Kight. (TR **320**). Mr. King was only peripherally involved in the Kight case. King made no policy decisions, no strategic decisions and no deals. Period. (TR **321**, et seq.). King hated Ellwood ("the little burglar" TR 323)[2] since Ellwood had burglarized the home of one of King's relatives.

Mr. King, prior to the Kight trial, had a relationship with the family of Eddie Hugo. (Hugo's father was a friend of the family). (TR **328**). Any help given to Hugo was keyed to that relationship. In a motion filed some eighteen **(18)** months after the Kight trial, Mr. King did mention Hugo's cooperation in that case, but there was never any "deal".

A later "motion to reduce sentence" was motivated by a need to correct a ministerial error (TR **335**) in which a concurrent sentence had been recorded as "consecutive". (TR **335**). Although the "sentence" reproduced in CCR's appendix inadvertently cut off

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[2] At TR **350**, King said any reduction of Ellwood's sentence would be a "miscarriage of justice".

a margin note in the Clerk's file copy which said to re-record the sentence as concurrent, the note came to light when the file was produced by the State.

King had no familiarity with Kight's other exhibits. (To TR **345**). King was not involved in the prosecution beyond just taking some depositions or peripherally helping with the trial. (TR **351**).

King noted that Ellwood asked for assistance in the presence of William Sheppard at one time. (TR **354, 367**).

On cross, Mr. King again noted that he did not solicit the D.O.C. letter sent to him in Hugo's behalf and therefore the mere request was not Brady material. (TR **366**). He did not do anything in response to the letter. (TR **367**). King had no control over whether Hugo could get drug treatment and thus he

(TR **401**). None of them ever said that they had lied to Mr. Link. (TR **401**).

The inmates did not like the jail facilities, did not like being State witnesses and did not like losing prison gain time. (TR 403).

On cross, Mahon noted he had entered the case just a few weeks before trial. (TR 420). He had little background information. (TR 421). He let his witnesses review their own depositions and normally prepared them for trial. (TR 421). He never told anyone to lie. (TR 422). He knew of no deals. (TR 423). He never promised anyone anything. (TR 423). Although accused by Kight of suborning perjury, no one ever bothered to talk to him prior to filing the accusations. (TR 426, 429).

Kight's next witness was Victor Bostic. (TR 447). Bostic never even testified at the trial. Bostic contradicted Ellwood by alleging that Hugo had hatched the perjury scheme. (TR 450). Bostic never spoke to Fred Moody about Kight. (TR 452). Bostic dealt with Hugo and never contacted the State Attorney's Office for help. (TR 453). He and Hugo hatched a scheme whereby Bostic, on his return to prison, would write a letter to the prosecutor. (TR 454). In the letter he requested "immunity". (TR 456).

Later, Bostic backed out and refused to testify at a deposition. (TR 460). Bostic alleged that the inmates, especially Hugo and Ellwood, made remarks that they hoped for deals. (TR 461). Ellwood and Hugo said they were lying. (TR 463).

Although Bostic had cooperated with CCR, he had refused to talk to State lawyers prior to this hearing. (TR 469). Bostic

denied refusing to testify because the State would note make a deal. (TR 469). But, Bostic agreed that he was never offered or promised anything for his testimony. (TR 470). Bostic's refusal to testify, according to his deposition, was based on a fear of being killed in prison. (TR 470). Bostic tried to back out of that admission. (TR 471).

Also, at his pretrial deposition, Bostic said he had never spoken to Hugo. (TR 471). When asked if he lied, he admitted it. (TR 471). Bostic agreed that his oath means nothing. (TR 472).

The State called Mr. Ed Austin, the State Attorney, who strongly vouched for Denise Watson and clarified office policy. (TR 478, et seq.).

Next, the State called Mr. Lou Eliopolis. (TR 491).

Mr. Eliopolis was the Public Defender's investigator. (TR 491-492). He was working on Hutto's case when he approached Ellwood. (TR 492). He "bluffed" a reluctant Ellwood into revealing he had information. (TR 493). Ellwood wanted a "deal" but Eliopolis was working for the defense. (TR 493-494).

Ellwood told him that Kight confessed. (TR 494). He provided no details to Ellwood, (TR 494-495) but Ellwood gave information that was not contained in the media stories. (TR 495, 497). The same was true of the others. At no time did any inmate say that they were lying. (TR 496-497).

The next witness was Edward Hugo (Jr.). (TR 509). Hugo stood by his trial testimony. (TR 510). The first person to contact him was Mr. Eliopolis, not the State. (TR 511). Hugo

testified to prevent Kight from falsely accusing Hutto. (TR 513).

No one from the State ever offered him a thing for his testimony. (TR 514). Denise Watson refused to make any deal. (TR 516). He was never coached to lie (TR 516), never told what to say (TR 516), never threatened (TR 516) and never received a sentence reduction. (TR 516).

Ellwood was mad at the State for refusing to make a deal. (TR 157). He (Ellwood) vowed to "get even" after trial. (TR 517).

Hugo never, ever, told Bostic to lie or to seek immunity from the State. (TR 518).

Ms. Watson spoke to the witnesses individually and not as a group. (TR 519). No one ever told the group to lie or anything else. (TR 519, 520).

On cross, Hugo noted that he had approached Baker King about a drug program because King's family was friends with his. (TR 544).

Hugo had never before helped the State Attorney's Office. (TR 548).

Denise Watson testified next. (TR 558). She was lead counsel. (TR 559). She did not see Hugo's letter to King prior to trial. (TR 560). She did not use Victor Bostic because he wanted immunity. (TR 565).

Denise was approached by Ward Metzger, Moody's lawyer, about Moody's situation regarding a delay in his release date caused by this trial. (TR 568). **At Metzger's request,** Denise

agreed to join in a request to reduce Moody's sentence. (TR 569). Denise identified the infamous "Ellwood-liar''note as a midtrial note reflecting an allegation by Sheppard that she had to rebut. (TR 571).

Ms. Watson never offered Ellwood any deals, but after trial Ellwood began threatening and pressuring her. (TR 580-581). Mr. David sought elimination of part of the judge's "retention of jurisdiction'' but Ellwood's sentence was not reduced. (TR 581). Denise did not like Ellwood. (TR 582). Mr. David had to soften her attitude over time. (TR 582).

When Ellwood's life was in danger she did write the prison to get him transferred, not released. (TR 585-586).

Ellwood never told her he had orchestrated lies. (TR 596). She would not have called him if she thought he was a liar. (TR 596).

Denise had **ample** evidence without Ellwood, **et al,** including a confession by Kight, the murder weapon, bloody clothes, etc. (TR 596). Denise never offered a deal to anyone. (TR 598). Thus, Ellwood threatened to make this case come back. (TR 599). She only tried to help Sims after Sims' life was threatened. (TR 603).

Denise never coached the inmates to lie or gave them any access to files. (TR 607). Indeed, such a stunt could have backfired at trial if attempted. (TR 608).

After brief, speculative, rebuttal from Mr. Link (as to what he's seen prosecutor's do over the years) and Bill Sheppard (over what he would do differently). The hearing ended.

The trial judge found for the State, gauging both the testimony and the demeanor of the witnesses. The court found that no "deals" were made, thus negating both the "perjury" and "Brady" claims.

SUMMARY OF ARGUMENT

Since this brief is being filed without benefit of an Appellant's Brief, the State respectfully reminds the Court that it should not be held to have waived any argument raised by Mr. Kight but not addressed here.

We anticipate that Mr. Kight will address these issues:

(1) The ruling on the perjury claim.

(2) The granting of the State's "Chapter 119" request.

(3) The denial of an evidentiary hearing on his other claims.

On the first issue, we will argue that the ruling is supported by the record.

On the second, we will argue the merits of the decision and "mootness" since the files were not used

On the third, we shall stand on the court's orders.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING MR. KIGHT'S "**BRADY** PERJURY" CLAIM

The trial **sub judice** boiled down to a question of who was more credible. On the one hand, there was Mr. Ellwood, Mr. Bostic and Mr. Sims, who said they were liars who ought to be believed "now" and who contradicted each other. On the other hand, we had three attorneys who prosecuted the case and corroboration by a **defense** lawyer (Mr. David) and a **defense** investigator (Mr. Eliopolis) and Eddie Hugo, Jr.

The record is crystal clear. No deals were made, but some inmates who lost gain time or had their lives threatened were later helped, usually on their own initiative or that of some defense attorney (Mr. David or Mr. Metzger). No deals existed, **so** no "**Brady**" material existed. No deals existed, so there was no perjury. Period.

This situation is controlled by **Tibbs** v. **State,** 397 So.2d 1120 (Fla. 1981). The trial judge, as trier of fact, heard and saw the witnesses, gauged their demeanor, weighed the evidence and ruled. There cannot be "trial **de novo**" on appeal.

It is superfluous to really discuss **Brady** and **Bagley, supra,** in the absence of any evidence.,

While Mr. Kight called these four inmates "seasoned jailhouse informants" in his deceptive 3.850 petition, this "fact" was never shown. Indeed, Ellwood and Sims hated the State and Ellwood's only prior testimony had been as a defense witness.

While Kight alleged that the State needed and sought this testimony, we now know that the testimony was uncovered by Mr. Eliopolis, who induced Ellwood to talk with a "bluff". The defense lawyer in Hutto's case gave this information to the State. It is unrealistic to assume that Ellwood, et al, would want to work out a deal with the State by going to Mr. Link first, rather than the State.

While Mr. Sheppard, whose testimony was rejected by the trial court in **Lusk** v. **State,** 498 So.2d 902 (Fla. 1987), gave testimony to the effect that "if" deals existed he would have "pushed harder" on discovery, citing to various posttrial documents and unsolicited letters, he failed to help his client[3] because he could not satisfy **Bagley;** to-wit:

> (1) The mere fact that unsolicited mail was received by the State Attorney's Office requesting help does not establish the existence of any deal. In fact, Ellwood's letters make clear, by his anger, the absence of a deal.
>
> (2) The fact that inmates risked their very lives in order to testify against Kight, or lost gain time just to testify against Kight, would hurt Kight's case, not help it.

Thus, Mr. Sheppard's speculative testimony here, as in **Lusk,** was mainly given out of his deep sense of loyalty to his client. While it was not "false" (Mr. Sheppard always works very hard), it was not credible to the extent Mr. Sheppard opined regarding **Bagley.** There was no evidence that "but for" this information

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[3] The appendix shows that Mr. Sheppard's office prepared this issue and then gave the case to CCR, who later accused Mr. Sheppard of being ineffective. A curious bit of cooperation.

there would, by reasonable probability, have been a different result.

Denise Watson, Mark Mahon and Baker King were falsely and carelessly accused of serious misdeeds - both ethically and even criminally - in a careless and basically uninvestigated petition. (This sad trend continues from the Mills, Heiney, Engle, Parker and Williamson cases and appears to be the latest "**de rigeur**" charge). The Petitioner failed to put on any credible evidence to support his allegations. The trial court's judgment should be affirmed.

ARGUMENT

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S CHAPTER 119 ACCESS TO SPECIFIC FILES

CCR, as a state agency, came into the possession of Mr. Sheppard's criminal defense files prior to filing its **Brady** and "ineffective counsel" charges. CCR sought to deny the State access to these files (and, in fact, the files were never delivered to the attorneys trying the 3.850 case in Jacksonville, so the Court's order did not affect the hearing).

Chapter **119** does not recognize the existence of an attorney-client privilege. **Wait** v. **Florida Power and Light, 372** So.2d **420, 424** (Fla. **1979).** There is, of course, no attorney-client privilege in cases involving "ineffective counsel" claims or where the so-called "confidential" communications have already willingly been delivered to third parties by the defense. Thus, Mr. Kight had no "privilege" here.

Mr. Kight may allege that the trial court's denial of his ineffective counsel claim ended the State's right to disclosure. We disagree for three reasons; to-wit:

> **(1)** The claim against counsel was being appealed and would be renewed in federal court. The issue is not dead.
>
> (2) The statute does not recognize the exemption anyway. We would **also** note that the State did **not** want communications or files prepared by or between CCR and Mr. Kight. All we wanted were Mr. Sheppard's files.
>
> **(3)** In addition to the malpractice issue, there was a **Bagley-Brady** claim. A vital part

> of our **Bagley** defense could have been[4] what the defense actually knew, to see if the "reasonable probability of a different result if the defendant had had the evidence" test could be met.

While this issue may be moot as to the Rule 3.850 hearing, this issue could be germane to future federal or state proceedings in this case. It will also appear in other cases since the State has the right to defend itself and has a right and a duty to investigate its cases.

Since Mr. Sheppard's files were "received pursuant to law or ordinance or **in connection with the transaction of official business by any agency", Tribune Co. v. Public Records,** 493 So.2d 480, 483 (Fla. 2nd DCA 1986), they were subject to Chapter 119 disclosure.

The State's inability to view these files would result in the very problems "cured" by the Florida Bar's decision regarding waiver of the attorney-client privilege in "ineffectiveness" cases. Capital litigants simply cannot be allowed to raise claims on the one hand and deny the court access to evidence refuting those claims, or deny counsel the ability to defend himself, on the other.

Legally and equitably, the trial judge's order was correct.

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[4] As it turned out, the Stae was able in **this case** to get by without the files. In future cases, the situation could be different.

ARGUMENT

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING KIGHT'S REMAINING CLAIMS

Mr. Kight's Rule 3.850 petition raised twenty-two additional issues which did not compel relief or even an evidentiary hearing.

Mr. Kight's "strongest" (in terms of its ability to provoke a hearing) claim was the **de rigeur** bad faith attack upon trial counsel. In this case, the victim was Mr. William Sheppard, an outstanding defense lawyer and recognized expert in capital litigation (he is used as an expert, in fact, by his accusers).

While no lawyer can ever be "perfect", the record clearly showed that Mr. Sheppard's performance was within the wide range of professional assistance allowed by **Strickland** v. **Washington,** 466 **U.S.** 688 (1984). Under **Strickland,** even if Mr. Sheppard made demonstrable or "unreasonable" errors, he would not been deemed ineffective if his performance, over all, satisfied the Sixth Amendment.

While the courts like evidentiary hearings in disputable cases, no hearing is required when the record clearly refutes the charge. **Bundy** v. **State,** 497 So.2d 1209 (Fla. 1986); **Stano** v. **State,** 520 So.2d 278 (Fla. 1988).

While Mr. Kight may disagree with the circuit court's conclusions regarding certain tactical decisions, the circuit court was the fact-finder. This is an appeal. Also, even if Mr. Sheppard committed technical errors, one cannot look at this

massive record or his aggressive defense and conclude he was operating outside the scope of **Strickland.**

Turning to Mr. Kight's other claims, we find the usual collection of procedurally barred claims.

Rule **3.850** proceedings are not "second appeals", thus negating claims VI, VII, IX, X, XI, XII, XIII and XX. **Francis** v. **State, 529** So.2d **670** (Fla. **1988); Straight** v. **State, 488** So.2d **530** (Fla. **1986); Tafero** v. **State, 459** So.2d **1034** (Fla. **1984).**

Similarly, Rule **3.850** proceedings cannot be used to argue issues which could and should, if preserved, have been raised on appeal. Woods v. **State, 531** So.2d **79** (Fla. **1988); Demps** v. **State, 515** So.2d **196** (Fla. **1987); Atkins** v. **State, 14** F.L.W. **207** (Fla. **1989); Grossman** v. **State, 525** So.2d **833** (Fla. **1989); Harich** v. **State, 14** F.L.W. **218** (Fla. **1989); Adams** v. **State, 14** F.L.W. **235** (Fla. **1989).** Therefore, claims IV, V, VIII,[5] XIV, XV, XVI, XVII, XVIII and XIX.

We note, regarding issue VIII (despite its procedural bar but **not** waiving said bar as a defense), that the alleged "victim impact statements" were not relied upon by the sentencer as non-statutory aggravating evidence, see **Barclay** v. **Florida, 463 U.S. 939** (1983), **so** no error was committed that affected the case.

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[5] Claim VIII is a procedurally barred **Booth** claim which the trial court rejected under a harmless error analysis. Since the court below can be affirmed for **any** reason, we submit that the procedural bar should apply

CONCLUSION

Mr. Kight has shown no basis for relief.

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 hand delivery to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 4th day of December, 1989.

MARK C. MENSER
Assistant Attorney General