IN THE

SUPREME COURT OF FLORIDA

CASE NO. 75,086

CHARLES MICHAEL KIGHT,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the record on direct appeal to this Court shall be cited as (R. ___); references to the transcript of the evidentiary hearing shall be cited as (H. ___); references to the non-transcript documents and records of the Rule 3.850 record on appeal shall be cited as (HR. ___). All other references shall be self-explanatory or otherwise explained.

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INTRODUCTION

This case is before the Court on appeal from the denial of Mr. Kight's motion for Rule 3.850 relief. The lower court held an evidentiary hearing, limited to one claim of that motion and denied relief on all other claims. As to the claim on which a hearing was held, the lower court failed to properly apply the law or adequately assess the facts. As to the other traditional Rule *3.850* claims presented by Mr. Kight, the lower court erred in refusing to allow an evidentiary hearing, and in declining to even allow Mr. Kight to file a motion for rehearing of its overnight order denying the claims. The original and post-conviction records now before the Court, the Rule *3.850* motion, and the discussion presented herein show that the lower court erred. Mr. Kight submits that he is entitled to relief on all claims, and is entitled to full and fair evidentiary resolution on a number of classic post-conviction claims which the circuit court erroneously summarily denied.

This Honorable Court entered a stay of Mr. Kight's execution and directed expedited briefing. In the interest of brevity, since the Rule *3.850* motion and habeas corpus petition have been before the Court and the Court has reviewed them, Mr. Kight will not repeat herein the legal and factual issues discussed in those pleasings, and does not specifically discuss herein every claim presented. Rather, Mr. Kight specifically incorporates into this brief at this juncture all of the issues and claims, and their supporting factual and legal analyses, already presented in the habeas petition and Rule *3.850* motion. No claim presented in the habeas petition and Rule *3.850* motion is waived or abandoned,

whether or not specifically discussed in the body of this brief. As noted, Mr. Kight expressly incorporates his Rule **3.850** motion, accompanying appendix, and habeas petition in this brief and asks this Court to carefully consider those pleadings and the claims presented therein in conjunction with this brief. Mr. Kight also notes at the outset that this brief will not reply to the arguments stated in the brief filed with this Court by the Respondent at the time of Mr. Kight's death warrant. The discussion herein is that of an initial brief. Since the Court has entered a briefing schedule, Mr. Kight will reply on the date provided by the Court for the reply brief.

PROCEDURAL HISTORY

Mr. Kight and Gary Daniel Hutto were arrested for the armed robbery of Herman McGoogin on December **8, 1982.** The Office of the Public Defender was appointed to represent both Mr. Kight and Hutto on those charges on December **8, 1982,** the same Assistant Public Defender undertook the representation of Mr. Kight and co-defendant Hutto. This same assistant had represented Mr. Kight in previous judicial proceedings. On December 14, **1982,** while still incarcerated on that charge, police questioned Mr. Kight about a missing taxi cab driver. During renewed (and improper, see infra) police questioning on December 17, **1982,** Mr. Kight gave the police a statement in which he described his involvement in the robbery and death of the missing cab driver, but stated that Hutto committed the murder. On December **22, 1982,** the Public Defender filed a motion to withdraw from representation of Mr. Kight, because of a conflict of interest, but continued to

represent Hutto until July of 1983. On January 6, 1983, Mr. Kight and Hutto were indicted for first-degree murder.

The trial was conducted in Duval County, Florida. The State's primary evidence against Mr. Kight was the testimony of four "jailhouse informants" who claimed to have heard Mr. Kight admit the murder. The State had obtained these informants from Mr. Kight's co-defendant, Gary Hutto, as part of a plea agreement with Hutto. The Public Defender's Office was extensively involved in obtaining this evidence and turning it over to the State. The evidence was central to the State's prosecution of Mr. Kight, and substantially and adversely affected Mr. Kight, the Public Defender's original client. Mr. Hutto pleaded guilty to second-degree murder, pursuant to an agreement with the State, and did not receive a death sentence.

Although the State introduced statements by Mr. Kight to law enforcement and to the informants, the trial judge refused to permit proffered expert testimony that Mr. Kight was mentally retarded and had a low functional age, as well as lay testimony concerning his impaired intelligence and functioning. Such evidence would have related to the voluntariness of Mr. Kight's statements as well as to his state of mind at the time of the offense.

Mr. Kight was found guilty of murder on June 4, 1984. The jury sentencing phase, at which the judge refused to instruct the jury to consider age as a mitigating circumstance, was conducted on July 24, 1984. The jury recommended death and at a judicial sentencing conducted on August 7, 1984, the trial judge sentenced Mr. Kight to death.

This Court affirmed Mr. Kight's conviction and sentence on direct appeal. Kight v. State, 512 So. 2d 922 (1987). During those proceedings this Court noted that Mr. Kight should raise claims predicated on Bradv v. Maryland in a Rule 3.850 motion. Id. at 933.

On September 27, 1989, Governor Bob Martinez signed a death warrant. Mr. Kight's former trial and appeal counsel, after commencing investigation into a Rule 3.850 action, thereafter requested that CCR represent Mr. Kight. Mr. Kight then filed an Emergency Motion to Vacate Judgment and Sentence and Application for Stay of Execution in the Fourth Judicial Circuit of Florida. By an order entered on November 13, 1989, the Honorable David C. Wiggins, Circuit Court Judge, scheduled an evidentiary hearing on Claim 11, involving violations of Bradv v. Maryland, 373 U.S. 83 (1963), for November 20, 1989, and denied relief on all other claims without a hearing. The lower court in that order specifically referred to this Court's directions concerning the Bradv issue. The court denied the majority of the remaining claims, including claims traditionally presented under Rule 3.850, by asserting that the claims should have been raised on appeal or had been rejected on appeal. One of the claims so denied was the claim involving the conflict of interest resulting from the Public Defender's representation of both defendants and actions on behalf of Mr. Hutto and to Mr. Kight's detriment. The lower court also denied a hearing on the ineffective assistance of counsel and mental health issues presented in the Rule 3.850 motion. The lower court's order expressly directed, contrary to

Rule 3.850 itself, that no motion for rehearing would be entertained, and thus Mr. Kight was left without a mechanism for addressing the errors in the lower court's order.

The hearing was conducted on the afternoons of November 20, 21, 22, 28 and 29, 1989, and on November 30, 1989, the lower court denied relief on the Bradv claim. During those proceedings the lower court also granted a motion by the State to compel disclosure of Mr. Kight's attorney's files pursuant to Section 119, Fla. Stat., and refused to stay that order to permit an interlocutory appeal. The order was complied with, over the strenuous objection of Mr. Kight's counsel.

Mr. Kight timely filed a notice of appeal, this Court granted a stay of the then scheduled execution, and this appeal follows. Given the difficulties facing the CCR office, the fact that the Court has had the 3.850 motion and habeas petition, and the State's responses, and the Court's direction of expedited briefing, this brief shall not detail all of the claims for relief involved in this case and will not re-brief what is contained in the habeas petition and Rule 3.850 motion. Rather, it is intended that this brief be reviewed in conjunction with the Rule 3.850 motion and habeas corpus petition.

ARGUMENT

(I)

THE COURT'S ORDER COMPELLING DISCLOSURE OF MR. KIGHT'S FILES DENIED HIM HIS RIGHT TO COUNSEL, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

On November 13, 1989, the State Attorney for the Fourth Judicial Circuit made a formal request to the Office of the

Capital Collateral Representative (CCR) for access to public records pursuant to section 119.01 et. seq., Florida Statutes (1985), "relating to Mr. Kight's post conviction litigation.'' The request was made "for purposes of [the State's] preparation of a response to Mr. Kight's post-conviction pleadings" (See Motion to Supplement Record).[1]

Counsel for Mr. Kight responded to this request by stating that files held by CCR were not subject to 119 disclosure because they are not the files of a state agency, but rather the files of a private individual, Mr. Kight. Unlike other state agencies, CCR does not litigate on behalf of the agency, but represents individual clients -- in this case Mr. Kight. Mr. Kight, obviously, is not a state agency, and the disclosure request was therefore improper. Further, the records were specifically exempt under section 119.07 (3)(0). They were materials falling under the "active litigation" exemption -- Mr. Kight's materials were prepared for the litigation of these post-conviction proceedings. Id.

The State Attorney's Office then filed a Motion to Compel Disclosure on November 15, 1989 (HR. 563-64). Mr. Kight, through counsel, filed a response the next day (HR. 641-45).

On November 27, 1989, the lower court entered an Order

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[1]The State Attorney's letter (and Mr. Kight's answer) was appended to Mr. Kight's response in opposition to the State's motion for disclosure. Although the Circuit Court Clerk included the motion and response in the record that is now before this Court, the Clerk left out of the record the State's letter making the section 119 request, and Mr. Kight's letter in response. Each of those documents is included in the motion to supplement record, filed herewith.

Granting State's Motion to Compel Disclosure (HR. **663-64**). The order required CCR to provide access to files, but limited the scope to those files prepared by defense counsel William Sheppard relating to Mr. Kight's capital trial, rather than those prepared by **CCR** for post-conviction litigation.[2] Although the State in its written requests, and then orally, argued that all the files were subject to disclosure, it apparently later conceded that records prepared by **CCR** for post-conviction litigation were exempted by Section **119.07 (3)(0).** CCR counsel have also long recognized this principle, and thus have never requested access to files prepared by the Attorney General for capital post-conviction litigation.

Mr. Kight's counsel objected to the lower court's order and requested the court to stay issuance of the order to permit appeal. The court refused, and Mr. Kight's counsel, without waiving objection, provided access to the State for inspection and copying of the files originally prepared by Mr. Sheppard.

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[2]William White, on behalf of the Public Defender's office, appeared before the lower court at the commencement of the evidentiary hearing and joined Mr. Kight's counsel in objecting to the State's motion. Obviously, the same theory relied on by the State in seeking Mr. Kight's files could be relied upon to obtain a Public Defender's files concerning any Public Defender client. Although the order's scope was eventually limited, the fact remains that section **119** was an improper vehicle, as Mr. Kight does not fall within the statute's rubric: Mr. Kight is not a state agency. Moreover, since the lower court had already ruled that there would be no hearing on the ineffective assistance of counsel issues, the directed disclosure of Mr. Sheppard's files was improper. The typical situation in capital cases in which either **CCR** counsel or former counsel disclose trial attorney files when a hearing is conducted on an ineffective assistance of counsel claim did not arise in this case because the circuit court declined to allow evidentiary resolution of these issues.

However, this issue is not moot. Even though Mr. Kight's counsel have complied with the lower court's order, this issue should be reviewed and determined.

Review now is essential because this issue is "capable of repetition, yet evading review." Honis v. Doe, 108 S. Ct. 592, 601 (1988); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 713 (1973); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). A court's order compelling appointed counsel for an individual client to relinquish a client's files during post-conviction litigation places the client in an impermissible "Catch-22". Once the files are disclosed in compliance with the order, the damage is done. If not addressed now, this denigration of rights could occur repeatedly, without remedy. This issue is thus brought to this Court at the earliest opportunity.

A request by a prosecutor to obtain client files from a defense attorney under Chapter 119 has never been deemed proper in any criminal proceedings prior to this. The request and subsequent order are flatly improper and contrary to Chapter 119 and longstanding legal and ethical precedent.

The purpose of Chapter 119 is to "insure the people of Florida the right to freely gain access to governmental records." Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So. 2d 695 (Fla. 1985). Chapter 119 provides access to "governmental records," not private records. The records sought by the State and ordered disclosed by the lower court belong to Mr. Kight, a private citizen. They do not belong to the Office of the Capital Collateral Representative, nor any of the office's individual employees. The records belong to the client, not the

lawyer. See City of Miami v. Miami Herald Publishing Co., 468 So. 2d 218, 219 (Fla. 1985). These records are not "governmental records" and are thus beyond the purview of Chapter 119.

These records are not only records of a private individual, but also are records protected from disclosure by the attorney/client privilege and the right to the effective assistance of counsel. Rule 4-1.6, Rules Regulating the Florida Bar (1989). As stated in the Response to the State's request for access to Mr. Kight's files:

> Compliance would violate Mr. Kight's right to due process of law in these capital post conviction proceedings, see Holland v. State, 503 So. 2d 1250 (Fla. 1987) and would violate Mr. Kight's right to counsel and his right to the effective assistance of counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).

The attorney/client privilege belongs to the client, not the attorney. Although the legislature has the constitutional authority to regulate the activities of state, county, and municipal governmental offices, and thus to require public meetings and public records to be open to the public, the legislature cannot infringe upon the attorney/client privilege or the right to counsel of a private citizen. This Court has recognized as much. See City of North Miami v. Miami Herald Pub. Co., supra. While the CCR office is a state agency, it has the responsibility of representing Mr. Kight, a private individual. Mr. Kight is being provided legal services as an individual and not as a government official. Unlike the petitioners in City of North Miami, the records involved here belong to the client, Mr. Kight, a private citizen. The records do not belong to the

lawyers, neither CCR attorneys, who are government employees, nor Mr. Sheppard, a private attorney.

Mr. Kight's attorney/client privilege and his rights under the state and federal constitutions are not superseded by Chapter 119.[3] He is entitled to all the privileges and rights arising from his individual representation. Undersigned counsel represents Mr. Kight, the individual, not the CCR office, the government entity. Under the State's construction here disclosure of the files of a private attorney appointed by the court to represent an indigent defendant could be obtained through Chapter 119. But CCR counsel's, or any attorney's possession of the files does not alter the client's rights. The files belong to the private individual, here Mr. Kight.

As this Court indicated in the City of North Miami, the focus is on the client, not the lawyer. Appointed counsel, although paid with government funds, nonetheless represent the individual client and have absolute allegiance to the individual client. The same is true with CCR counsel. Although employed by a state office, counsel represent Mr. Kight, a private citizen.

This Court has long recognized the importance of the attorney-client privilege as a means of preserving the confidentiality of private communications.

> The attorney-client privilege arises in the context of a relationship having great significance for the protection of

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[3] Ironically, even in this case, the Public Defender's files concerning former inmates who would not provide a release were never disclosed to CCR counsel.

> fundamental personal rights. For example, the ability to speak freely to one's attorney helps to preserve rights protected by the fifth amendment privilege against self-incrimination and the sixth amendment right to legal representation. See Note, The Attorney-Client Privilege; Fixed Rules, Balancins, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977)

Mills v. State, 476 So. 2d 172, 176 (Fla. 1985). Thus, in Mills this Court held that the attorney-client privilege was so significant that it outweighed the rights of Mr. Mills, a capital defendant, to cross-examine a key State's witness, irrespective of the fact that the witness had been granted immunity and thus that self-incrimination issues were irrelevant. In contrast, Mr. Kight maintains his right against self-incrimination, in addition to his attorney-client privilege, and both are protected by the federal and Florida constitutions, and by other legal and ethical standards.

Ironically, in State v. Provenzano (Case Nos. 73,981 and 74,101), State v. Ensle (Case No. 74,902), and State v. Kight (this case, until the trial court ordered disclosure), this same State Attorney's office took the position (and Mr. Kight disagreed) that no disclosure whatsoever was warranted of its own files regarding these defendants pursuant to section 119. The State Attorney complied with the mandates of Chapter 119 in Mr. Kight's case only after the court ordered disclosure. In Provenzano and Ensle, the State refused to comply and the circuit courts refused to order compliance. Ensle and Provenzano are both now pending before this Court.

Mr. Kight requests this Court to reverse the circuit court's order allowing access into his files pursuant to Chapter 119, and

urges that the Court rule on this issue since it is certainly subject to repetition.

(II)

THE LOWER COURT IGNORED THE STATE'S DISCOVERY VIOLATIONS AND SUPPRESSION OF MATERIAL EXCULPATORY EVIDENCE, AND THE LOWER COURT ERRONEOUSLY AND INADEQUATELY MISAPPLIED THE LAW TO THE FACTS PRESENTED AT THE EVIDENTIARY HEARING.

As this Court recognized on direct appeal, Mr. Kight was convicted and sentenced to death primarily on the basis of informant testimony. What has now been shown is that important facts concerning the informants' testimony were not disclosed to defense counsel. At the 5-day evidentiary hearing held under warrant, Mr. Kight first presented testimony of his trial counsel, William Sheppard, who described information and material withheld by the prosecution and described how that material would have affected the trial and sentencing of Mr. Kight (H. 38-167, 625-634). Mr. Sheppard testified unequivocally that if the information had been provided, he would have used it, and in fact his entire strategy and presentation at trial and sentencing would have been effected and altered.[4] In addition, Richard Ellwood and other jailhouse informants testified that they concocted the stories they told at trial of Mr. Kight's admission of the killing (H. 178-81; 295-96; 449). Ellwood and others testified that Mr. Kight's prosecutors were aware that their

[4]Mr. Sheppard testified in detail that if any of the information concerning informants Moody, Ellwood, Sims or Hugo, or if any of the other information adduced at the 3.850 hearing had been disclosed to him, he certainly would have used it at trial and sentencing.

stories were false. Elwood, Sims, and even Hugo (called by the State) testified that they expected benefits. The prosecutors, however, told them to say, if questioned, that there were no deals (H. 286, 297, 299).

Before discussing the Rule 3.850 hearing record, Mr. Kight outlines certain matters arising from the record which cannot be disputed by the Appellee and which the lower court completely failed to account for in its order denying relief.[5]

a. Fred Moody: Although after Mr. Kight's trial each of the four informants who testified would have motions for reduction of sentences, etc., either filed on their behalf by the same prosecutors who prosecuted Mr. Kight or joined in by those same prosecutors, Fred Moody's "Motion to Vacate Sentence" (App. 17 to motion to vacate, admitted as evidence at the 3.850 hearing) presents a straightforward and glaring violation of Bradv v. Maryland and the Florida rules of discovery. See Roman v. State, 528 So. 2d 1169 (Fla. 1988). Moody's motion to vacate sentence was filed on June 11, 1984, days after Mr. Kight's trial, and well before jury sentencing had beaun. It was, however, never disclosed to defense counsel. This discovery and Bradv violation is particularly appalling in light of Mr. Moody's trial testimony, described in the Rule 3.850 motion (pp. 32-33), that he would receive absolutely nothing and wanted absolutely nothing from the State. Like the motions filed in the cases of

[5]Since the lower court directed that no petition for rehearing would be considered, and did not allow the filing of any post-hearing memoranda, the errors in the court's order could not be presented to the lower court.

all the others, it was not lawful -- it was filed on his behalf well after the time expired for the filing of such motions, and the circuit court specifically was without jurisdiction to entertain such a motion pursuant to the jurisdictional standards of Fla. R. Crim. P. 3.800. The grounds for the motion (including the ground that "[t]he defendant co-operated in the first degree murder prosecution of Kight by giving both pre-trial and trial testimony") were expressly "stipulated to" by S. Denise Watson, one of Mr. Kight's trial prosecutors, as was the court's jurisdiction (which it did not have). Ms. Watson actually signed the motion itself, at page 2 of the document (See App. 17).

Although the motion was filed (with stipulation) and granted before Mr. Kight's sentencing, the State never informed defense counsel. This is clearly improper under Bradv and the applicable discovery provisions, and particularly with regard to the latter, the State has yet to even attempt to make the showing that the discovery violation was harmless beyond a reasonable doubt. Roman, 528 So. 2d at 1171, citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The lower court, however, said nothing at all about this issue in its order. The lower court erred.

b. Victor Huso: Mr. Hugo, another informant, was called by the State at the hearing. Baker King, one of the prosecutors who had been dealing with Hugo pretrial, also testified at the hearing. Hugo was discussed at pages 18-20 of the Rule 3.850 motion. He testified that although there were no "deals", Mr. King had promised to assist him in placing him in a drug treatment program, and both he and Mr. King knew that in order to do this his sentences had to be made to run concurrently (See

App. 5, p. 2, pretrial letter from Department of Corrections to Assistant State Attorney King relaying as much). Mr. King testified that he did want to assist Hugo with his drug treatment and did take steps in that regard. But those steps required a concurrent sentence. None of this was disclosed to defense counsel, and neither did counsel receive the Department of Corrections letter (App. 5), or the letter from Hugo to Mr. King requesting "help . . . with my situation as we have discussed" (App. 4). Subsequently, Hugo's sentence was reduced, unlawfully (see Rule 3.800), pursuant to a motion filed on his behalf by then Assistant State Attorney King (App. 6). Defense counsel testified that if he had been informed of any of this he would have developed and used it at deposition, trial, and sentencing. The lower court's order, however, did not speak to this issue.

c. The Prosecutors: Three prosecutors were involved in Mr. Kight's case. Each testified at the evidentiary hearing. Each were asked numerous questions by undersigned counsel concerning every exhibit introduced at the hearing, every item included in the appendix to the Rule 3.850 motion, every aspect of their dealings with the informants in this case. In response to these questions, the three former prosecutors each testified that they remember nothing specific about this case, nothing about the documents at issue, and indeed almost nothing at all. On cross-examination by the State, the lower court nevertheless allowed each of the three former prosecutors to speculate that if there were "deals", they "would have" remembered them. Notwithstanding their expressed lack of memory, the lower court

then relied on these speculations to deny the Rule **3.850** motion. This was simply wrong: speculation is not "competent, substantial evidence," and a trial court's denial of a **3.850** motion cannot be sustained if there is a lack of "competent, substantial evidence" bottoming the ruling. See, e.g., State v. Michael, **530** So. 2d **929, 930** (Fla. **1988).** This standard is particularly important in this case: two informants (Ellwood and Sims) testified at the Rule **3.850** hearing that there were agreements and understandings (e.g., for sentence reductions), one other (Hugo) denied that there were **"deals"** but did testify that the State had promised to assist him in gaining drug treatment and that he and the prosecutor knew that in order to get drug treatment his sentences had to be corrected to run concurrently, the fourth (Moody) had the stipulated-to motion to vacate sentence noted above filed on his behalf and granted before Mr. Kight's sentencing, the documentary and other evidence adduced at the hearing (including, Judge Adams' written order finding, pretrial, that the State had violated the discovery rules intentionally by not informing defense counsel of an agreement reached with an informant who did not testify, Def. Ex. 16; the unlawful -- beyond jurisdictional time limits -- motions to vacate/reduce filed by the State and/or with the State's stipulation in the case of each informant; and other documents which were never disclosed to defense counsel), all demonstrated that Brady and the discovery rules were violated in this case. The lower court erred in relying on the former prosecutors' speculations to reject this claim, especially given the prosecutors' own avowed lacks of memory.

d. Richard Ellwood: Richard Ellwood, like Charles Sims, testified at the evidentiary hearing that there were agreements and understandings but that they were told by the prosecutors to say that none existed. Ellwood and Sims, like the others, had motions to reduce/vacate filed for them and/or stipulated to by the State. The State, however, prior to Mr. Kight's trial believed that Ellwood was a psychopathic "liar" (App. 18), and in fact had specific evidence to support this. The evidence was presented by the same State Attorney's office that prosecuted Mr. Kight, at the State of Florida v. Robert Parker trial, a trial occurring prior to Mr. Kight's trial:

BY MR. GREENE [PROSECUTOR]:

Q Detective Mittleman, state your full name, please sir.

A P. R. Mittleman.

Q What's your occupation?

A Detective in Duval County Sheriff's Office.

Q How long have you been so employed?

A Almost 14 years.

Q And what section are you in?

A Burglary detective.

Q Did you have an occasion to come and meet and come in contact with one Richard Lee Ellwood?

A Yes, I have.

Q When did that occur?

A The first time I met Mr. Ellwood was November of 1981.

Q How was that?

A Arrested for burglary.

Q Okay. And this was pursuant to an investigation you conducted?

A Yes.

Q Would you generally describe your interaction with Mr. Ellwood from that first arrest until today?

A I have had several dealings with him, I have arrested him several times and spoken with him at length and other police departments about Mr. Ellwood.

Q All right. Was the purpose of your investigation of Mr. Ellwood the discovery of criminal acts he had committed?

A Yes.

Q In other words, you never went out to learn what his reputation was anywhere? I mean, that was never the purpose of your investigation?

A That's correct.

Q Okay. Now, how many times have you arrested Mr. Ellwood?

A Twice.

Q All right. And that was 1981 and when was the next time?

A In April of 1982.

Q Okay. Between November of '81 and April of '82, did you have an occasion to continue your investigation -- what happened to Mr. Ellwood after he was arrested in November of '81?

A He was out of jail on bond and jumped bond, was arrested in Ft. Lauderdale.

Q Okay. When was that -- when was he arrested in Ft. Lauderdale, approximately?

A January of 1982.

Q Okay. From November -- from the

time he jumped bond to January of '82, were you continuing your investigation of Mr. Ellwood?

A I was trying to find him, but I didn't know where he was.

Q Okay. So you were calling around, talking to various police agencies looking for him?

A That's correct.

Q And did you have occasion to talk to his people that knew him in the -- where did he live or do you know? Where was his home?

A He told me that his home was in Miami where his folks lived, but he was staying with different people while he was here in Jacksonville.

Q He also lived in Ft. Lauderdale?

A I don't know.

Q That's where he was arrested at?

A Yes, that's where he was arrested, but I don't know if he lived there or not.

Q Okay. Did you have occasion to talk to people that knew him in various locations around the State of Florida?

A Yes.

Q Now, this was in an effort to find him?

A Yes, sir.

Q Okay. After he was arrested in January -- was in January of '82?

A That's when he was arrested in Ft. Lauderdale; yes.

Q When was he returned to Duval County or what happened there?

A He was able to make bond in Ft. Lauderdale and jumped bond down there, also.

And then he was subsequently arrested in Jacksonville for the capiases that he jumped bond from in Jacksonville originally.

Q I see. And then you just succeeded in making further cases against him?

A Yes.

Q And during the course of making -- how many cases of burglary did -- were you ultimately able to solve through your investigation of Mr. Ellwood?

A 99.

Q 99 separate burglaries?

A Yes.

Q And involving these 99 burglaries, you talked to numerous people?

A Quite a few.

Q Okay. And how about law enforcement agencies?

A Several.

Q All right. Including -- could you name a few?

A FBI, Ft. Lauderdale Police, Broward County Sheriff's Office.

Q And did you also work with local agencies, the beaches and elsewhere?

A Yes, I did.

Q Okay. And during the course of your investigation -- in other words, pretty much you have been investigating Mr. Ellwood's criminal activities since November of '81 up until today?

A That's a fair -- that's about right; yes, sir.

Q And during the course of your investigation and the conversation with numerous people, did you come to learn Mr. Ellwood's reputation in the community in

which he resides for truth and veracity?

A Yes, I think so.

Q And what is that reputation?

A His reputation is extremely bad.

(See Def. Ex. **18**). None of this (evidence of Ellwood's reputation for truth and veracity and record) was turned over to defense counsel, although Ellwood was one of the key State witnesses at the Kight trial; nor was any of the information concerning Ellwood's criminal history which was known to the State (see Ex. **17** ["Williams Rule Notice"]; Ex. **6**) turned over. The lower court said nothing about the issue in its order and, as the court's on-the-record statements indicate, was unaware of the applicable legal standard: since all of the information noted above concerning Ellwood was known to other members of the same State Attorney's office that prosecuted Mr. Kight, that knowledge is imputed to Mr. Kight's prosecutors, and violations of Brady and the applicable discovery provisions are established. See Williams v. Griswald, **743** F.2d 1533, **1542** (11th Cir. **1984**); Giglio v. United States, **405** U.S. **150 (1972)**; Arango **v.** State, **467** So. 2d **692** (Fla. **1985**). The lower court did not understand this, and therefore ruled erroneously.

In failing to account for any of this, the lower court erred. With those specific points noted at the outset, we turn to a discussion of the evidence adduced at the **3.850** hearing. The motion to vacate itself (pp. **14-40**), contained a discussion of the informants' trial testimony and of the claim which is quite relevant to the discussion here. As the motion has been before the Court, we respectfully refer the Court to it, rather

than repeating its contents herein.

At the hearing, uncontroverted documents, including motions and orders in the circuit court files for the informants' cases, established irrefutably that each informant was rewarded. The informants said that their expectations and the prosecutors' instructions affected their trial testimony (H. 241, 295-96). Defense counsel was not provided this information nor other similar information that would have affected Mr. Kight's trial and sentencing, information he definitely would have used at deposition, trial and sentencing to investigate and challenge the informants' testimony and to present grounds supporting a sentence less than death (H. 69, 70, 79, 101-09, 124, 137, 148).[6]

The lower court, however, erred because it misapplied the law and improperly considered the facts. The lower court erred in simply relying on the former prosecutors' **"speculations"**, especially given the prosecutors own avowed lack of memory, about virtually anything and everything concerning this case (See, e.g., H. 324-59; 388-400; 404-420; 560-602). The informants had expectations that they would receive something (e.g., sentence reductions), the prosecutors knew -- indeed could not but have known -- that the informants had expectations, and later, each of the informants had motions to vacate and/or reduce sentences

[6]Given the fact that there was mitigation in this case (e.g., the fact that Mr. Kight is mentally retarded) and that the prosecution was based almost entirely on Mr. Kight's purported statements to the informants, counsel's use of information such as that adduced at the 3.850 hearing would have been very significant at the trial and the sentencing.

filed in each of their cases and/or stipulated to by the very same prosecutors involved in Mr. Kight's case. (Although the prosecutors stipulated to jurisdiction, each motion was made and granted beyond the jurisdictional time limits, and thus each one was not lawful.) Moreover, as noted, the lower court entirely ignored the motion to vacate filed in informant Fred Moody's case by then-prosecutor Denise Watson. This motion was filed before the jury or judge sentencing phases of Mr. Kight's case. However, it was not provided to defense counsel (H. 626).

Glaringly absent from the lower court's order is any discussion of discovery violations. Mr. Kight's trial attorney filed requests for discovery, a "Motion for Brady discovery," and a motion to compel that discovery (Defendant. Exh. 24). The lower court failed to address the state's failure to comply with this discovery that specifically sought information about these informants. The State's discovery violations, even standing alone, are sufficient to warrant reversal, for the State cannot and has yet to even attempt to show that the discovery violations are harmless beyond a reasonable doubt. See Roman, supra, 528 So. 2d at 1171.

Several witnesses recognized the uniqueness of the Kight case, both in the provision of the informants' names by his co-defendant as part of a plea agreement and in the use of these informants (R. 100, 432). Mr. Sheppard and former prosecutor Baker King testified that it is almost unbelieveable that an inmate would testify without expecting a deal (R. 161, 353, 359). These four inmates were no different. The record as a whole reflects that they had expectations which were known to the

State, but which were not disclosed, and which were later fulfilled (in Moody's case, before Mr. Kight's sentencing). The prosecutors in Mr. Kight's case agreed to, and themselves filed motions to reduce sentences for the informants. Former prosecutor Mahon testified that he had never heard of such actions being taken by prosecutors on behalf of defendants such as the informants in this case, and Mr. Sheppard and Mr. Link confirmed that testimony (R. **151, 413, 621-23).** (The motions were made by the other two prosecutors, King and Watson.) The evidence presented at the hearing establishes the improper conduct that occurred, and its effect on Mr. Kight's trial.

It is today well-settled that the prosecution's withholding of evidence that is favorable to the accused and material to guilt or punishment violates due process, regardless of the good or bad faith of the prosecution. Brady v. Maryland, **373** U.S. **83, 87 (1963).** Brady and its progeny impose on prosecutors a duty to disclose, and that duty to disclose extends to impeachment evidence. See United States v. Agurs, **427** U.S. **92 (1976);** United States v. Bagley, **473** U.S. **667 (1985).**

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." Giglio v. United State, **405** U.S. **150, 154 (1972),** quoting Napue v. Illinois, **360** U.S. **264, 269 (1959).** The suppression of such evidence violates not only due process but also the sixth amendment right to confront and cross-examine witnesses. See Bagley at **676,** Chambers v. Mississippi, **410** U.S. **284 (1973);**

Davis v. Alaska, 415 U.S. 308 (1974).

"Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, 480 U.S. 39, ___, 107 S.Ct. 989, 999 (1987). There is "particular need for full cross-examination of the state's star witness." McKinzy v. Wainwriaht, 719 F.2d 1525, 1528 (11th Cir. 1982). Without proper disclosure, counsel's cross-examination is rendered meaningless. Thus the State's suppression of impeachment evidence deprives an accused of his right to effective assistance of counsel as well. Cf. United States v. Cronic, 466 U.S. 648 (1984). In Mr. Kight's case, the prosecutors suppressed an array of impeaching material on various witnesses.

Additionally, this Court has established that where, as here, defense counsel makes a discovery demand and the State fails to fully comply with its discovery obligations, a discovery violation is shown. In such instances, the State bears the burden of demonstrating that the error is harmless beyond a reasonable doubt. See Roman, 528 So. 2d at 1171, citing State v. DiGuilio. The lower court completely failed to consider this issue, although the State never even attempted to make the requisite showing here.

Mr. Kight's trial counsel, William Sheppard, attempted to attack the credibility of the informants, but the suppression of information blocked his efforts (H. 58). Although he had a gut instinct that they were lying, the informants' claims of "no deals" dead-ended his attempts to challenge them or their stories

at deposition, trial, and sentencing (H. **50, 61, 67).** The undisclosed impeaching evidence included evidence that the informants lied and that they had expectations of benefit b caus of their testimony. This type of evidence falls undoubtedly within the parameters of Brady and the discovery rules, and must be disclosed. Roman, supra; Gislio v. United States, **405** U.S. **150 (1972);** Napue v. Illinois, **360** U.S. **264 (1959).**

Here, Ellwood described at the evidentiary hearing how he initially made up his story to help Hutto because he thought Kight was going to testify against Hutto (H. **178-80).** Ellwood recruited Hugo and Moody in his scheme (H. **178).** When Hutto turned over the informants' names to the State, Ellwood attempted to recant, but the prosecutors told him to stick to the original story (H. **184-88).** The prosecutors also ignored Ellwood's information that he gave Hugo and Moody the story (H. **195).** To cement the informants' testimony, the prosecutors kept them together in a room at the State Attorney's Office and provided them each other's depositions to review, the medical examiner's report and pictures of the victim (H. **209-11).**

Although unhappy with the situation, the informants were then caught and stuck with their original stories. As Ellwood stated, "after we got to the State Attorney's Office it's kind of hard not to testify. We were going to get perjury charges or we were going to get a deal" (H. **196).** The prosecutors told him he would get his retained jurisdiction dropped but they refused to put the deal in writing (H. **198)** and they told all the informants to say no deals were made (H. **198-99;** 201). Later, former

prosecutor Watson was actively involved in getting Ellwood's retained jurisdiction sentence dropped, although the trial court was without jurisdiction to do so (See Def. Ex. 7). Ellwood's description of the events conforms with one of former prosecutor Mahon's few recollections: that the informants were unhappy about the situation, but that they started the ball rolling and then could not get it stopped (H. 432).

Bradv and its progeny impose a duty on the prosecution both to respond to specific requests and to independently disclose favorable evidence to the accused. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." United States V. Agurs, 427 U.S. 97, 106 (1976). Mr. Kight's trial attorney was concerned, and properly so, about the motives of these informants (H. 45). He made first a demand for discovery under Florida Rule 3.220 and followed the demand with a motion for Bradv material in which he specifically requested statements of arrangements for, or expectations of, favorable treatment related to the informants' testimony (Exh. 24; H. 42-46; 50-52). The trial judge ordered the State to provide this material. A motion to compel then had to be filed, and the trial judge again ordered disclosure (Exh. 24; H. 42-46). Fla. r. Crim. P. 3.220 also mandated disclosure. The record now amply reflects that the State failed to comply.

In an order entered in co-defendant Hutto's case, Judge Adams found that the State had intentionally and willfully violated the Florida Rules of Discovery by failing to reveal its agreement with a potential witness (who, eventually, did not testify)(Exh. 16).

The lower court failed to evaluate the discovery violations and failed to comprehend what the facts adduced at the hearing established. Mr. Sheppard explained how he would have used the non-disclosed information to change his trial and sentencing strategy and to further investigate and attack the informants.

Mr. Sheppard was forced to call Mr. Kight's co-defendant Hutto as a witness because he had no other way to counter the informants' testimony (H. **57).** Hutto's testimony was devastating to the defense. Mr. Sheppard would not have called Hutto if he had information showing the informants had an interest in testifying (H. **57),** but nothing about this was disclosed.

Mr. Kight is entitled to a new trial and/or sentencing because of the discovery violations, Roman, supra, as well as under the standards of Brady and its progeny. the record now before this Court is troubling. After all, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Aranso v. State, **467** So. 2d **692** (Fla. **1985);** Brady, **373 U.S. 83, 87-88 (1963).** The bizarre and unfair circumstances of Mr. Kight's case are now undisputable. Relief is appropriate.

The lower court also ignored the further instructions of United States v. Bagley, **473** U.S. **667 (1985),** that a reviewing court should assess the totality of circumstances to determine materiality.

> "[T]he reviewing court may consider directly any adverse effect that the Prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should

> assess the possbility that such effect might have occurred in light of the totality of circumstances and with an awareness of the difficulity of reconstructing in post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Id. at 683 (emphasis added).

Mr. Sheppard testified that his entire conduct (at deposition, trial, and sentencing) would have been different had he known of any of the information which was not disclosed. Under the totality of circumstances, confidence in the outcome of the trial and sentencing proceedings is undermined. It did affect the preparation and presentation of Mr. Kight's case.

With regard to Ellwood, the State's failures to disclose were even more substantial. The State had abundant evidence that questioned Ellwood's credibility. The "Williams Rule Notice" filed by the State in one of Ellwood's cases noted that Ellwood admitted to over 50 burglaries (Def. Exh. 17). Although the State presented a detective's testimony that Ellwood had a bad reputation for truth and veracity in an earlier capital case in Jacksonville (State v. Parker)(Exh. 18), and that Ellwood's criminal history was substantial, it is undisputed that these facts were never provided to the defense. The State's real view of Ellwood is embodied in a notice of intent to seek enhanced penalty and the resulting judgment by which Judge Olliff sentenced Ellwood to 3 concurrent forty year sentences with retained jurisdiction of 10 years (Def. Exh 32). This too was not disclosed. Nevertheless, later, prosecutor Watson joined in Ellwood's motions to reduce sentence (Def. Exh. 13, 14). Those

motions stated that Ellwood was instrumental in Mr. Kight's conviction and sentencing (Id.). Judge Olliff granted the specific relief requested in the second motion, expressly noting the agreement of state attorneys Ricke and Watson (Exh. 7).

Ellwood testified at the hearing that these motions, and an additional motion filed in May, **1989**, were his efforts to enforce the deal that the State had promised to him (H. 221). The most recent motion states that Ellwood's original sentence as a habitual offender was changed because he was a witness in the Kight case (Exh. **8)** This **1989** motion is further confirmation that Ellwood expected to receive and eventually did receive compensation for his testimony, although he has not yet received all he feels he was promised (H. 221).[7]

The State's suppression of evidence pertaining to informant Fred Moody constitutes perhaps the clearest and most blatant Brady/discovery violation, a violation that the lower court completely ignored. Although Moody testified at trial that his sentence would expire in a few days, he faced a consecutive 6-month county jail sentence following the expiration of his state sentence (Exh. 34).

'Ellwood made similar efforts to enforce the State's promises by writing Watson and demanding some help. Watson in response wrote the Parole and Probation Commission and requested that Mr. Ellwood be transferred. The Parole Commission transferred Ellwood in direct response to those letters, although the records note that Ellwood did not appear to be in any danger (Def. Exh. 25). The Parole Commission then reduced Ellwood's presumptive parole release date by 60 months, expressly in response to the information that Ellwood had provided instrumental testimony in a death penalty case (Defendant Exh. 25).

The defense was never informed of this fact, nor was the defense told that prosecutor Watson stipulated to a motion to vacate that sentence on June 11, 1984, before jury or judge sentencing in Mr. Kight's case (Exh. 33; H. 626, 130). This motion was filed after the time limit set by the relevant rule (See Rule 3.800; H. 180). No one told the defense.

Former defense counsel testified at the Brady hearing that he did not attack the informants at all in his sentencing presentation. If at the time of sentencing he had had that document or the information it contained, however, he certainly would have challenged the testimony of these witnesses at penalty phase, would have renewed his investigative and discovery efforts, and his entire penalty phase strategy would have changed (H. 626-27). Moody was, after all, rewarded for his testimony, before sentencing. Viewed in conjunction with Moody's letter to Watson informing her of his release date and asking that she clear up his detainer (Exh. 31), and the previous order of January, 1984, that denied a reduction motion in his case (Exh. 9), the stipulated motion to vacate would have been quite compelling evidence for the defense.

In the case of Charlie Sims, former prosecutor Watson did more than agree to a reduction of sentence: in her capacity as an assistant state attorney she filed a motion to vacate on behalf of Sims on September 7, 1984 (Exh. 33). Former prosecutor Mark Mahon and defense attorneys Robert Link and Bill Sheppard testified that they had never heard of prosecutors taking such action in any other case (H. 157, 413, 621-23). This motion by Watson was granted (Exh. 12), although an earlier plea for

mitigation in Sims' case had been denied (Exh. 10). This motion was not lawful -- the circuit court was without jurisdiction to grant it, see Rule 3.800, notwithstanding the State's "stipulation" to circuit court jurisdiction. Nothing about this was given to defense counsel.

The unusual filing of such a motion by an assistant state attorney and the testimony of Sims at the hearing establish that Sims expected that the State would aid him because of his testimony against Mr. Kight, that the State knew this, but that the State never told defense counsel.

Sims testified at the hearing that Hutto offered him money to say that Mr. Kight had admitted the killing (H. 281). Ellwood confirmed Hutto's involvement. Sims testified that he told Watson about this offer and that she told him not to mention it (H. 320). Similarly, he told Watson that Hutto had admitted the stabbing, and she told him not to mention that (H. 290). He also testified at the hearing that he did expect to get a deal (H. 286) and that he heard the prosecutors promise Ellwood, Moody and Hugo rewards as well (H. 292). Finally and importantly, Sims testified that the things the prosecutors told him affected his trial testimony (H. 295). He said his trial testimony was the result of coaching by the state attorneys. Like all the informants, he expected to gain from his testimony but was instructed not to reveal that expectation (H. 286). The prosecutors explained that they could not promise deals before the trial but they would make sure the witnesses were rewarded after trial (H. 284-86).

The deception of the Kight prosecutors is also evident in the uncontroverted documents in the case of Robert Dorminey, another informant who did not testify. Dorminey wrote letters to Watson, asking in one that she work with his attorney to get his sentence shortened (Exh. 21, 20). In that letter he said that "this whole thing can turn into a nasty mess if it is not handled right...," and he carefully stated "I am not making a deal with your office. I would just like some help with this problem" (Exh. 21). The motion and order that ultimately reduced his sentence demonstrate that he in fact had a deal, a deal that the State did not reveal to his defense attorney or the sentencing court, a deal that the State was forced to honor once his defense attorney became involved. Judge Adams' order found as much. None of this was provided to Mr. Sheppard.

Both the motion to reduce and the order stated that Dorminey cooperated with the State Attorney in the Hutto and Kight cases but that the State Attorney did not reveal that cooperation to either Dorminey's attorney or the court at the time of sentencing (Def. Exh. 4, 5). The pattern of deception extended beyond they Kight case. Everything in this record conforms with the prosecution's original instructions to these informants to say "No deals," although they were led to understand that their expectations would be fulfilled later. In fact, those expectations were fulfilled, as each informant received sentence reductions either by motions filed by the Kight prosecutors, or by motions stipulated to by the Kight prosecutors.

Testimony by Victor Bostic, another potential but unused witness, is also in conformity. Bostic testified at the Brady

hearing that Hugo urged him to write the State Attorney's office volunteering information against Mr. Kight (H. **454).** Although Bostic was in a cell with Mr. Kight at the Duval County Jail (H. **448),** Kight never admitted the killing to him (H. **450).** Hugo gave him information about the crime and told him this was their chance to be set free (H. **456).** He did in fact write a letter to the State Attorney offering **"to** testify for immunity from justice" (Exh. **19).** The State never provided this letter to defense counsel nor informed Mr. Sheppard of its existence (H. **628).**

Bostic ultimately refused to testify in his deposition because he decided that it was not the right thing to do (H. **460).** He had been brought back for depositions with the other informants (H. **458-59).** Since they were all placed in one room together at the State Attorney's office he knew that Hugo and Ellwood expected deals and that Ellwood and Hugo had made up their stories (H. **461-65).** Defense counsel could have used this information and the Bostic letter to impeach Hugo and to fortify his investigation of the informants (H. **628,631).** None of this information, however, was disclosed.

Hugo himself had a letter written on his behalf to prosecutor King from the River Junction Correctional Institution (December, **1983)** explaining that Hugo would be eligible for a drug treatment program if his consecutive sentences were altered to run concurrently (Ex. *36).* King and Huto knew about this. No one told defense counsel.

In March, **1984,** Hugo wrote to King, addressing King and

Watson, stating, "I have also given you my deposition and it is my hope that you will help me with my situation as we have discussed" (Def. Exh. 2). None of this was turned over to Mr. Sheppard, who testified that if he had it, he would have used it (H. 70). Indeed, after Mr. Kight's trial, Baker King, as a prosecutor, filed a motion to reduce on Hugo's behalf (Exh. 35), a motion which stated that Hugo "rendered invaluable assistance" in the Kight case and that "he was very helpful in motivating other inmates," statements consistent with Ellwood's and Bostic's version of events (Exh. 35, H. 549-546; 184).

Mr. Sheppard testified how all this information would affected his strategy and Mr. Kight's case at trial and sentencing (E.g., H. 57). Since he was unable to directly challenge the motive of the informants he was compelled to have the court call Kight's co-defendant Hutto as a witness, and then to recall Hutto (Id.). If he had had, for example, the three documents relating to Hugo (Exh. 2, 35, 36), Mr. Sheppard would not have called Hutto (H. 80). These documents would have impeached Hugo and Mr. Sheppard would have used them to challenge each of the informants at trial and sentencing (H. 57, 80).

This Court has ordered a new trial in similar cases. See Roman, supra; Aranso v. State, 467 So. 2d 692 (1985). But the lower court failed to properly assess the evidence before it in terms of its relevance to the trial and to the sentencing. After all, all the informants testified at trial that they expected nothing. But they did have (known) expectations. The possible influence on the jury warrants reversal. Prosecutorial conduct that allows a jury to wrongly infer credibility of witnesses is

error because such inferences contribute to jury verdicts. See United States v. DiLoreto, 46 Crim. L. 1184 (3d Cir. Nov. 29, 1989).

The State did not disclose specific documents and information that Mr. Sheppard would have used (H. 162). Defense counsel and the jury never had a chance to evaluate the real motives of these informants. The jury was not instructed on corroborating or interested witnesses; the non-disclosed evidence would have justified such an instruction (H. 82). Mr. Kight, who is mentally retarded, was taken advantage of by the informants. The informants' trial testimony, however, was left virtually unchallenged -- although the evidence was there, defense counsel was given nothing with which to challenge it.

The Rule 3.850 record as a whole demonstrates Mr. Kight's entitlement to relief. A new trial and/or sentencing is warranted.

(III)

MR. KIGHT WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE OF THE PUBLIC DEFENDER'S OFFICE'S CONFLICT OF INTEREST.

The unique circumstances of this case spring from the initial conflict in the Public Defender's dual representation of Mr. Kight and his co-defendant (Hutto) and the actions intentionally taken by the Public Defender's Office which aided Mr. Hutto at the expense of Mr. Kight. As William Sheppard, the attorney who undertook Mr. Kight's representation after the Public Defender withdrew, testified at the hearing, "there was something about the involvement of the Public Defender's Office

in it that made me uncomfortable" (H. 99-100). The lower court erred in declining to hear this traditional post-conviction claim.

Mr. Sheppard described the sequence of events from the initial conflict representation to the negotiation for Hutto's life deal that required Hutto to give the State the names of informants against Mr. Kight (H. 100). Mr. Sheppard explained that "the whole thing stank to high heaven to me then and I had never seen that kind of negotiating technique go on before" (H. 100). Mr. Sheppard's instinctive revulsion accurately reflects the nature and magnitude of this conflict.

The lower court denied this claim on the ground that it should have been raised on appeal. Mr. Kight actually presented this issue on appeal, on the basis of the facts then known to counsel, but this Court's opinion did not mention the issue.

Regardless, conflict of interest claims may properly be heard in post-conviction proceedings, both Rule 3.850 proceedings, see, Harich v. State, 542 So. 2d 980 (Fla. 1989), and federal habeas corpus proceedings. See Porter v. Wainwright, 805 F.2d 930 (11th Cir 1986); Burden v. Zant, 871 F.2d 956 (11th Cir 1989). Further, evidentiary hearings are necessary to resolve conflict claims. Harich; Porter; Burden. An evidentiary hearing is necessary here because the files do not conclusively show that Mr. Kight is entitled to no relief. See Sorsman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989); Lemon v. State, 498 So. 2d 923 (Fla. 1986). To the contrary, the files and records support Mr. Kight's claim -- that is why appellate counsel sought

to present the claim on direct appeal. The lower court was simply wrong in believing that the claim was not but should have been raised on appeal. It was. Since it involves facts that are not "of record" and that came to light after the original trial proceedings, and since the files and records by no means showed that Mr. Kight was entitled to no relief (the circuit court in fact cited to no such records and none exist), full and fair Rule 3.850 evidentiary resolution was required. See Lightbourne v. State, Nos. 73,609 and 73,612 (Fla. July 12, 1989).

Following Mr. Kight's initial arrest on the McGoogin robbery, the public defender's office was appointed to represent both Mr. Kight and co-defendant Hutto, on December 8, 1982. The same attorney, Ann Finnell, represented both Mr. Kight and Mr. Hutto. Ms. Finnell had previously represented Mr. Kight in other cases. Public defender files obtained during the hearing on the Bradv claim reveal that someone from the public defender's office spoke to Mr. Kight on December 9, 1982, but apparently no attorney talked to Mr. Kight until December 20, 1982 (See Motion to Supplement Record, and attachments thereto). On December 20, 1982, the Public Defender's office withdrew from representing Mr. Kight, and continued representation of Hutto. As noted, that office, and in particular Ann Finnell, had a pre-existing responsibility to Mr. Kight, arising from her representation of him in a 1979 burglary case (R. 925). In that case Mr. Kight was found not guilty by reason of insanity and was involuntarily committed (R. 925 and 266). In the course of that prior representation Ms. Finnell and her office obtained confidential information from Mr. Kight (R 925-27).

Despite the Public Defender's prior representation of Mr. Kight in this 1979 case, the Public Defender accepted conflict representation of both Mr. Kight and his co-defendant for this capital felony in 1982 and then withdrew from representation of Mr. Kight while continuing to represent Hutto.

In the crucial time period between his arrest on December 7, 1982 and its withdrawal from the case, the Public Defender's office in effect provided Mr. Kight no representation at all. No "Edwards notice" (see Edwards v. Arizona, 451 U.S. 477 (1981)) was filed to assert Mr. Kight's right to counsel during police questioning, although one was filed in Hutto's case shortly after the Public Defender's involvement. (Mr. Kight was in fact questioned by law enforcement after the Public Defender entered the case, with no advice from the Public Defender as to whether Mr. Kight should provide statements to the police, and for that matter, without any advice from the Public Defender on anything at all.) No attorney met Mr. Kight until the time of withdrawal, and then only to obtain information later used to his disadvantage and to co-defendant Hutto's advantage. This complete lack of representation and this conflict resulted in many bizarre and striking violations of Mr. Kight's constitutional rights. During the crucial time after his initial arrrest, Mr. Kight, unadvised and unprotected by counsel, gave police an incriminating statement that the State used against him at trial (See Motion to Vacate, Claim XII). The public defender's notes refer to this statement -- the public defender knew of its existence and contents. Nothing was done to protect

Mr. Kight from these circumstances, although he is mentally retarded and severely impaired -- the public defender could not but have known about these handicaps, for Ms. Finnell herself had represented Mr. Kight in the past in proceedings in which he was found not guilty by reason of insanity because of these very handicaps.

The Public Defender's representation of Hutto sharply contrasts with its ineffective representation of Mr. Kight. On December 17, 1982, Mr. Kight gave the incriminating statement to police. The next day, December 18, 1982, the Public Defender filed an "Edwards notice" on Hutto's behalf. On January 3, 1983, assistant Ann Finnell requested investigation on Hutto's case. Investigative notes indicate that the search for witnesses was well underway in January. Nothing, however, was done for Mr. Kight -- the Public Defender's former (on the 1979 case) and then-present (on this case) client.

The public defender's investigation focused exclusively on Mr. Kight's involvement, and that office sought to develop evidence that Mr. Hutto was not involved, including evidence on this from Mr. Kight, notwithstanding the fact that the Public Defender had a duty of loyalty, see Strickland v. Washington, 466 U.S. 668 (1984), to Mr. Kight both during that office's representation of him and, as a former client, thereafter.[8] By

[8]Interestingly, the Public Defender withdrew from Mr. Hutto's case because of a conflict arising from its representation of another witness in this action (Dorminey). The same protections were due to Mr. Kight -- the Public Defender should have withdrawn from both cases at the outset, rather than working to the advantage of Hutto and disadvantage of Mr. Kight, a client of the Public Defender's since 1979.

February 8, 1983, the Public Defender obtained a statement from Sherwin Cray that Mr. Kight had allegedly admitted complicity. Public Defender investigator Louis Eliopulos testified below that he approached inmates at the Duval County Jail searching for statements Mr. Kight might have made about the crime.[9] Mr. Eliopoulos in fact testified that he falsely told witness Ellwood that he knew Ellwood had information from Kight about the murder, in an effort to persuade Ellwood to talk (H. 493).

After withdrawing from Mr. Kight's case, the Public Defender's office continued to have a duty of loyalty to Mr. Kight -- this duty was known, as Mr. Kight had been the Public Defender's client on this case as well as in the **1979** case. The Public Defender nevertheless continued to actively work to aid Mr. Hutto at the expense of Mr. Kight, and did so to an extent that is truly extraordinary. As Eliopulos explained, the Public Defender actively and deceptively cultivated witnesses that would specifically place the blame for the killing on Mr. Kight. Ms. Finnell made the State aware that she had gathered such witnesses (R. **927).** The Public Defender was attempting to obtain a plea agreement for Mr. Hutto's benefit, in exchange for the evidence it was collecting against Mr. Kight. When the Public Defender was forced to withdraw from Mr. Hutto's case because of a conflict with a potential witness (see Def. Exhibit 16), Ms. Finnell told Hutto's new attorney, Robert Link, that the Public

[9]Mr. Eliopoulos was called as a witness by the State because he supposedly had information relevant to the Bradv claim. If anything, he had information very relevant to the conflict claim. But the circuit court refused to hear this issue.

Defender's office had uncovered a number of witnesses that would be helpful to Mr. Hutto and damaging to Mr. Kight. She informed Mr. Link that the State was very interested in these witnesses because the case against Mr. Kight was not very strong. The witnesses were then traded to the State as a condition of Hutto's plea agreement. These jailhouse informants testified against Mr. Kight at trial and were central to the State's case, as this Court's opinion on direct appeal makes abundantly clear. The trap the Public Defender built around Mr. Kight snapped shut.

The Public Defender's betrayal of Mr. Kight violates ethical principles as well as Mr. Kight's constitutional rights. The Florida Rules of Professional Conduct provide that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client, nor use information relating to the representation to the disadvantage of the former client. See Rule 4-1.9, Florida Rules of Professional Conduct (emphasis added). As in a law firm, conflict representation by one assistant public defender is imputed to the entire office. See Babb v. Edwards, 412 So. 2d 859, 862 (1982); Fitzpatrick v. State, 464 So. 2d 1185 (Fla. 1985); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir 1987). In this case, however, the same assistant public defender represented Mr. Kight in the past, and Mr. Kight and Mr. Hutto in this case, and that same assistant and her office were directly involved in developing the evidence obtained from Mr. Kight which would be used to his detriment and Hutto's assistance. When that evidence was turned

over to the State, it became central to Mr. Kight's prosecution and death sentence.

Multiple representation of criminal defendants inherently raises conflict concerns, and courts have taken steps to prevent such conflict representation. See Fed. Rule Crim. P. 44(c) (requiring court to advise defendant of potential problems and to protect defendant's right to counsel unless there is good cause to believe no conflict will arise); Fleming v. State, 270 S.E.2d 185 (Ga. 1980)(requiring separate representation in capital cases); People v. Mroczko, 672 P.2d 835 (Calif. 1983) (requiring separate counsel for jointly charged indigent clients at the commencement of criminal proceedings).

More importantly, the unethical conflict violated Mr. Kight's sixth amendment rights. "The 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). An actual conflict is itself a denial of the right to effective assistance of counsel, Cuyler v. Sullivan, 446 U.S. 3356 (1980), and in such cases prejudice is presumed. See Cuyler at 348; Lishtbourne at 1023. Even a "potential" conflict violates the sixth amendment if it adversely affects the client. Lishtbourne at 1023. Here, obviously, the conflict did. In addition, unconstitutional multiple representation can never be deemed harmless error. Cuyler at 349. A per se rule of reversal is constitutionally required when, as here, a conflict of

interest is demonstrated. See Strickland v. Washington, 466 U.S. 668 (1984); Hollowav v. Arkansas, 435 U.S. 475 (1978); Cuvler v. Sullivan, supra. At a minimum, Mr. Kight is entitled to an evidentiary hearing on this claim -- his Rule 3.850 motion pled much more than sufficient facts to warrant a hearing. See Motion to Vacate, Claim XVI, pp. 106-112. Mr. Kight's motion reflected, inter alia, the following:

CLAIM XVI

> MR. KIGHT WAS DENIED HIS RIGHT TO BE FREE FROM SELF-INCRIMINATION, HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE PUBLIC DEFENDER'S OFFICE, WHICH INITIALLY REPRESENTED BOTH MR. KIGHT AND HIS CO-DEFENDANT MR. HUTTO, USED INFORMATION AGAINST MR. KIGHT TO BENEFIT MR. HUTTO, AND THIS CONFLIT OF INTEREST VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
>
> 1. All other allegations contained in this motion and all facts reflected in the accompanying appendix are fully incorporated herein by specific reference.
>
> 2. Mr. Kight's constitutional rights were violated because the Public Defender's Office participated in a conflict of interest arising out of that office's mutual representation of both Mr. Kight and his co-defendant Hutto.
>
> 3. Charles Kight and Gary Hutto were both arrested on December 7, 1982, for the McGoogin robbery. During interrogation by R.T. Weeks at the police station, shortly after the arrest, Mr. Hutto implicated Mr. Kight in the robbery (R. 668-696). The Public Defender's Officer had notice of Mr. Hutto's statement because it was contained in Mr. Kight's Arrest and Booking Report (R. 696). Nonetheless, without objection, the Honorable Edward P. Westberry appointed the Public Defender's Office to represent both Mr. Hutto and Mr. Kight (R. 684).

4. Even though Mr. Kight was in the Duval County Jail, charged with a life felony, he had no individual contact with an attorney from the Public Defender's Office for at least ten days (R. 721). During this critical period, on December 14, Mr. Kight was interrogated by Officer Perry Riley at the jail concerning the missing taxi cab of Lawrence Butler (R. 401, 948).

5. Three days later, Detective Weeks, knowing Mr. Kight had invoked his fifth and sixth amendment rights, nevertheless took Mr. Kight from his jail cell for the stated purpose of seizing Mr. Kight's clothing (R. 524-25). It was during this police-initiated contact that Mr. Kight, who had not yet spoken to an attorney, made certain statements introduced against him at trial (R. 525-26). Shortly after making his statement, Mr. Kight was arrested for murder (R. 1-2). It was not until December 22 that the Public Defender's Office recognized the conflict which existed in its representation of the two men. In a motion by the assistant public defender to withdraw from Mr. Kight's defense, only Mr. Kight's statement implicating Mr. Hutto was cited (R. 4). Mr. Hutto's earlier statement implicating Mr. Kight was never mentioned. The public defender knew that Mr. Kight had been implicated by the public defender's other client (Hutto) but did nothing to protect Mr. Kight, and never even bothered to see him and advise him during this critical time period.

6. The Public Defender's Office continued to represent Gary Hutto. During the period of this representation, the Public Defender gathered the names of jailhouse informants who would be willing to testify to statements against interest purportedly made by Mr. Kight. Mr. Hutto's plea agreement required that he provide the names of these witnesses to the State (R. 927). After the Public Defender was forced to withdraw from Hutto's defense, the names were given to the newly-appointed counsel, Robert Link (R. 929). Mr. Link, complying with the plea negotiations, gave the names to the State (R. 955). The jailhouse informants eventually testified against Mr. Kight at trial. Prior to trial a motion to exclude the testimony of these witnesses was filed and denied (R. 414-415, 476).

7. The testimony of these witnesses arose directly from the conflict of interest of Mr. Kight's former counsel -- and counsel's resulting ineffective assistance. This conflict violated Mr. Kight's constitutional rights in two ways. First, no attorney from the Public Defender's Office spoke with Mr. Kight individually for at least ten days, even though he was charged, at a minimum, with a life felony. During the fifteen-day period that the Public Defender's Office nominally represented Mr. Kight, he received no representation at all. Denied the "guiding hand of counsel," Johnson v. Zerbst, 304 U.S. 458, 463 (1938), Charles Kight, retarded and illiterate, held in the highly coercive environment of the jail, repeatedly subjected to police-initiated investigatory contacts, was ill-equipped to protect his own rights. Alone against the overwhelming forces of the State, he succumbed. Mr. Kight's statement to Weeks was a direct result of the failure of his counsel to make even a minimal effort to protect him. Mr. Kight's statement should have been excluded at trial. He desperately needed counsel's aid, but his counsel did not even bother to see him, advise him, or even advise law enforcement to leave him alone.

8. In addition, the Public Defender's Office labored under a conflict of interest, at the very outset, in attempting to represent both Hutto and Kight, and should have withdrawn from both defendant's cases immediately. By remaining on Mr. Hutto's case, the Public Defender's Office placed itself in a position completely antagonistic to the best interest of its former client, Mr. Kight. The only appropriate remedy was to withdraw as counsel. While the public defender did ultimately withdraw, it was not until after it had obtained testimony from its other clients (Moody, Sims and Ellwood) that incriminated Mr. Kight.

9. Although it was plain at Mr. Kight's bond hearing on the robbery charge that, since Hutto was implicating Mr. Kight, a conflict existed, the Public Defender's Office was appointed to represent both men. When, ten days later, both were formally arrested for Butler's murder and Mr. Kight implicated Hutto, the assistant public

defender was again appointed on both cases. Five days later, the assistant public defender noticed the conflict, and withdrew from Mr. Kight's case, despite the fact that (never having represented Hutto before) the very same Assistant Public Defender, Ann Finnell, had previously represented Mr. Kight (R. **924-926).** The assistant public defender then gathered names of jailhouse informants against Mr. Kight, a former client, to further Hutto's plea negotiations. After building the case against a former client through the testimony of present clients, including the co-defendant, the assistant public defender turned the entire file over to Robert Link, who in accord with the agreement reached by the public defender provided the information to the State, to Mr. Kight's indisputable detriment.

10. "Loyalty is an essential element in the lawyer's relationship to a **client."** Comment to Rule **4-1.7** Florida Rules of Professional Conduct. The relevant Rules provide:

RULE **4-1.9** CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as rule **4-**1.6 would permit with respect to a client or when the information has become generally known.

Rule **4-1.9,** Florida Rules **of** Professional Conduct (emphasis added).

11. There is no question that conflict representation by one assistant public defender is imputed to the entire office. Rule **4-1.10** (While lawyers are associated in a firm, none of them shall knowingly

represent a client when anyone of them practicing alone would be prohibited . . . .); Babb v. Edwards, 412 So. 2d 859, 862 (1982)("[T]wo adverse defendants should not be represented by assistant public defenders in the same circuit . . .").

12. The sixth amendment to the United States Constitution guarantees the criminally accused the right to conflict-free representation: "The 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). Prejudice is presumed when a defendant demonstrates "an actual conflict of interest adversely affected his lawyer's performance.'' Culyer v. Sullivan, 446 U.S. 335, 348 (1980). The Eleventh Circuit has defined actual conflict of interst as follows:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.

Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986), quoting Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981)(Unit B). This is precisely the case here.

13. "The most common means by which an attorney may fail to function as his client's advocate in the absence of an affirmative state interference involves a conflict of interest arising from multiple or dual representation." Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The prejudice from the conflict here is obvious and devastating. The testimony of the inmates condemned Mr. Kight to death while saving Hutto from that fate. The conflict is especially offensive because, as recently discovered, this testimony was false. The First District found that an evidentiary hearing was necessary in a similar case involving both duel representation and perjured testimony. Monson v. State, 443 So.

2d 1061 (Fla. 1st DCA 1984). In the instant case a hearing is warranted, but even without a hearing the facts on the face of this motion establish the egregious conflict and the need for relief.

14. A conflict such as this, with the irrevocable harm it engenders, could have easily been avoided. In the federal system, Fed. R. Crim. P. 44(c) has been promulgated to prevent the inherent dangers of multiple representation. That rule provides:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 1, and are represented by the same retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The United States Supreme Court has noted:

> Seventy percent of the public defender offices responding to a recent survery reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation.

Cuyler, 446 U.S. at 346.

15. The Georgia Supreme Court has imposed a rule that in all capital cases, each defendant is to be provided with separate, independent counsel. See Fleming v. State, 270 S.E. 2d 185 (Ga. 1980). Similarly, in People v. Mroczko, 672 P.2d 835 (Cal. 1983), the California Supreme Court adopted a simple rule which will forever obviate the treacherous potential of joint representation. In a well-reasoned opinion, the Mroczko court held that separate and

independent counsel must be appointed for jointly charged indigent defendants at the outset of criminal proceedings.

16. Under federal standards, to establish a conflict claim, all that need be shown is that the matters involved in the previous attorney-client relationship are substantially related to those in the action in which the attorney represents an adverse interest. See United States v. Kitchin, 592 F.2d 900, 904 (5th Cir. 1979); see also In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); American Can Company v. Citrus Feed Company, 436 F.2d 1125 (5th Cir. 1971); United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964). Mr. Kight has more than made such a showing: the prior contact of the Public Defender's Office involved the defense of Mr. Kight in this case.

17. The public defender's office in effect traded one client's life for the life of a former client; this representation is ineffective and violates Mr. Kight's fundamental constitutional rights. An evidentiary hearing and Rule 3.850 relief are improper.

Here the circumstances demonstrate both the actual conflict and the profound adverse effects. The active and beneficial representation of Mr. Hutto at Mr. Kight's expense involved a direct conflict, a conflict which was compounded by the Public Defender's failure to provide any real representation to Mr. Kight in the critical period following his arrest. This lack of representation left Mr. Kight unprotected from police questioning and permitted the elicitation of incriminating evidence by the State (See Motion to Vacate, Claims XVI, VII, and XI). The Public Defender's office then expanded its exploitation of Mr. Kight by actively seeking witnesses against him, witnesses that were eventually provided to the State. These circumstances establish the conflict and also illustrate that, regardless of

how the conflict is characterized, the adverse effect to Mr. Kight was uniquely devastating.

Since an incriminating statement was obtained from Mr. Kight and since the Public Defender cultivated rather than challenged these witnesses against Mr. Kight, his right to be free from self-incrimination and his right to cross-examine and confront witnesses were also violated. Mr. Kight was denied these basic guarantees at the heart of our judicial system, as well as the right to effective assistance of counsel. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safe guards that distinguish our system of justice, a serious risk of injustice infects the trial itself." Cuvler at 343. The Public Defender not only failed to safeguard Mr. Kight, but further it provided the State potent ammunition with which to convict Mr. Kight and sentence him to death. The proceedings were fatally infected. Since the files do not conclusively show that he is entitled to no relief but instead establish that this error merits relief, Mr. Kight is entitled to relief or initially an evidentiary hearing on this claim. See Harich v. State, 542 So. 2d 980 (Fla. 1989).

(IV)

MR. KIGHT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE LOWER COURT ERRED IN DENYING A HEARING ON THIS CLAIM.

Ineffective assistance of counsel claims often require evidentiary hearings in order to be properly resolved, see Sorsman v. State, 549 So. 2d 686 (1989), and a hearing is

necessary for proper resolution of the claim here. Rule 3.850 provides a movant with the right to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. This Court consistently has required that hearings be granted pursuant to that standard, Lemon v. State, 498 So. 2d 923 (Fla. 1986), and has encouraged circuit courts to hold evidentiary hearings to aid its review of 3.850 proceedings. Francis v. State, 529 So. 2d 670, 672 n.2 (Fla. 1988). The files and records in Mr. Kight's case do not conclusively show that he is entitled to no relief. Indeed, the circuit court referred to none which made such a showing. Rather, the record demonstrates affirmatively that an evidentiary hearing is warranted.

Rule 3.850 further provides that a court denying a hearing must attach "a copy of that portion of the files and record which conclusively show that the prisoner is entitled to no relief...." Fla. R. Crim. P. 3.580. The lower court failed to attach or even cite any portion of the record that shows Mr. Kight is not entitled to relief. The lower court could not cite any record support for its denial because there is none. Mr. Kight's allegations were amply sufficient to require a hearing, and the lower court erred in failing to allow one.[10]

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[10]The lower court also refused to allow amendment/supplementation of the Rule 3.850 motion, and then expressly refused to allow rehearing (in direct contravention of Rule 3.850

(footnote continued on following page)

A. COUNSEL'S ERROR **AND OMISSIONS**

Given space limitations and the fact that this Court has already had the opportunity to review the Rule **3.850** motion itself, Mr. Kight will not detail the ineffective assistance of counsel claim (or related mental health issues) in this brief. Rather, the Court is respectfully referred to the Rule **3.850** motion. This opportunity is taken, however, to discuss some of the more obvious flaws in the lower court's disposition.

The lower court denied this claim by saying that the first four instances of ineffectiveness alleged involved tactical decisions. But the lower court failed to provide any facts in support of this conclusion. Since no hearing was held, and counsel never testified, it is impossible to understand how the lower court could find that certain actions resulted from **"tactics"**, as opposed to ignorance or inadequate investigation, as Mr. Kight alleged. The record in fact indicates, and at an evidentiary hearing Mr. Kight could establish, that these were not reasonable tactical decisions.

(footnote continued from previous page)

itself) concerning any issue, notwithstanding the fact that Mr. Sheppard withdrew from the case only days before the 3.850 motion was filed and current counsel had barely even become familiar with the case at the time the motion was filed (See Motion to Vacate, introductory portions and Claim I). Typically in Florida capital post-conviction actions, the CCR office files a detailed proffer (including affidavits, reports, etc., from trial counsel and mental health experts or other relevant witnesses involved at the time of the original proceedings) in conjunction with a motion for an evidentiary hearing. Since the lower court flatly rejected anything other than the Bradv claim and refused to hear anything concerning anything else, this record does not include a proffer.

The question of adequate performance involves a determination of "whether counsel's assistance was reasonable considering all the circumstances." Strickland v. Washington, 466 U.S. 668, 688 (1984). But whether counsel acted "reasonably" cannot be determined without an evidentiary hearing -- Mr. Kight alleged that counsel's actions were not reasonable under the circumstances, but were based on inadequate investigation. An attorney's failure to properly present a defendant's defense and failure to properly cross-examine key witnessse is ineffective performance. Chambers v. Armontrout, No. 88-2383 (8th Cir. Sept. 15, 1989). Mr. Kight's counsel failed to ensure that he could prove Mr. Kight's retardation as he promised the jury in opening argument. Counsel's calling and recalling of the co-defendant Hutto permitted Hutto to describe Mr. Kight as the murderer (R. 2178-84); because of inadequate preparation counsel sandbagged his own defense. Indeed, counsel stated on the record originally that he was not prepared to call Hutto and that he was so worn and tired that he may have been doing Mr. Kight a disservice. These errors by Mr. Kight's attorney constituted deficient performance.

Defense counsel's failure to pursue evidence of voluntary intoxication was likewise not a reasonable tactical decision. The allegation was that counsel did not adequately investigate the issue or consult with the experts employed at the time of the trial about it. Trial testimony revealed that Mr. Kight was intoxicated at the time of the offense (R. 223, 2179, 2188, 2301). The record contains no showing that defense counsel affirmatively chose not to puruse this area and there is no basis

on which counsel might have made such a choice. Rather, the failure of defense counsel's attempted defense of mere presence enhanced the need for critical evidence of the defendant's drug and alcohol induced diminished capacity, particularly in light of the fact that Mr. Kight is mentally retarded and that his controls are already diminished.

At trial both defense counsel and the trial court recognized, on the record, counsel's ineffectiveness in cross-examining Mr. Hutto (R. **2266-67, 2255).** Since counsel failed to properly examine Hutto, he had to recall him. The impact of this error, which permitted the co-defendant to place all blame for the killing on Mr. Kight, is obvious. There was nothing to gain and everything to lose by calling Hutto. Asking the court to call Hutto was risky; being unprepared and failing to adequately cross-examine Hutto made the risk a reality. Counsel's actions were not the result of a reasonable tactical decision. The lower court, however, declined to hear the evidence, and thus had no basis upon which it could base a ruling as to whether or not counsel's actions were "tactical".

The record also demonstrates that the failure to request jury instructions on the voluntariness of Mr. Kight's statement could not have been a tactical decision. Counsel had moved to suppress the statement (R. **210),** had tried to elicit testimony about Mr. Kight's prior mental state (R. **1853-96;** 1894-96), and had requested other special instructions (R. **553).** Having recognized the significance of the issue, counsel failed to place it in front of the jury, so that the jurors could have properly

evaluated Mr. Kight's statement. As a result of counsel's deficiencies, the jurors were allowed to consider Mr. Kight's statement as a valid confession, although they were never taught to assess the voluntariness of the statement.

The prejudice from an unchallenged confession is obvious in ordinary situations. Mr. Kight's mental condition, described herein, made the voluntariness of his statement especially questionable, but the jury was not allowed to question it. The state was able to argue that Mr. Kight fabricated his statement implicating Hutto as the killer. The court accepted that theory in its sentencing order (R. **492),** and the jury must have as well.

B. INTERFERENCE BY THE COURT AND STATE

The denial of effective assistance resulting from court and prosecution actions also justifies a hearing. A careful review of the facts would illustrate the circumstances that rendered counsel ineffective and that created presumed prejudice. **See** United States v. Cronic, **466** U.S. **648 (1984).**

As discussed above and more fully in Mr. Kight's Rule **3.850** motion, the court's exclusion of mental health evidence in effect denied Mr. Kight a defense. Drs. Krop and Miller would have testified about Mr. Kight's low intellectual capacity and about his passive tendencies (R. **2235-36; 2241-42).** Without this evidence trial counsel's attempted defense fell apart. The exclusion of this evidence, evidence which Mr. Sheppard in opening had promised to show, destroyed his credibility with the jury. With no credibility and no defense, counsel was helplessly ineffective.

The record also shows the inadequate performance resulting

from the trial court's denial of a continuance. The refusal to grant a continuance can constitute a denial of due process and effective assistance of counsel. E.g., Gandy v. Alabama, 564 F.2d 1318 (5th Cir. 1978). Even if Mr. Kight's trial judge properly exercised discretion in his denial of continuance, the denial forced counsel to proceed when he and the trial court recognized that he was not able to provide competent representation. Counsel had merely requested a continuance until the next day; he desperately needed one afternnoon to properly prepare the defense case (R. 2165, 2171-72). The effect of the denial was to render counsel ineffective, and the resulting deficient performance, as discussed more particularly above, was detrimental to Mr. Kight's case.

(V)

MR. KIGHT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THE LOWER COURT ERRED IN DENYING A HEARING OR RELIEF.

The lower court apparently misunderstood this claim. In its denial the court described this as a claim that counsel was ineffective at the sentencing phase of trial for not raising a voluntary intoxication defense at sentencing. This claim actually involves trial counsel's failures to present significant statutory and nonstatutory mitigating evidence which covered a vast array of mitigating facts having to do with the character, background, and impairments of the defendant as well as the circumstances of the offense -- intoxication was but one of the areas of mitigation that counsel neglected. Intoxication could

thus have served two roles, one as a defense theory and a second as mitigation. But counsel also failed to develop and present other mitigating evidence that the jury should have been allowed to consider.

These failures are especially onerous here because ~~statutory~~ and nonstatutory mitigation was neglected. The lower court's denial ignores voluminous law requiring complete presentation to the capital sentencing jury of available mitigation and corrolary law imposing on capital defense attorneys the duty to investigate and present at sentencing available mitigating evidence. E.g., Penry v. Lynaugh, 109 S. Ct. 2934 (1989); ~~Woodson v. North~~ Carolina, 428 U.S. 280 (1976); ~~Bassett v. State~~, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); ~~Harris~~ v. Dugger, 874 F.2d 756 (11th Cir. 1989).

One area of mitigation that counsel failed to investigate or present was that of Mr. Kight's history of drug and alcohol abuse and of his drug and alcohol use at the time of the offense. Evidence of intoxication is relevant mitigation. Waterhouse v. Duqger, 522 So. 2d 341 (Fla. 1988). Easily accessible jail records and prior mental health evaluations established Mr. Kight's pattern of substance abuse. Counsel could have used this evidence to establish statutory mitigation. Counsel also failed to develop the statutory mitigating factor of substantial impairment of capacity to appreciate criminality of conduct or to conform conduct to the law. Counsel's omission of the word "substantial" in his questioning of the mental health expert transformed the factor into a test for insanity, and deprived Mr.

Kight of this statutory mitigation to which he was so clearly entitled. See Perri v. State, 441 So. 2d **606 (1983).** Mr. Kight refers this Court to his motion to vacate which more fully describes the evidence of this mitigation and how it might have been developed.

In addition, counsel failed to present evidence of Hutto's superior intelligence, evidence that would have enabled experts to find that Mr. Kight acted under Hutto's domination. Counsel also failed to present the numerous past mental evaluations that consistently found Mr. Kight to be intellectually and emotionally impaired and that documented his drug and alcohol abuse.

Since the trial court found absolutely no mitigation, these failures undermine confidence in the outcome of the sentencing proceeding. Complete investigation and proper presentation of this compelling mitigation could have swayed the sentencing decisions of both the jury and the judge. Counsel's failure to prepare and present this mitigation denied Mr. Kight the adversarial testing process that the constitutional right to counsel entails. Bassett v. State, **541** So. 2d **596** (Fla. **1989);** State v. Michael, 530 So. 2d (Fla. **1988).**

Viewed in its proper perspective, this claim is meritorious. The files and records do not show conclusively that Mr. Kight is entitled to no relief. Rather, Mr. Kight's Rule **3.850** motion shows that Mr. Kight is a man who should never have received a death sentence. An evidentiary hearing was required because in this case there is more than a sufficient showing that death was imposed "in spite of factors calling for a less severe penalty," Lockett v. Ohio, **438** U.S. **586** (1978), but that defense counsel

failed to reasonably investigate, develop, and present those factors.

(VI)

MR. KIGHT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE COUNSEL UNREASONABLY FAILED TO PRESENT CRITICAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY DEVELOP AND EMPLOY EXPERT MENTAL HEALTH ASSISTANCE, AND BECAUSE THE EXPERTS RETAINED AT THE TIME OF TRIAL FAILED TO CONDUCT PROFESSIONALLY ADEQUATE MENTAL HEALTH EVALUATIONS, AND THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

In denying this claim the court stated that counsel could not be deemed ineffective simply because he relied on less than complete pre-trial psychiatric evaluations. The court's characterization of the pre-trial evaluations as "less than complete" is an extreme understatement given the obvious and significant mental health problems from which Mr. Kight suffers, and the shortcomings in the original experts' assessments of these impairments. Mr. Kight, a mentally retarded man with the functional capacity of 10-year-old, was entitled to a professionally adequate mental health evaluation. Blake v. Kemp, 758 F. 2d 523 (11th Cir.); Ake v. Oklahoma, 470 U.S. 68 (1985). Indeed, his mental health deficiencies were so severe that he had been acquitted by reason of insanity and involuntarily committed in the past. Overwhelming evidence of Mr. Kight's history, background, and his mental, functional and emotional deficiencies, establish what proper investigation and competent psychological assistance at trial and sentencing should have revealed. Without expert assistance the sentencing jury had a skewed and inaccurate picture of Mr. Kight, and significant

competency and intoxication defense issues were lost. The trial judge found that Mr. Kight had fabricated his implication of Hutto as the killer (R. 492). In view of the real mental state of Mr. Kight, this conclusion is literally incomprehensible. The evidence shows that the pretrial evaluation here was not merely "less than complete" but was grossly inadequate. This issue required an evidentiary hearing, see Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 502 So. 2d 1221 (Fla. 1987), and the lower court erred in declining to conduct one.

(VII)

NEW LAW DEMONSTRATES THAT MR. KIGHT'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. KIGHT TO PROVE THAT DEATH WAS INAPPROPRIATE, AND LIMITED THE JURY'S ABILITY TO FULLY AND FAIRLY CONSIDER MITIGATING EVIDENCE, AND BECAUSE THE TRIAL COURT ITSELF APPLIED THIS IMPROPER STANDARD.

As more completely discussed in Mr. Kight's motion to vacate, instructions such as those provided to Mr. Kight's jurors impermissibly shift to the defendant the burden of proving a life sentence is appropriate, and violate the constitution because of their burden-shifting qualities and also because they inhibit the jury's ability to give full effect to mitigating evidence. The United States Supreme Court has granted writs of certiarori in three cases involving similar claims, see Blystone v. Pennsylvania, 109 S.Ct. 156 (1989), Boyde v. California, 109 S. Ct. 2477 (1989), Walton v. Arizona, 110 S. Ct. 49 (1989), and two Florida capital cases involving this issue are also now before the Supreme Court. Hamblen v. Dusser, 110 S. Ct. 7 (1989);

Kennedy v. Dugger, ___ S. Ct. ___ (1989). This issue is ripe for review at this time.

(VIII)

THE SENTENCING COURT'S REFUSAL TO FIND CLEARLY ESTABLISHED MITIGATION CONSTITUTED FUNDAMENTAL CONSTITUTIONAL ERROR.

The lower court denied this claim, stating that it had already been decided on appeal. However, significant new case law has altered the analysis of this issue and mandates relief at this juncture. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

In Penry v. Lynaugh, 109 S. Ct. 2934 (1989), a precedent found by the Supreme Court on its face to be retroactive, the Supreme Court held that a capital sentencer must fully consider and give effect to all possible mitigation. The question of whether the trial judge complied with Penry affects the determination of whether the court's refusual to find mitigation was proper.

As discussed more completely in Mr. Kight's Rule 3.850 motion, the record indicates that the trial judge did not give the full consideration required by the constitution to the mitigating evidence which came out at sentencing (including mental health mitigation). Even if this mitigation did not rise to the level of a statutory mitigating circumstance, it was still nonstatutory mitigation and, under Penry and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the trial court was required to fully consider and give to it effect. See Messer v. Florida, 834 F.2d 890 (11th Cir. 1987)(even if mental health mitigating evidence did not rise to statutory level, trial judge must give it full consideration as nonstatutory mitigation, and trial judge's

consideration of evidence only in terms of the statute's listed factors, as reflected by the judge's sentencing order, constituted reversible error under the eighth amendment). The trial court erred originally, and the post-conviction court (a different judge) erred in failing to properly assess this issue in light of Hitchcock and Penry.

(IX)

SIGNIFICANT NEW LAW REQUIRES THAT MR. KIGHT BE GRANTED RELIEF ON THE BASIS OF THE STATE'S PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT EVIDENCE.

The lower court found that the prosecutorial and judicial comments regarding the victim in Mr. Kight's case violated the principles of Booth v. Maryland, 482 U.S. 496 (1987), but the court found that the error was harmless because the sentencing judge did not detail that evidence in his order. This Court has applied Booth retroactively as a significant change in law in cases in which, as here, the defense counsel objected at trial. See Jackson v. Duaser, 14 F.L.W. 355 (Fla. July 6, 1989).

As this Court has recognized, Booth itself did not state that the violations would be subject to a harmless error test. Grossman v. State, 525 So. 2d 833 (Fla. 1988). However, even if harmless error analysis is appropriate, it cannot be said in Mr. Kight's case that beyond a reasonable doubt the death penalty would be imposed without that evidence.

The lower court addressed only the judge's written sentencing order, but failed to consider the effect of the victim impact evidence on the jury's sentencing decision, see South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Jackson, supra, and

on the judge's consideration of whether, ultimately, death or life should be imposed. The State cannot show -- indeed, has not even attempted to show -- beyond a reasonable doubt that the error had "no effect" on the jury's sentencing decision. The Florida jury plays an extremely important role in capital sentencing, see Mann v. Dugger, 844 F.2d 1446 (11th Cir 1988)(in banc); Tedder v. State, 322 So. 2d 908 (Fla. 1975), and the misleading of a capital jury through irrelevant victim impact information is inherently prejudicial. Although it was correct in determining this claim on its merits, see Jackson v. Dugger, supra, the lower court erred in completely ignoring the jury's role from its decision on the merits. Mr. Kight respectfully refers the Court to the full discussion of this issue in his Rule 3.850 motion and submits that relief is proper on the basis of the legal and factual discussion more fully amplified therein.

(X)

THE EXCLUSION OF EVIDENCE MATERIAL TO DEFENDANT'S THEORY OF DEFENSE WAS FUNDAMENTAL ERROR, RENDERED DEFENSE COUNSEL INEFFECTIVE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The lower court found that this claim had already been decided. On appeal this Court found that the trial court did not err in excluding important evidence of the defendant's mental health impairments in the absence of an insanity defense, and found that any error would have been harmless. Kight, 512 So. 2d at 929-30. Mr. Kight asserts that the exclusion of this evidence was fundamental error: in essence he was denied any defense, he was denied effective assistance of counsel and he was denied a

fair trial. Moreover, Mr. Kight has submitted that counsel's handling of this whole area was unreasonable and ineffective: having failed to file an insanity notice or otherwise to obtain a ruling from the trial court that the expert testimony would have been admitted, it was not reasonable for counsel to promise the jury in opening that his defense would be based on mental health experts -- when the trial court later refused to allow the experts to testify, counsel was left with nothing. At a minimum, the ineffective assistance of counsel claim required evidentiary resolution, but the lower court declined to allow any hearing. As briefed in greater detail in the Rule **3.850** motion, this claim presents fundamental error, and involved ineffective assistance of counsel. The lower court erred in its disposition of this issue.

(XI)

THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO ELICIT TESTIMONY CONCERNING MR. KIGHT'S MENTAL CONDITION VIOLATED MR. KIGHT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHTS TO PRESENT A COMPLETE DEFENSE.

Finding that this issue was litigated on direct appeal and decided adversely to Mr. Kight, the lower court denied relief on this claim. As Mr. Kight discussed more completely in his Rule 3.850 motion, this claim involves fundamental sixth, eighth, and fourteenth amendment error. This fundamental error virtually deprived Mr. Kight of any defense at all. The United States Supreme Court, in Crane v. Kentucky, **476** U.S. **683 (1986),** recognized a defendant's constitutional right to present a complete defense. The files do not show conclusively that Mr. Kight is entitled to no relief but instead demonstrate that the

exluded evidence could have significantly changed the outcome of the trial and sentencing. An evidentiary hearing on this claim and its related questions concerning counsel's effectiveness, and post-conviction relief are proper.

(XII)

JURY INSTRUCTIONS EXPRESSLY PERMITTING JURORS TO DISCUSS THE CASE BETWEEN THE TRIAL AND SENTENCING VIOLATED FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT CONSTITUTIONAL PRINCIPLES.

This Court on direct appeal condemned as "highly improper" the trial judge's dispersal of the jury and direction that the jury could discuss the case between the guilt-innocence and sentencing phases. Kight, 512 So. 2d at 932. The lower court denied the claim because it had already been decided. For the reasons discussed in the Rule 3.850 motion, Mr. Kight respectfully submits that this Court erred in its prior disposition: the tainting of the jury in this manner, just before the crucial sentencing stage, is fundamental error. It violated Mr. Kight's right to a fair and impartial jury and also interfered with the strict capital sentencing precautions mandated by the sixth and eighth amendments. We pray that this Honorable Court revisit the issue, and for the reasons noted in the Rule 3.850 motion, allow a proper resentencing.

(XIII)

NEW LAW AND PENDING SUPREME COURT CASES DEMONSTRATE THE CONSTITUTIONAL ERROR OF THE PRECLUSION OF THE JURY'S CONSIDERATION OF MERCY AND SYMPATHY IN SENTENCING.

Significant new law since Mr. Kight's appeal has altered analysis previously given such issues and makes post-conviction relief appropriate. As discussed more completely in Mr. Kight's emergency motion to vacate, the United States Supreme Court has consistently recognized the role sympathy should play in sentencing proceedings. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc)(reviewing Supreme Court decisions concerning the role of mercy and sympathy in sentencing), cert sranted sub nom, Saffle v. Parks, 109 S. Ct. 1930 (1989). Penry v. Lynaugh, 109 S. Ct. 2934 (1989), an opinion retroactive on its face, directs that a capital sentencer must consider all possible mitigation to avoid the risk that the death penalty is imposed in spite of factors calling for a less severe penalty. The Supreme court granted a writ of certiorari to review the Parks decision concerning the jury's consideration of sympathy. Saffle v. Parks, 109 S. Ct. 1930 (1989). Mr. Kight respectfully submits that in light of these developments this claim should be fully and fairly resolved at this juncture.

(XIV)

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON THE STATUTORY MITIGATING FACTOR OF AGE WAS PLAIN EIGHTH AMENDMENT ERROR.

This issue, and its attendant substantive and procedural aspects, is discussed in Mr. Kight's Rule 3.850 motion and habeas corpus petition. It is one of clear error. Resentencing is

proper because, given the mitigation in the record, the error cannot be deemed harmless. See Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Skipper v. South Carolina, 476 U.S. 1 (1986).

CONCLUSION

Counsel have not in this brief repeated the contents of the Rule 3.850 motion or the petition for writ of habeas corpus. It is intended that this brief be read in conjunction with those pleadings, which are fully incorporated herein, as the Court has had the benefit of the motion and petition. No claim presented in the motion and/or petition which is not specifically discussed herein is waived or abandoned. On the basis of the presentation in the 3.850 motion and habeas petition, and the above discussion, we urge that the Court grant Mr. Kight the relief to which he has established his entitlement and/or remand this case for proper evidentiary resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid to Mark Menser, Assistant Attorney General, Department of Legal Affairs, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 26th day of December, 1989.

Attorney