IN THE SUPREME COURT OF FLORIDA

CHARLES MICHAEL KIGHT,

Appellant,

v. CASE NO. 95,208

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Kight was convicted of murder and sentenced to death in 1984. His conviction and sentence were affirmed on direct appeal. Kight v. State, 512 So.2d 922 (Fla. 1987). Although Kight did not challenge the sufficiency of the evidence on appeal, this Court "reviewed the record" and found "sufficient evidence to support Kight's conviction for first degree murder." Id. at 931. Kight also did not challenge the sufficiency of the evidence to support the two statutory aggravating factors found by the trial court: (1) that the murder was committed during the course of a robbery, and (2) that the murder was especially heinous, atrocious or cruel. The trial court found no statutory mitigating factors, but did find two nonstatutory mitigators: (1) that Kight had once committed the good deed of chasing down and apprehending a robber, and (2) that Kight's codefendant Gary Hutto could receive a maximum sentence of life imprisonment by virtue of his plea of guilty to second degree murder. This Court affirmed the trial court's findings as to aggravation and mitigation and rejected Kight's argument that his

death sentence was disproportionate, finding "sufficient record support for the jury's conclusion that Kight 'actually' killed Butler," and stating: "From our review of the entire record, the death penalty was proportionately imposed." Id. at 933.

Kight attempted to raise on direct appeal an issue concerning concessions allegedly made by the State to state witnesses in exchange for their testimony and only "just discovered" by the defense. This Court did not reach the merits at this time, noting that the claim could be raised in a rule 3.850 motion, "thus giving the trial court an opportunity to determine if the alleged undisclosed concessions were in fact made and, if so, whether a new trial is mandated under the standards set forth by the United States Supreme Court ..." Ibid.

Thereafter, Kight filed his initial 3.850 motion for postconviction relief in the circuit court. His primary contention in circuit court was that the state had failed to disclose concessions it had made to four jail inmates in exchange for their testimony at trial.[1] The circuit court conducted an evidentiary hearing on this issue, following which the court denied the claim, stating:

[1] All other claims raised by Kight in his first postconviction motion were summarily denied.

> [After] viewing each witness and their demeanor on the witness stand, their frankness and lack of frankness in answering the attorneys' questions, and the bias and prejudices brought out on some of the witnesses, ... [t]his court is satisfied *beyond any doubt* that the jailed inmates ... were not given any inducements for their testimony prior to or after the trial of the Defendant, Mr. Charles Kight.

(5PCR 670-71)(emphasis supplied).[2] This Court affirmed on appeal, finding the evidence, although in conflict, "sufficient" to support the trial court's denial of the claim. Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990). This Court also affirmed the circuit court's summary denial of all other claims raised by Kight, and, in addition, denied the petition for habeas corpus Kight had filed in this Court. Ibid.

Kight then filed a second petition for writ of habeas corpus in this Court complaining about the jury instruction as to the heinous, atrocious or cruel statutory aggravating factor. This

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[2] Because of the nature of Kight's claim here, it will be necessary to refer not only to the record in the instant appeal, but also to the record of his original trial and to the record of his first postconviction motion. The State will cite to the record in this successive state postconviction proceeding as "R." To differentiate, the State will refer to the original trial record as "TR" and to the first state postconviction record as "PCR." Volume numbers will precede the record identification and page numbers will follow; thus, for example, page 459 of volume three of this successive postconviction record would be: "3R 459."

Court summarily denied relief. Kight v. Singletary, 618 So.2d 1368 (Fla. 1993).

Kight next filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, asserting some eighteen claims. The federal district court denied relief without holding an evidentiary hearing. Kight appealed to the Eleventh Circuit Court of Appeals. That Court affirmed. Kight v. Singletary, 50 F.2d 1539 (11th Cir. 1995). One of the issues specifically addressed by the Eleventh Circuit was Kight's assertion that the state failed to disclose concessions made to four jailhouse inmates in exchange for their testimony at trial. Kight argued that the federal district court should not have accepted the state court's findings "because the factual dispute concerning the Brady violation was not fully resolved by the state court and because the court's conclusions were not supported by the record." Id. at 1547. The Eleventh Circuit found no merit to these assertions, holding that "the state court's findings that there were no undisclosed deals is entitled to a presumption of correctness and the district court correctly declined to hold an evidentiary hearing." Ibid.

The Eleventh Circuit also specifically addressed and specifically rejected Kight's claim that the state trial court had

erred in failing to find that Kight's alleged borderline mental retardation and childhood abuse were mitigating. Id. at 1548-49.

On September 9, 1997, Kight filed in the circuit court of Duval County a successive motion for state postconviction relief, contending in Claim I he had newly discovered evidence--as outlined in an affidavit from convicted murder William O'Kelly--which "establishes that Mr. Kight is innocent of the offense for which he was convicted and sentenced to death" (2R 167). This new evidence, Kight contended, "exonerates" and "exculpates" Kight and "completely absolves him of the murder" (2R 167). Kight alleged in the motion that O'Kelly would testify that Kight's codefendant Gary Hutto had stated to him that Kight "did not kill the taxi driver" (2R 168).[3] Kight alleged in the motion that had O'Kelly

[3] In the affidavit, O'Kelly stated that he was a cellmate with Kight's codefendant Gary Hutto in the Duval County Jail. O'Kelly further stated:

> Gary Hutto told me that he was in jail for killing a black taxi cab driver. Gary told me that he stabbed the cab driver in the neck and then stabbed him a number of other times. Gary said he then put the body in the trunk and just drove around in the cab for awhile. Gary also told me that he was going to put the blame on a retarded guy named Charles Kight. Gary said he was going to blame Kight so that he (Hutto) would not be sent to the electric chair. *Gary told me that Kight did not kill the taxi cab driver*. [3R 378] [Emphasis supplied.]

been available to testify at his original trial, "a jury would probably acquit Mr. Kight of first degree murder" (2R 170). Although Kight's primary insistence in Claim I was that his alleged newly-discovered evidence would exonerate him, he presented a one-sentence alternative claim at the very end of Claim I that the jury "would have considered evidence of Mr. Hutto's greater culpability, yet more favorable treatment, and recommended a life sentence for Mr. Kight" (2R 171). Nowhere in this postconviction pleading did Kight raise any issue of proportionality of his sentence.[4]

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[4] In his Statement of the Case, Kight spends several pages discussing (1) the state's motion for reconsideration of the circuit court's determination that Kight was entitled to an evidentiary hearing on the newly-discovered-evidence issue, based upon the state's allegation that, subsequent to the court's ruling, O'Kelly had repudiated what purported to be his affidavit and (2) the state's alleged resistance to divulging O'Kelly's location. As to the former, the circuit court merely ruled that an evidentiary hearing would be necessary to resolve conflicting factual allegations. As to the latter, after listening to allegations of misconduct against assistant state attorney Laura Starrett, the court told Kight's attorney:

> This case has been pending for quite some time. The fact of the matter is you are where you are because you just didn't put your case together. The only reason you have any idea whether Mr. O'Kelly is even alive is because the state found him.
>
> I am ... going to have them tell you their best information about where he is. They have offered to produce him for a deposition to perpetuate his testimony which it seems -- which seems to me would be clearly adequate

After hearing the evidence, the circuit court, the Honorable Hugh A. Carithers, denied all relief. Judge Carithers noted, first, "that the evidence at trial that the Defendant was directly involved in the murder was overwhelming" (3R 448). Indeed, his trial attorney had not even contended at trial that Kight was "completely innocent" of the murder; instead he tried to prove that Gary Hutto had actually caused the death of the victim or at least was the more culpable of the two defendants (3R 449).

The "newly-discovered evidence," Judge Carithers found, did not exculpate Kight. The "new" witness, William O'Kelly, testified that, while he and Gary Hutto were incarcerated together awaiting trial, Hutto had admitted stabbing the victim, but "significantly" O'Kelly did not testify that Hutto either absolved Kight of the crime or gave any indication that Kight did not stab the victim. Thus, taken in the light most favorable to Kight, this "new" evidence would not have indicated that Kight was innocent and "could not have resulted in an acquittal on retrial" especially "in light of the overwhelming evidence of guilt produced at the trial" (3R 451-52).

> for your purposes, and for you to make these accusations about them withholding [O'Kelly] is shocking to me and it's unprofessional on your part. Now let's move on. [3R 519]

Nor, Judge Carithers found, would the new evidence "probably produce a life sentence if a new penalty phase trial and sentencing hearing were granted." O'Kelly's testimony would have been "at best" cumulative to evidence produced at trial by the defense to the same effect. Therefore, Judge Carithers found, "[i]t is hard to imagine how the new evidence ... could have affected any significant conclusion drawn by the jury or the trial judge" (3R 452).

Finally, Judge Carithers briefly addressed proportionality, an issue raised by Kight for the first time in the post-hearing memorandum.[5] This issue was "troubling" to Judge Carithers, because "an over-all review of the record herein indicates that Mr. Hutto's culpability for the murder was at least equal to that of Mr. Kight's." Therefore, "the death sentence herein appears unconstitutionally disparte [sic]" (4R 452). However, Judge Carithers concluded:

> the relative involvement of the two was well known at the time of the trial, and argued vigorously at that time. Thus, this Court concludes that Defendant is procedurally barred from raising the issue again here.

[5] It should be noted that the parties were required to file simultaneous post-hearing memoranda (4R 668). Because it had no prior notice of this issue, the State did not address proportionality in its memorandum.

(4R 453). Judge Carithers denied relief on all grounds. Ibid.

STATEMENT OF THE FACTS

A. INTRODUCTION

The State cannot accept Kight's misleading, argumentative, inaccurate and often irrelevant statement of the facts. Kight attempts to reopen every issue he has, or should have, raised, and to relitigate issues which either were, or could have been, litigated to a conclusion a long time ago, including allusions to a possible conflict of interest within the Public Defender's office in its representation of Kight (who was represented at trial by private counsel, and who raised this issue in the trial court, but not on appeal to the Florida Supreme Court), and accusations that the State had made deals with inmate witnesses and had knowingly introduced perjured testimony at trial (these accusations were found wholly baseless in previous litigation). The State will present its own summary of the evidence presented at trial, at the evidentiary hearing in 1989, and at the evidentiary hearing in 1999.

B. THE TRIAL RECORD

On December 14, 1982, Dennis Reed was riding a motorcycle near the river when he saw a wallet. There was no money in it but he

found a picture identification of someone named Butler. Reed looked around and saw a body lying 30 feet away. He drove to a fish camp and called police (26TR 1763-64).

Detective Kesinger was called to the scene, just over half a mile from Heckscher drive (26TR 1777). Fifteen feet from the body was a belt hanging in a small tree; just a few feet north of that Kesinger found a pair of men's trousers; 36 feet further away, Kesinger found two shirts (26TR 1778). The victim's wallet was on a dirt road 20 feet from the paved road (26TR 1778). The area surrounding all this was "swampy brushy area" with no nearby homes or businesses (26TR 1779). The victim was lying on his back wearing jockey shorts (26TR 1782). He had been stabbed in the chest and neck (26TR 1782-83). Mr. Butler was a black male who appeared to be in his mid thirties or forties (26TR 1783).

The body was positively identified as that of Donald Lawrence Butler, a cab driver (26TR 1802-03, 1943).

Dr. Bonifacio Floro conducted the autopsy. Butler had been stabbed at least 51 times, 10 times on the right side of the neck, four times on the left side of the neck, 12 times in the back of the neck, and 25 times in the chest (26TR 1815-16). The wounds to the neck were nonfatal except for one to the front side of the neck which was larger and deeper than the others and which cut the

carotid artery and the jugular vein (26TR 1824). Some of the stab wounds to the chest would have been fatal but not immediately so; the victim could still have, for example, run a short distance, but he soon would have become unconscious and died (26TR 1828). The neck wound to the carotid artery and jugular vein would have greatly hastened Butler's death (26TR 1831).

Kight was already in custody when Butler's body was found, having been arrested on December 7 for the robbery of another cab driver, Herman McGoogin. McGoogin testified that he picked up Kight and Gary Hutto between 9 and 9:30 pm on December 7 (27TR 2119-20, 2131). Kight sat immediately behind McGoogin while Hutto sat in the right-hand side of the back seat (27TR 2120).[6] McGoogin was directed to Clark Road (27TR 2121). As he approached Heckscher Drive while heading north on Main, Hutto directed him to "turn here," onto Clark Road, and then left on Kentucky road (27TR 2121-22). Hutto then told him to stop. When he did, Kight put a knife to his throat and told him "don't move you black nigger, you black son of a bitching nigger" (27TR 2123). McGoogin testified that

[6] McGoogin did not know their names at the time, of course, but he identified Kight in court during his direct examination (27TR 2120), and identified Gary Hutto when he was brought into court by the defense at the outset of cross-examination (27TR 2131). For convenience, the State will just use Kight's and Hutto's names instead of repeating McGoogin's testimony about "this man" or "the other one," etc.

when Kight put the knife to his throat, Hutto asked him "what in the hell he was going to do," and put his hand on the knife (27TR 2135).[7] McGoogin managed to break free and run away, but as he was doing so, Kight reached between the seat and door and removed $20 from McGoogin's shirt pocket (27TR 2124-25). McGoogin ran to a nearby house to call police while Kight and Hutto ran away (27TR 2126). Shortly thereafter, he was brought to Clark Road where he identified both of them (27TR 2129).

Officer Scott Simmons testified that he heard the report of the robbery and, being nearby, went to investigate (27TR 2138-39). On Clark Road, he saw a man he later identified as Kight. Simmons identified himself as a police officer and told Kight he needed to talk to him. Kight's first words were, "I can explain everything" (27TR 2140). Simmons asked him if he had just gotten out of a

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[7] On page 14 of his brief, Kight asserts that McGoogin felt that Hutto was daring Kight to do something with the knife. Although that is one possible inference from testimony about what Hutto had said and done, the state's objection to McGoogin's "conclusion" was sustained and the trial court's ruling was affirmed by this Court on appeal. Kight v. State, supra, 512 So.2d at 922. Thus, the "testimony" to which Kight refers in his brief does not exist and, although not a matter of great moment, Kight's reliance on this excluded testimony nevertheless is improper. The State would note that McGoogin was not necessarily the best witness concerning Hutto's intention in placing his hand on Kight's knife, and considering that McGoogin, unlike Butler, was able to break free, it is not unreasonable to infer that Hutto, as he later testified (28TR 2186), was trying to prevent Kight from stabbing the victim.

taxi; Kight answered, no, he had just come from a relative's house on the other side of the expressway (27TR 2141). Simmons frisked him and found a knife. He told Kight there had just been a robbery and they were looking for two suspects. He asked Kight if he had seen them. Kight said yes, he had seen two white males wearing blue jeans and dark blue jackets (27TR 2141). This description fit the one provided by McGoogin "to a T," and sounded persuasive to Simmons, who returned the knife to Kight and asked him to wait in the car, thinking he was merely a useful witness (27TR 2141-42). However, Officer Butler arrived and told Simmons they had just apprehended one of the robbers and Kight had to be the other one. Butler took the knife back from Kight (27TR 2142). McGoogin arrived a few moments later and identified Kight (27TR 2143). When McGoogin did so, Kight called him a "lying nigger" (27TR 2143).

Officer Simmons described the knife he took from Kight as a locking blade type knife similar to a buck knife (26TR 1840). The knife had been in a sheath attached to Kight's belt (26TR 1841).

Kight was arrested and taken to jail, charged at this time only with robbery. However, after Butler's body was discovered on December 14, robbery detective Weeks collected Kight's clothes to send to the crime laboratory for analysis (26TR 1857). As he was doing so, Kight told Weeks he was not afraid of "the electric chair

because Hutto stabbed the guy and cut his throat and he's still got the man's watch" (26TR 1883).

After being advised of his rights, Kight elaborated, ultimately giving a statement which was reduced to writing by Detective Kesinger. In this very detailed statement, Kight recounted how he had met Hutto a couple of weeks earlier. On the evening of December 6, 1982, Kight was at the "Odessy" club at Main and Ashley Street. Sometime after midnight, Hutto came in and began talking to Kight, saying he had called a cab to visit a friend and wanted Kight to accompany him. A blue cab arrived; a black male was driving. Hutto told the cab driver to go out Heckscher Drive towards the ferry. The victim drove north on Main Street and turned onto Heckscher. Then Hutto directed the victim down a dirt road. Very soon thereafter, Hutto pulled a knife on the victim, telling him to stop and put the cab in park. When the driver reached toward his left, Hutto began stabbing him in the chest. The driver got out of the cab and started to run, but Hutto grabbed him and told him to remove his clothes. The driver, according to Kight's statement, was wearing a black leather jacket, a white shirt and dark trousers. As directed, he stripped down to

his underwear.[8] Hutto removed the victim's watch and two rings, one of which was described by Kight as a golden wedding band and the other as a silver ring with one stone. The driver was reluctant to give up his wedding band, but Hutto stabbed him and told him to shut up. The victim fell but was still breathing. Hutto stabbed him again in the chest and stomach, and then dragged him into the bushes. Kight stated that he had gone back into the bushes also and saw Hutto stab the victim again. Finally, Hutto cut the driver's throat because he was still breathing. Hutto then, according to Kight, gave Kight the knife. They then got into the victim's cab and drove to the Old Trout River Bridge on Main Street. It had been barricaded to traffic, but you could drive right off the end into the river. Hutto got two bricks and put them on the gas pedal, put the gear shift lever in drive and the cab started rolling. Kight heard crashing noises at the end of the bridge. Hutto wanted to go check to make sure it went off into the water, but Kight did not, so they left, walking to the Clock Restaurant on Main Street, where they ate breakfast and talked to a friend named Roger. Kight and Hutto then walked to a condemned

[8] The State pointed out in closing argument that there were no holes in or blood on the victim's clothes and therefore Hutto could not suddenly, without participation by Kight, have begun stabbing the victim from the back seat, while the victim was still dressed (29TR 2419-21).

house "just a couple of houses north of Sam's Liquors on the same side of the street." Hutto put the rings into a medicine cabinet in one of the back rooms. Hutto then gave Kight $23 cash. Although Kight claimed not to have taken money from the victim, he admitted having picked up the victim's wallet from the seat and handled it.[9] While in jail, he saw an article in the paper about the murder and kept it.[10] Kight stated that the knife taken from him at the time of his arrest had belonged to the victim (26TR 1912-1916).[11]

Kight stated he could take the police to the area where the victim's cab was and also could take them to where the victim's rings were (26TR 1886). Detectives Weeks and Williams went with Kight to the Old Trout River Bridge. There was a barrier across

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[9] In closing argument, the state rhetorically asked why Kight had mentioned handling the wallet and suggested it was to provide an innocent explanation in case the State found his fingerprints on it and not Hutto's (29TR 2423-24).

[10] The State also wondered why, and how, someone who supposedly could not read would cut an article about the crime out of the newspaper (29TR 2424).

[11] On pages 22 through 24 of his brief, Kight attempts to reargue the guilt-phase admissibility of testimony by Dr. Krop and Dr. Miller concerning Kight's mental condition as a circumstance under which his confessions were made. The exclusion of their testimony at the guilt phase, however, was upheld not only by this Court on direct appeal, 512 So.2d at 930-31, but also by the Eleventh Circuit Court of Appeals in Kight's appeal from the federal district court's denial of federal habeas corpus relief. Kight v. Singletary, supra, 50 F.3d at 1545-46.

the bridge so at first the officers thought “it was a fix” (26R 1886). They went looking for another bridge, but Kight was adamant it was the Trout River Bridge (26TR 1886-87). Kight then took the officers to the 1100 block of Market Street to the “Daniels Apartment Building,” an abandoned structure, windows knocked out, doors ajar, and filled with litter (26TR 1886). Kight took the police into and through the abandoned apartment building, walked into a bathroom, opened the medicine chest, and handed the officers the two rings inside (26TR 1887). They were, as Kight had earlier described, a gold wedding band and a silver ring with a stone. Kight told the officers that they had belonged to Mr. Butler (26TR 1887).

Detective Kesinger testified that he and Detective Pruett went back to the bridge Kight had described and discovered that the barrier could be lifted and moved by hand. At the end of the bridge, Kesinger observed scrape marks and metal as if something had run off (26TR 1916). Below was a bulkhead, having large bolts that had been bent down; in addition, there was some glass lying on some timbers (26TR 1917). The next day, a police boat and divers found the victim’s vehicle; due to the current it had drifted a couple of hundred feet into the river (26TR 1917). SWAT team diver Thomas White testified that they found it by dropping into the

water under the bridge and floating for about the length of time it would have taken the cab to sink; they reached an area where they were no longer moving, and dove straight down to the cab (26TR 1933). When the car was pulled out of the water and processed, a concrete block was on the accelerator, holding it down (26TR 1947).

The victim's wife identified the gold wedding band and the silver ring with a stone, which Kight had recovered for the police from the medicine chest of the abandoned apartment, as having belonged to her husband (26TR 1944-45).[12]

Serologist Paul Doleman testified that, although there was some possibility of error due to the age of the sample, blood on the defendant's jeans was consistent in type and one enzyme with that of the victim and inconsistent with that of Kight (27TR 1964-

[12] Kight asserts on page 8 of his brief that "Hutto had the victim's watch and lighter when he was arrested." In fact, Hutto testified without contradiction that he had bought the watch and had picked up the lighter at a bar (28TR 2297). Although these items had been seized by police when Hutto was arrested (28TR 2192, 2194-95)(defendant's exhibit 2 was the watch, while 3 was the lighter), and were available for identification, neither the victim's wife nor anyone else identified either of these items as having ever belonged to the victim.

66, 1972-73).[13] In addition, blood on Kight's knife was the same type as that of the victim (27TR 1963).

The first inmate witness to testify, Eddie Hugo, testified that he had been in the Duval County Jail following Kight's arrest. Kight told him he would beat his case, stating: "last week I cut a taxicab driver's throat" (27TR 1992). A couple of days later, Kight described how they had run the taxicab off the end of the bridge, and had forcefully taken the victim's rings and wallet and had hidden the rings in an abandoned house (27TR 1995). Sometime after that, Kight told Hugo "he wasn't going to catch a murder case, that ... [h]e was going to put it on another man" (27TR 1997). Kight told Hugo that he and the other man had ridden a taxi to this spot, they had knifed the driver several times, they had struggled to get his watch and rings, and they had pulled him over to some palmetto bushes. Kight then stated: "*I* walked away and *I*

[13] Kight asserts in a footnote on page 22 of his brief that the prosecutor "lied" in closing argument about the blood on Kight's jeans. However, although Doleman acknowledged a mathematical possibility that the blood on Kight's jeans was his own (as the prosecutor acknowledged in his argument, 29TR 2374), nevertheless, Doleman's opinion remained that the blood was consistent with that of the victim and inconsistent with that of Kight. Furthermore, there is no evidence that Kight had any visible injuries when he was arrested less than 24 hours after the murder, and there is nothing in the record to explain how Kight's own blood could have gotten on his jeans. The prosecutor did not "lie," and the accusation by Kight's appellate attorney is improper and unethical.

heard the man breathing like he was sucking blood through his lungs and *I* walked back and *I* slit the man's throat" (27 TR 1998-99)(emphasis supplied).

Hugo testified that he was not getting any help from the State; he had only been convicted of burglary and was due to be paroled in less than a year in any event (27TR 2000, 2006).

The next inmate witness was Fred Moody, who met Kight in jail in February of 1983 (27TR 2014). Moody told Kight he was facing three years on a drug charge and Kight laughed, telling him he had nothing to worry about; Kight showed him his booking sheet charging him with murder (27TR 2014). Moody asked, "this doesn't bother you?" and Kight laughed again, stating he would "get off on insanity" (27TR 2014-15). Moody overheard Kight talking to someone else about the murder, but he was not sure if Kight had said "I" or "we" or "he" had stabbed the cab driver (27TR 2015). He did not come forward in exchange for any deal; he was scheduled for release in six days, and actually would have gotten out sooner if he had not been a witness (27TR 2022-23). He came forward because "Kight was trying to put the whole thing off on Gary Hutto" (27TR 2022).

Richard Ellwood was the third inmate witness. He testified he met Kight in December of 1982 at the Duval County Jail; they were cellmates. When Kight first arrived, a television newscast came on

about a missing taxicab driver; the next day it was reported that the driver's body had been found but that the cab was still missing. Kight stated that he could tell them where the cab was (26TR 2026). Kight then told Ellwood about the robbery; he and his codefendant had taken a cab, stopped it at some point, and told the driver it was a robbery and they wanted his money and his jewelry. The driver pulled out a buck knife, but Kight took it from the driver and began stabbing him in the chest with it (27TR 2026). After a struggle, "they" dragged the man behind a bush. Kight could hear the man "breathing through the holes, he was gurgling blood through the holes in his lungs," so Kight "went back behind the bush" and in Kight's words, "cut the nigger's throat" (27TR 2027). Ellwood admitted on cross-examination that he had thirteen felony convictions (27TR 2030), for burglary and grand theft (27TR 2033). He acknowledged having been in a drug class on one occasion with Gary Hutto, but stated that he had never talked to him (27TR 2031, 2033).

The fourth and final inmate witness testifying for the state, Charles Sims, testified that before he was sent to Baker Correctional Institute, where he resided at the time of the trial, he had been in Duval County jail with Kight (27TR 2035). Kight told Sims that he "was going to tell people" that Gary Hutto had

killed the cab driver, even though he had not, because he had once been a correctional officer and the state would not give him much time. Kight stated he planned to play crazy to minimize his time (27TR 2036). Sims also testified to a later incident in which Kight had started an argument with an older inmate over the use of a telephone. When Sims came to the older inmate's defense, Kight told him, "nigger, I will kill you the same way I killed that black cab driver" (27TR 2037). Sims acknowledged that a state attorney had offered to talk to Sims' parole officer, but while Sims "appreciate[d]" the offer, he did not volunteer to testify to get help for himself, but only to tell the truth (27TR 2040-41).

After the State rested, Kight's trial attorney asked the court to call Gary Hutto as a court's witness so he would not have to vouch for him (28TR 2163). Over the state's objection (28TR 2164), the court did so (28TR 2169). Hutto denied ever having admitted to anyone that he stabbed and cut the throat of Lawrence Butler (28TR 2176-77). When asked by the state to describe the events of the murder, Hutto testified that he was heavily under the influence of drugs and alcohol before and during the time of the murder; that Kight (whom he had only known for a day) asked him if he wanted to go to the fish camp; Hutto agreed and the next thing he remembered was sitting in the back seat of a cab; he awoke to realize that

Kight was at the rear of the vehicle; Hutto got out and saw that Kight had someone in the trunk and was stabbing him in the chest; the victim was clad only in his undershorts and maybe a sock; Kight told Hutto that he had robbed the cab driver and now had to kill him; the cab driver somehow managed to get up and run 30-40 feet and fell down; Kight went to him and kneeled down; Kight returned to the car and they drove off; Kight went to a bridge on Main Street, put a block on the gas pedal, and drove it into the water; they walked to a bar, talked to "Roger," and went to a vacant house on Market Street where they spent the night; the next morning Hutto could not remember what had happened, but he recovered his memory over the next four months; the next evening, he and Kight took a cab to a party, and Kight put a knife to the driver's throat and tried to rob him; this driver escaped; Hutto and Kight ran away, but they were arrested within minutes (28TR 2179-86).

Detective Kesinger testified that Hutto had told him he was "so blasted I could hardly walk, that's the only reason I done it" (28TR 2199).

Serologist Paul Doleman testified that blood on Hutto's jeans was consistent with that of the victim and inconsistent with that of Hutto (28TR 2219-20).

Lee Forman, formerly Larry Forman, testified that she met Hutto at the Odyssey Lounge in Jacksonville early in the evening of December 7, 1982 (28TR 2204, 2206). Forman testified that he was a man dressed as a woman that evening (28TR 2206-07). Hutto was wearing a black leather jacket and told Forman he "stabbed a nigger to get it" (28TR 2205). Hutto also showed Forman a knife he claimed to have used (28TR 2205).[14] Forman admitted on cross-examination that in April of 1983 (the trial was June of 1984), she could not remember the date this encounter had occurred (28TR 2208). In any event, she had not believed Hutto; she thought he said it to impress her so he could have sex with her (28TR 2124).

Finally, inmate Clifford Cutwright testified. He met Hutto in jail. Hutto told him that Kight had not known the murder was going to happen; Hutto had pulled the knife and started stabbing the cab driver; Kight had tried to stop it; Kight had gotten stabbed himself; when Kight then exited the cab and ran off, Hutto called him a chicken shit and a wimp; Hutto had dragged the driver into the bushes by himself and had cut his throat; Hutto took the victim's ring and watch and jacket and drove the victim's car until he picked Kight up; Hutto then got into the back seat; they drove

[14] Although Kight states that Forman *saw* blood on this knife, she actually said only that Hutto "*told me* there was blood stains on it" (28TR 2205)(emphasis supplied).

the cab into the river and then walked to town (28TR 2304-05). According to Cutwright, Hutto planned to get Kight by himself and kill him to keep him from telling on him (27TR 2305). On cross-examination, Cutwright admitted that, although he has since been charged with murder and attempted sexual battery, he had originally been in jail on a 30-day sentence and had not then informed anyone of these statements by Hutto (28TR 2308-09).

On page 26 of his brief, Kight presents as established fact proffered mitigation which was rejected by the trial court after full consideration of all the evidence and testimony. The State would note that, on direct appeal, this Court fully reviewed the evidence presented at the penalty phase and found no error in the trial court's rejection of Kight's alleged mental retardation and deprived childhood in mitigation. Kight v. State, supra, 512 So.2d at 932-33. The trial court's rejection of this proposed mitigation also was affirmed by the Eleventh Circuit Court of Appeals. Kight v. Singletary, supra, 50 F.3d at 1548-49. The State would add that although Dr. Krop did, as Kight contends, testify that Kight's IQ is 69 (which according to Dr. Krop was borderline mentally retarded), Dr. Miller testified by way of deposition offered in evidence at the sentencing hearing before the judge (32R 2720) and relied upon by trial counsel in argument to the court (32R 2725)

that Kight's IQ was in fact some 10 points higher, i.e., between 77 and 80, based upon "overall responsiveness to mental status, ... and also ... the rapid assessment intelligence test" (4R 647). Dr. Krop testified that such an IQ score would not show mental retardation (31R 2606). Dr. Miller opined that Kight was intelligent enough to have a driver's license, do construction work, and to follow instructions and execute (4R 645), and Dr. Krop acknowledged that Kight was capable of functioning independently and was capable of initiating aggressive activity, even if he were in association with one more intelligent than he (31R 2609-10).

The State would note also that Kight's trial attorney offered in evidence Hutto's guilty plea and supporting documents (4R 670-79) which indicate not only that Hutto was a year younger than Kight (22 vs. 23) but also that, except for a couple of misdeameanor charges, Hutto had no prior criminal record, unlike Kight who did have a prior criminal record (4R 659).

C. THE 1989 STATE POSTCONVICTION HEARING

At page 9 of his brief, Kight states that his suspicion that the State had made deals with inmate witnesses in exchange for their testimony was "confirmed" at this hearing. Kight fails to acknowledge the explicit finding by the circuit court that, having heard all the testimony, the court was satisfied "beyond any doubt

that the jailed inmates ... were not given any inducements for their testimony prior to or after the trial of [Kight]" (5PCR 670-71). Because the issue of the existence of any inducements was expressly litigated to a conclusion which was affirmed by both this Court and the Eleventh Circuit Court of Appeals, and because Kight's alleged newly-discovered evidence adds nothing new to the issue of the existence of any improper and/or undisclosed inducements, the State will argue that neither the facts alleged by Kight nor any of the testimony adduced at the hearing is relevant to this appeal. However, since Kight devotes some 19 pages of his brief to a discussion of the testimony presented at this hearing, the State will offer its own presentation of the evidence presented. By doing so, the State does not waive any claim that the prior determinations of this matter are dispositive of any issue in regard to the inmate witnesses.

As Kight notes in his brief, Richard Ellwood testified at this hearing that he had lied at Kight's trial and that he in fact had never heard Kight confess (7PCR 173). He claimed to have learned his facts from TV and the newspaper (7PCR 177). He wanted to help Hutto because he had heard that Kight was going to turn state's evidence against Hutto and Ellwood did not "mind busting the State Attorney" (7PCR 178). So he called Hutto's attorney Bob Link about

it and gave Link's investigator a statement (7PCR 180). However, when he found out in December that Hutto was a former correctional officer, Ellwood tried to back out of helping Hutto. But Link already had Ellwood's deposition and sworn statement (7PCR 182). Then Hutto pled and Ellwood and the others ended up as State's witnesses (7PCR 182). Ellwood told every assistant state attorney he talked to, including Baker King, Mark Mahon and Denise Watson, that his story was a lie and that Kight had not confessed, but they all told him it did not matter, that his sworn statement and deposition were all they cared about (7PCR 187-88, 195). Ellwood and the other inmate witnesses were placed in the same room, shown pictures and instructed on the facts of the case, allowed to read each other's depositions, and prepped by these assistant state attorneys on exactly what to say (7PCR 191, 203, 206, 209). The inmate witnesses were threatened with perjury if they refused to testify (7PCR 193). If they did testify, they would get help with their sentences (7PCR 196). The state refused to put anything in writing, however, because then if the witnesses were asked if they had a deal, they would have to answer yes (7PCR 198). The inmate witnesses were instructed by the assistant state attorneys to lie and testify that no deals were made, if asked (7PCR 199, 201). Ellwood claimed that although he had a "deal," the State failed to

carry out its end of the bargain (8PCR 217, 219, 237). He admitted he told assistant state attorney Watson that he "could really screw the State" (8PCR 239-40). He also admitted he would like to see Hutto "fry" because he was once a correctional officer (8PCR 241).

Virtually every significant aspect of Ellwood's testimony was contradicted by other witness. For example, Louis Eliopoulos, prior to 1985 an investigator for the Public Defender's office, testified that he went to the jail to talk to inmates who had been there with Kight (11PCR 492). Eliopoulos testified that he had no contact with Ellwood prior to his visit to jail and had no information going in that Ellwood might know something about the Butler murder (11PCR 493). However, he told Ellwood he did as a bluff (11PCR 493). Ellwood looked concerned and told Eliopoulos he did not know how Eliopoulos had got that information, but admitted to Eliopoulos that Kight had made statements to him about the case (11PCR 493-94). Although Eliopoulos warned Ellwood that the Public Defender's office simply was not in the position to offer any deals in exchange for information, Ellwood gave a written statement, which included details that had not been publicized on TV or in the newspapers (11PCR 494, 497). Eliopoulos then contacted other inmates who would have been in contact with Kight, including Edward Hugo and others (11PCR 495). These inmates also had talked to

Kight and also knew details of the crime that they could not otherwise have known (11PCR 497). Eliopoulos checked to see if any of them had ever been cellmates with Gary Hutto, and concluded that they had not (11PCR 497-98).

Ellwood's testimony that Charles Sims and Edward Hugo had lied at trial was contradicted by both of them. Although Sims did claim that the state had offered him a deal, he testified that his trial testimony was true (9PCR 295, 315-16); Kight did tell him that he was going to put the murder off on the other guy, Kight did tell Sims that he had killed the cab driver and had slit his throat, and Kight did threaten to kill Sims just like he had killed the black cab driver (9PCR 307-08, 310). In fact, Kight later tried to carry out his threat, and tried to kill Sims with a razor (9PCR 309).

Hugo also stood by his trial testimony; he testified that Kight had indeed admitted killing the cab driver by slitting his throat (12PCR 510). Hugo was first contacted by Eliopoulos, not the state (12PCR 511). Hugo had been a cellmate with Kight for four months (12PCR 512); he did not know anything about Hutto, but he knew Kight was guilty and did not want to see the wrong man on death row (9PCR 513-14). Hugo testified that the state offered him nothing and made no promises; he was released on parole, but no earlier than scheduled (12PCR 514-16). He has not been back in

jail since being released (12PCR 521). Hugo had never before helped the state attorney's office (12PCR 548). Hugo never got together with Ellwood to concoct a story, and no one with the prosecution coached him to lie, told him what to say, or threatened him (12PCR 516-17). Nor did the state speak to the inmate witnesses as a group; Ms. Watson spoke to them individually (12PCR 519). Hugo did talk to Ellwood after they had testified and Ellwood told him he "was madder than hell" that the state had not done anything for him and he promised "he would get back at them" (12PCR 517).

Victor Bostic was an inmate who did *not* testify at trial. Although Bostic testified that he would have been willing to concoct testimony in exchange for a deal, Bostic admitted that the state never offered or promised him anything for his testimony (11PCR 469-70).

(Then) State Attorney Ed Austin and former assistant state attorneys Baker King, Mark Mahon and Denise Watson testified. Mr. Austin testified that the policy of his office was full disclosure to the defense of any and all concessions or deals with state witnesses (11PCR 480-81). Unfair and unethical prosecutorial conduct is not tolerated (11PCR 483). King, Mahon and Watson testified in no uncertain terms that they did not suborn perjury in

this case, did not coach witnesses, did not give them access to state files other than their own depositions, and did not make any promises in exchange for testimony (9PCR 320 et seq; 10PCR 383 et seq; and 12 PCR 558 et seq). As these prosecutors noted, the inmate witnesses who testified were already under sentence (10PCR 434); generally, as defense attorney Robert Link acknowledged, when there is a "deal in exchange for testimony," the sentencing occurs after the trial; it is unusual for an already sentenced person to testify against an unrelated defendant (12PCR 622).[15]

[15] Kight emphasizes that, despite the prosecutors' testimony, inmates did receive benefits after trial (Initial Brief at 42-44). This alone, however, fails to show any pre-existing agreement or inducement. Furthermore, not a single inmate got time off his sentence; any post-trial favorable treatment was limited to compensating for gain time lost by having to remain in the Duval County jail for a lengthy period of time rather than being in prison, or providing drug treatment, or arranging transfers for inmates whose lives were demonstrably in danger as the result of having testified for the state in a capital murder case (12PCR 568-71, 585-86, 602-04).

D. THE 1999 EVIDENTIARY HEARING

William O'Kelly testified that he was in inmate in Duval County Jail from October 1983 to November 1984, charged with murder (4R 536).[16] Gary Hutto was his cellmate for a month or more (4R 536-37). Hutto told him he and a codefendant were in for killing a cab driver (4R 538). Hutto told him he had stabbed the driver (4R 538). Hutto did not, however, tell O'Kelly what Kight's involvement was (4R 556), he never told O'Kelly he had acted alone in stabbing the cab driver, and he never told O'Kelly that Kight had not stabbed the cab driver (4R 563).

O'Kelly did not come forward with this information initially because he had "problems of his own" at the time; but even as late as 1989, when "people came to me," O'Kelly still did not divulge what he supposedly knew about this case (4R 541). However, for reasons which O'Kelly could not explain, in 1996 he told a CCR investigator name Rick what he knew about Kight (4R 542). He signed an affidavit at a copy center (4R 543). O'Kelly did not write out the affidavit (4R 558)

In October of 1998, O'Kelly lived in Chicago (4R 545). As he was getting ready to move back to Colorado, he was arrested and taken to jail on a Colorado warrant for assault on police officers

[16] See Kokal v. State, 492 So.2d 1317 (Fla. 1986).

(4R 545, 547). He was not "mistreated" at the jail (4R 546). While there Assistant State Attorney Laura Starrett and an investigator named Barry spoke to him (4R 547). They were "really, really nice." Ms. Starrett "never made any promises, any threats, nothing."

O'Kelly was picked up at the Jacksonville airport and taken to a hotel the evening before the hearing by "Christine" (4R 559-60). He left the room but returned at midnight when "Christine" talked to him about "what I was going to say today" (4R 561). He did not tell "Christine" right away that he had lied to Ms. Starrett and Mr. Abromowitz about having signed a sworn affidavit when he had talked to them in Chicago; it took some two hours of talking to her (4R 651-62). He acknowledged that Ms. Starrett had never told him to lie or to say anything but the truth, but nevertheless he had not up to the day of the hearing told her that some of what he had told her earlier was a lie (4R 562). He reiterated, though, that even though he had signed an affidavit which stated to the contary,[17] Hutto had never told him that Kight did not kill the cab

[17] As noted in footnote 3, supra, O'Kelly stated in the affidavit: "Gary told me that Kight did not kill the taxi cab driver" (3R 378)

driver (4R 568). In this regard, his testimony was consistent with his statement to Abramovitz in Chicago.[18]

Kight's trial attorney Bill Sheppard testified, basically, that if O'Kelly had been available as a witness at the time of the trial, he would have called him. Sheppard did acknowledge, however, that he "was stuck in a case and I think we do this from time to time, I guess you call it around the defense bar, as a slow plea of guilty on the guilt phase trying to impact the penalty phase" (4R 605). He also admitted that he would not be "as thrilled" to use O'Kelly if O'Kelly had recanted his affidavit (4R 605), but would still have called him "simply because this type of witness ..., you don't know what they're going to say until they're sitting here and saying it so, I mean, he could have recanted 36 times and that wouldn't have surprised me if you put it that way because these type of witnesses do this" (4R 606). Even if O'Kelly had recanted his affidavit, Sheppard would have called him "because I'd have made him eat every piece of this paper" (4R 606).

Barry Abramovitz, state attorney investigator testified that he went to Chicago to speak to O'Kelly about his affidavit (4R

[18] In the statement to investigator Abramowitz in Chicago, O'Kelly denied having been sworn (2R 359), denied signing the affidavit (2R 361), denied being afraid to come forward earlier (2R 360), and denied stating that Hutto had told him that Kight did not kill the taxi cab driver (2R 360).

625). Chicago authorities had located O'Kelly by running an NCIC, which was standard procedure for locating a witness (4R 627-28). Abramovitz informed O'Kelly that he was not charged with anything in Florida. O'Kelly was not threatened and spoke voluntarily and willingly (4R 621). O'Kelly told Abramovitz that statements in his affidavit were not true; he had no doubts about it, was indeed emphatic about it (4R 622).

SUMMARY OF THE ARGUMENT

Kight obtained an evidentiary hearing on his successive 3.850 motion by alleging that he had newly discovered evidence which would exonerate Kight and prove his innocence. Having failed utterly to present any evidence which exonerates him, Kight now attempts to relitigate the issues of proportionality and prosecutorial misconduct, neither of which were raised in the 3.850 motion, and both of which were presented and decided long ago. Both of these issues are procedurally barred, not only because they were not timely raised even assuming that his "new" evidence bears on either of those issues, but also because his "new" evidence fails to call into question the prior determinations as to these issues. Kight long ago had a full and fair opportunity to litigate any issue of proportionality and prosecutorial misconduct. He is not entitled to relitigate those issues.

The record fully supports Judge Carither's determination that O'Kelly's testimony simply could "not have affected any significant conclusion drawn by the jury or the trial judge," including any conclusion as to the relative culpability of Kight versus Hutto. The evidence in this case amply supports the conclusion reached by both the jury and the trial judge that Kight was the actual killer. O'Kelly's testimony is not sufficient to undermine that conclusion. Therefore, Kight is not entitled to either a new trial or a new sentencing.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT RELIEF AS TO SENTENCE ON GROUNDS OF PROPORTIONALITY; THIS ISSUE IS NOT ONLY PROCEDURALLY BARRED, IT IS MERITLESS

Kight leads off his argument with an issue not raised in his 3.850 motion, and decided long ago adversely to the Kight by this Court on direct appeal. On direct appeal, this Court reviewed all the evidence, including evidence presented by Kight indicating that Hutto might also have stabbed the victim, and determined (1) that the trial court's findings in aggravation and mitigation were proper, (2) that "there was sufficient record support for the jury's conclusion that Kight 'actually' killed Butler," and (3) that "the death penalty was proportionately imposed" on Kight. Kight v. State, supra, 512 So.2d at 933. This finding is the law of this case, unless Kight can present newly discovered evidence materially calling into question the relative involvement of the two codefendants. Because Judge Carithers determined that the new evidence does not, and could not "have affected any significant conclusion drawn by the jury or the trial judge," it would seem that Kight would first have to demonstrate how Judge Carither's evaluation of the new evidence was erroneous. Instead, Kight argues this issue as if the relative culpability of Kight versus

Hutto is an open question never before resolved. The State's position is this: absent newly discovered evidence which "affects any significant conclusion drawn by the jury or the trial judge," the issue of proportionality is procedurally barred as one which was raised on direct appeal and decided by this Court, just as Judge Carithers found (3R 453).

This is not a case like Scott v. Dugger, 604 So.2d 465 (Fla. 1992), in which a codefendant received a life sentence *after* this Court affirmed the defendant's death sentence on appeal. In such a case, the life sentence subsequently imposed may constitute newly discovered evidence. In this case, it was known to all parties and to the courts, not only on direct appeal, but also at trial, that Hutto had pled guilty to second degree murder and thus was ineligible for a death sentence. In fact, this circumstance was found to be mitigating by the trial court in its sentencing order. Kight, supra, 512 So.2d at 932. Thus, Hutto's sentence is most emphatically "new" evidence.

Nor is this a case like Puccio v. State, 701 So.2d 858 (Fla. 1997), in which this Court found on direct appeal that the trial court's determination that Puccio was the actual killer was not supported by sufficient evidence. In this case, this Court explicitly found on direct appeal that the record supported the

determination that Kight was the actual killer. Kight, supra at 933.[19] Furthermore, Judge Carithers explicitly found that Kight's new evidence could not have affected this conclusion (3R 452).

This case is controlled by Steinhorst v. Singletary, 638 So.2d 33 (Fla. 1994). As in Steinhorst, Kight's proportionality claim is successive; absent new evidence materially affecting any judgment made at that time, Kight cannot relitigate this issue.

This issue is also procedurally barred because it is not timely raised. Rule 3.850(b) contains a one-year time limitation for filing motions to vacate judgment and sentence in capital cases. An exception is made for motions based on newly-discovered facts. Rule 3.850 (b)(10). Claims filed after the one-year period has elapsed are procedurally barred unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Henderson v. Singletary, 617 So.2d 313, 316 (fn. 3) (Fla. 1993). Assuming that O'Kelly was a newly discovered witness in 1996, when he allegedly signed his affidavit, then Kight had one year to bring a new claim for relief based upon that new evidence.

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[19] Although this Court's opinion refers to the jury's determination, it should be noted that the trial court also made this explicit determination, stating that the evidence, although in dispute, "supports a clear finding that the defendant actually committed the homicide" (4TR 663-64).

Mills v. State, 684 So.2d 801, 804-05) (Fla. 1996). Nowhere in the 3.850 motion does Kight allege that his death sentence is disproportionate. The proportionality issue was raised and argued for the first time in Kight's post-hearing memorandum filed simultaneously with the State's in March of 1999--some three years after O'Kelly gave his affidavit. What has happened, the State would suggest, is that having failed miserably in his attempt to "exonerate" Kight with O'Kelly's testimony, he has belatedly, and some two years too late, raised proportionality. This piecemeal presentation of ever-shifting legal theories is exactly the kind of litigation on the installment plan that the time limitations incorporated into 3.850 are supposed to prevent, and his proportionality claim is time barred.

In any event, this issue is not only procedurally barred, it is meritless. Kight's death sentence is not disproportionate, with or without O'Kelly's testimony. Although the evidence is not completely undisputed (and was not at trial), it was and is more than sufficient to support the conclusion that Kight was the actual killer.

Virtually all of Kight's argument on this issue is merely a rehash (and an inaccurate rehash at that) of evidence presented and arguments made at the original trial and on appeal. For example,

he reargues the proffered mitigator of Kight's low intelligence which was rejected by the trial court, by this Court on direct appeal, and by the Eleventh Circuit on appeal from the summary denial of federal habeas relief. He asserts as indisputable fact that Kight had an IQ of 69 and that Hutto was much more intelligent (page 64 of his brief). Actually, however, some of Kight's own evidence at sentencing indicated that his IQ was *77–80* and that he was *not* mentally retarded. Moreover, other evidence in the case supports a conclusion that Kight is not mentally retarded, including the statement he gave to police accurately describing the victim, his dress, the rings taken from him, the color of his cab, the stab wounds, and manner in which he and Hutto disposed of the victim's cab; also corroborating Kight's intelligence was his ability to take the police to the place where the car had been disposed of and to the place where the victim's rings were hidden, as well as his ability to concoct a story sufficient initially to persuade officer Simmons that Kight was not involved in the McGoogin robbery. Furthermore, although it was the defense theory of the case that Hutto was much more intelligent, there is no actual evidence of Hutto's IQ, and his background working briefly in construction and as a correctional officer hardly establishes that he was any kind of whiz mentally.

Kight also argues (page 67 of his brief) that Hutto had the victim's watch and lighter in his possession when he was arrested, but that fact was never established; on the contrary, the failure of the victim's wife to identify these items found on Hutto when he was arrested strongly suggests that these items did *not* belong to the victim.

Kight argues that "with the addition of Mr. O'Kelly's testimony," is is now clear that Kight was telling the truth when he identified Hutto as the killer. Initial brief at 68. But all O'Kelly says is that Hutto admitted stabbing the victim. O'Kelly does not claim to have heard Hutto say that Kight did not stab the victim. Thus, O'Kelly's testimony, even if believed (and that is a stretch in view of his conflicting statements and lengthy delay in coming forward with this information) does no more than indicate that Hutto may have participated in the stabbing with Kight. But that has always been the case. The state never claimed that Kight acted alone or that Hutto was innocent. Hutto obviously was a party to the murder, and pled guilty to second degree murder. The state acknowledged at trial that Hutto's participation may have been greater than he was willing to admit. Furthermore, evidence was presented at trial that Hutto may have stabbed the victim: Kight said he did, and Lee Forman and Clifford Cutwright testified

that Hutto had admitted to them that he had stabbed the victim. Nevertheless, the jury found that Kight "actually" killed the victim, and the nothing O'Kelly has to say calls into question that conclusion. Even if Hutto also stabbed the victim at some point, the State presented substantial evidence at trial establishing that Kight not only had stabbed the victim, but had administered the "coup de grace" by slitting the victim's throat after the victim had been dragged into the bushes.[20] Not only did Kight admit to several persons that he was the one who had killed Butler and cut his throat, but it was Kight, not Hutto, who put a knife to McGoogin's throat the next evening. And not only did Hutto *not* attack McGoogin with a knife, he did not even *have* one; it was Kight, not Hutto, who had a knife when arrested, and it was not merely loose in his pocket, but in a sheath attached to his belt. It was Kight, not Hutto, who could accurately describe the victim's rings and who took the police to them, and it was Kight, not Hutto, who explicitly acknowledged handling Butler's wallet, just as it was Kight, not Hutto, who took McGoogin's money. Finally, and the

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[20] The State would note that this Court has held that such act shows not only heightened premeditation, but also such deliberate ruthleness as would support a finding of the cold, calculating and premeditated statutory aggravator. Foster v. State, 654 So.2d 112 (Fla. 1995)(after stabbing victim and dragging him into bushes, defendant administered fatal wound because victim was still breathing).

State considers this relevant to any issue of proportionality, at the time Butler was murdered, it was Kight, not Hutto, who had a criminal record. The evidence thus supports a conclusion that Kight was the more culpable of the two, and Kight's "new" evidence, even if believed, does not contradict this, or add anything new to testimony presented at trial. Kight has failed to demonstrate any valid reason for this Court to redetermine an issue it resolved more than ten years ago on direct appeal.

ISSUE II

THE TRIAL COURT PROPERLY DETERMINED THAT KIGHT IS ENTITLED NEITHER TO A NEW TRIAL OR NEW SENTENCING

Judge Carithers determined that Kight is not entitled either to a new trial or to a new sentencing. As to the former, Judge Carithers noted that the "evidence at trial that the Defendant was directly involved in the murder was overwhelming." The new evidence, even taken in the light most favorable to Kight, could not "absolve" him of guilt and "thus could not have resulted in an acquittal on retrial." Kight barely tries to refute this, disposing of the issue of guilt in one sentence. But it is obvious that Kight was a party to this murder even if he had not stabbed the victim at all. Even his own trial attorney admitted as much (4R 594). Judge Carithers clearly was correct in determing that O'Kelly's testimony did not warrant a retrial.

Other than the one sentence alluded to above, Kight focuses on the sentence, arguing that his "new" evidence entitles him to a new sentencing hearing. Judge Carithers, however, concluded "that the new evidence would not probably produce a life sentence if a new penalty phase trial and sentencing hearing were granted" (3R 452). The new evidence, he noted, would have been "at best" cumulative to evidence presented at trial. Judge Carithers found it "hard to

imagine how the new evidence, then, could have affected any significant conclusion drawn by the jury or the trial judge" (3R 452).

Much of what the State argued as to Issue I, above, is applicable here. The State would note that O'Kelly, who failed to come forward with any information for over a decade because he just did not want to be involved, has given three materially different statements to the parties and to the court. His delay in coming forward, his lack of good reason for coming forward, and, as well, as the inconsistencies in his statements do not reflect well on his credibility. Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998)(proper for court to consider inconsistencies and length of delay, as well as reason witness failed to come forward sooner).

Even if O'Kelly is to be believed, however, his testimony fails to contradict in any way evidence presented at trial establishing to the satisfaction of the jury and the trial judge that Kight was the actual killer. As the State argued previously, evidence presented at trial indicated that Hutto participated in the murder, and may well have stabbed the victim a time or two himself. However, the evidence established beyond a reasonable doubt that Kight stabbed the victim and administered the final fatal stab wound to the neck which severed the victim's jugular

vein and carotid artery. O'Kelly's testimony simply adds nothing new to the sentencing calculus. Thus, there is no reason to believe that the jury or the trial court would have come to any different conclusion if O'Kelly's testimony had been presented.

Kight is not entitled to a new sentencing hearing.

ISSUE III

KIGHT HAS NO RIGHT TO RELITIGATE THE ISSUE OF ALLEGEDLY IMPROPER INDUCEMENTS TO STATE WITNESSES UNDER THE GUISE OF "CUMULATIVE REVIEW"

Here, Kight seeks to relitigate an issue fully resolved years ago under the guise of a "cumulative review," without presenting any new evidence which might call into question any determination made either by the trial court, this Court or the Eleventh Circuit Court of Appeals, all of which have addressed the issue of alleged state misconduct in offering undisclosed inducements in exchange for testimony and in suborning perjury. O'Kelly's testimony simply does not impact on this issue, and provides no possible basis for reopening the issue. Downs v. State, 24 Fla. L. Weekly S231, S232 (Fla. May 20, 1999)(noting that successive motion may be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits); Teffeteller v. Dugger, 734 So.2d 1009, 1016 (Fla. 1999)(3.850 proceedings not be be used as

second appeal to relitigate claims previously raised and found meritless); compare Lightbourne v. State, 24 Fla. L. Weekly S375 (Fla. July 8, 1999)(successive Henry claim allowed where defendant alleged and presented newly discovered evidence bearing on that issue).

Kight insists that this Court's opinion in State v. Gunsby, 670 So.2d 920 (1996), required Judge Carithers to consider and weigh "evidence that does not satisfy the newly discovered evidence test." Initial Brief of Appellant at 84. But Gunsby does not allow a defendant to relitigate an issue as to which he has already had a full and fair hearing. Gunsby dealt with an initial 3.850, not a successive one. Thus, neither the effectiveness of trial counsel nor the question of newly-discovered evidence had been previously raised. In considering the testimony of four allegedly newly-discovered witnesses presented at the 3.850 hearing, this Court found that, to the extent that at least some of the testimony should have been discovered through due diligence at the time of the trial, trial counsel's performance was deficient. In these "unique" circumstances, it was not necessary to determine whether or not the evidence was admissible as newly-discovered evidence or as evidence of trial counsel's ineffectiveness; it was in any event admissible under either one theory or the other. Gunsby does not

even hint, much less hold, that a claim found to be wholly meritless may be relitigated de novo ten years later in a successive postconviction motion.

The State would rely on Jones v. State, 591 So.2d 911 (Fla. 1991), which like this one, involved a successive 3.850 motion. After unsuccessfully litigating a postconviction claim of ineffective assistance of counsel at which Paul Marr testified about statements made to him by Glen Schofield, Jones attempted four years later to offer Marr's statements in support of a successive postconviction claim of newly discovered evidence of innocence. This Court found the use of Paul Marr's testimony procedurally barred in the successive 3.850 motion, because Jones had previously "unsuccessfully sought to introduce Marr's testimony in support of his claim of ineffective assistance of counsel." Id. At 916, fn. 2. This Court reaffirmed this ruling in Jones v. State, 709 So.2d 512, 522 (fn. 7) (Fla. 1998), when it "reject[ed] Jones' argument that we must consider all testimony previously heard at the 1986 and 1992 hearings, even if the testimony had previously been found to be barred or not to qualify as newly discovered evidence."

O'Kelly's testimony was simply that Hutto made an incriminating admission to him which failed to exculpate Kight.

Nothing in O'Kelly's testimony supports or contradicts any claim that the state was guilty of seriously unethical and even criminal activity at Kight's trial, as alleged in the previous 3.850 motion, and Kight has no right to attempt to relitigate that issue.

Furthermore, the claim is absurd. It is obvious from any review of the transcript of the 1989 hearing that Kight failed present any remotely credible evidence of prosecutorial inducement or suborning of perjury. Not only was Ellwood's testimony contradicted by every other witness, but to believe Kight's theory on this issue, one would have to believe that the entire Duval State Attorney's office was not only so incredibly dishonest and unethical that it actively suborned perjury not only as to the fact of any deals but also as to the substantive issue of whether or not Kight had confessed, but in addition, was so incredibly stupid that it did so in the presence of all the witnesses collectively in the most blatantly obvious manner possible with witnesses who could not possibly have been regarded as trustworthy co-conspirators in the commission of a serious crime, given that, among other things, they were involved in this case precisely because they did *not* keep silent after having obtained incriminating evidence of serious criminal activity.

O’Kelly’s testimony standing alone, or considered in conjuction with the testimony from the 1989 hearing, does not undermine confidence in Kight’s conviction or sentence. Kight’s “cumulative effect” claim is meritless.

CONCLUSION

Kight's 3.850 motion was properly denied. Neither his conviction nor sentence is unconstitutional for any reason urged, and this Court should affirm the denial of relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Christine Haydinger, CCRC-South, 1444 Biscayne Blvd., Suite 202, Miami, Florida 33132-1422, this 15th day of November, 1999.

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