

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,208

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CHARLES MICHAEL KIGHT,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

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

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AMENDED INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

This proceeding involves the appeal of the circuit court's denial of Mr. Kight's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on appeal to this Court;

"T" -- transcript of 1989 evidentiary hearing;

"PC-R." -- record on appeal to this Court following the 1999 evidentiary hearing;

"Def. Exh." -- defense exhibits.

**REQUEST FOR ORAL ARGUMENT**

Mr. Kight has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Kight, through counsel, accordingly urges that the Court permit oral argument.

**STATEMENT OF FONT**

Mr. Kight's Initial Brief is written in Courier font, size 12.

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### STATEMENT OF THE CASE

Mr. Kight was indicted for first-degree murder on January 6, 1983 (R. 13-14). He was convicted on June 4, 1984 (R. 571). The jury recommended a death sentence by a vote of 8 to 4 (R. 636). The circuit court accepted the jury recommendation and sentenced Mr. Kight to death (R. 653). The court found two aggravating factors: commission during a robbery and heinous, atrocious or cruel (R. 673-74). The court found two mitigating circumstances: that Mr. Kight once apprehended a robber and Mr. Kight's co-defendant entered a plea agreement that allowed him to avoid the death penalty (R. 673). The sentencing order specifically states that "[t]he evidence is in dispute as to who actually killed the victim." (R. 674).

This Court affirmed Mr. Kight's conviction and sentence on direct appeal. Kight v. State, 512 So. 2d 922 (Fla. 1987), cert. denied, 485 U.S. 929 (1988). During those proceedings, this Court noted that the evidence against Mr. Kight consisted of his statements to the police -- which indicated that Mr. Hutto was the actual killer -- and his admissions to jailhouse informants. This Court also noted that newly discovered evidence that the State had presented false testimony and failed to disclose evidence of deals it had made with the informants should be raised in a Rule 3.850 proceeding.

After Governor Martinez signed a warrant on September 27, 1989, Mr. Kight filed a motion to vacate in the circuit court and a petition for habeas corpus relief in this Court. The circuit

court conducted a limited evidentiary hearing on Mr. Kight's claim that the State had violated Brady v. Maryland. The circuit court denied relief on all other claims including the ineffective assistance of counsel and mental health issues.

This Court affirmed the circuit court's denial of relief, noting that although there was "conflicting testimony concerning whether the State made concessions in exchange for the informants' testimony, it was within the trial court's discretion to find the state's witnesses more credible than those of the defense." Kight v. State, 574 So. 2d 1066 (Fla. 1991). This Court also denied Mr. Kight's petition for writ of habeas corpus.

On May 17, 1991, Mr. Kight filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The petition was denied without an evidentiary hearing.

On October 20, 1992, Mr. Kight filed a petition for writ of habeas corpus in this Court based on the Supreme Court's decision in Espinosa v. Florida. The petition was denied. Kight v. Singletary, 618 So. 2d 1368 (Fla. 1993).

On September 9, 1997, Mr. Kight filed his second Motion to Vacate Judgments of Conviction and Sentence presenting newly discovered evidence of his co-defendant's culpability. The circuit court denied relief on November 7, 1997. Mr. Kight filed a motion for reconsideration which was granted on December 17, 1997.

On August 14, 1998, the circuit court conducted a Huff



hearing and scheduled a hearing on Mr. Kight's newly discovered evidence claim for January 21, 1999.

On November 24, 1998, Assistant State Attorney Laura Starrett filed a Motion for Rehearing regarding Mr. Kight's entitlement to a hearing (PC-R. 355-61). In support of her motion, Ms. Starrett included a transcript of a taped interview with William O'Kelly, the newly discovered witness who was scheduled to testify on behalf of Mr. Kight. During the interview at the Chicago jail with Ms. Starrett, an investigator from her office, and a representative of the Chicago prosecutor's office, Mr. O'Kelly recanted the affidavit he provided to Mr. Kight's counsel stating that Mr. Kight's co-defendant confessed to the murder and planned to blame Mr. Kight. Ms. Starrett's motion alleges that the affidavit is "false" and she requested "that the defendant be compelled to provide the Court with the original affidavit so the Court can consider sanctions." (PC-R. 355). Ms. Starrett explained the basis for this allegation:

The signature on the affidavit submitted by CCR appears identical to the signature of Richard Hays, who was an investigator with CCR in 1996. O'Kelly recalls that the investigator he spoke to was named Rick, but does not remember his last name. The State Attorney's Office has a copy of Hays' signature from another investigation. Paralegal Sally Parsons from the State Attorney's Office has checked with the State of Colorado, and determined that the notary stamp on the affidavit is not consistent with Colorado requirements. They also indicated that Richard Hays was not a notary in that state in 1996.

(PC-R. 355).

On December 17, 1998, the circuit court held a hearing on the State's motion. Ms. Starrett expanded upon the allegations against Mr. Kight's counsel that were contained in her motion:

Mr. O'Kelly represented to us that, one, he -- the things in this affidavit were not true and, two, that he had never sworn to these facts. He indicated that the only contact he had had with anyone from C.C.R. was when he was in Colorado, an investigator who he only remembered the name Rick met with him in a gay bar and it was just the two of them. He indicated that there was no notary present that he was aware of.

He also indicated, however, that it did appear to be his signature on -- all we have ever seen is a copy of this affidavit. However, he has no idea how that happened. In further investigating we tried to determine who had notarized this, and it's hard to read. The only thing that appears -- appears to be the name Richard.

Mr. Abramowitz has had a previous dealing with a Richard Hays who is an investigator with or was formally [sic] an investigator with C.C.R. The signature appears to be the same. We are not handwriting experts, and since we don't have the original we haven't been able to go any further than that.

(PC-R. 473-74). Ms. Starrett also told the court that Mr. O'Kelly had denied the contents of his affidavit: "it is of great concern how Mr. O'Kelly's name has appeared on this when he denies ever signing it and has made clear that none of these -- he would never have sworn to these facts because they are not true." (PC-R. 475). According to Ms. Starrett, Mr. O'Kelly had "no desire to come back to Florida, and he certainly has indicated that he would never testify in behalf of C.C.R. to these facts." (Id). The circuit court granted Ms. Starrett's

request that the original affidavit be provided to the court but denied her motion to reconsider Mr. Kight's right to an evidentiary hearing (PC-R. 479-80). Pursuant to the circuit court's order, counsel for Mr. Kight filed the original affidavit (PC-R. 367-71). Ms. Starrett later withdrew her request that the court impose sanctions based on the affidavit (PC-R. 528).

During a January 5, 1999, hearing on Mr. Kight's pre-hearing motions, during which Ms. Starrett resisted requests to provide Mr. O'Kelly's location to counsel for Mr. Kight, Ms. Starrett revealed that she was still in communication with Mr. O'Kelly after he was extradicted to Colorado. Mr. O'Kelly had called Ms. Starrett directly from Colorado and once asked her to have an ankle bracelet removed (PC-R. 510). Mr. O'Kelly was out on bond on misdemeanor charges and had been told that the Duval County State Attorney's Office requested that he be restrained by the ankle bracelet (PC-R. 510). Ms. Starrett indicated that she contacted Colorado authorities to have the bracelet removed (Id.). Ms. Starrett also revealed that her office had been instrumental in arranging Mr. O'Kelly's arrest in Chicago (PC-R. 521-22).

At the evidentiary hearing on January 21, 1999, William O'Kelly testified that Gary Hutto confessed to him that he stabbed the victim in this case (PC-R. 553). Mr. Hutto also said that he was going to save himself by blaming Mr. Kight for the murder because he believed that a mentally retarded person could not be sentenced to death in Florida (PC-R. 555-56). Mr. O'Kelly

also testified about the events that occurred in Chicago when he recanted his affidavit. He explained that he had been arrested on an outstanding Colorado warrant for misdemeanor criminal mischief (PC-R. 545, 547). When Mr. O'Kelly spoke to Ms. Starrett and her investigator, he was handcuffed to the wall of a holding cell and told them what they wanted to hear because he believed this was the only way he would be permitted to leave the jail (PC-R. 546, 549).

The circuit court found that Mr. O'Kelly's testimony proves that Mr. Kight's death sentence is unconstitutional in light of his co-defendant's life sentence:

In his trial memorandum, Defendant also placed great emphasis on the fact that the death sentence was imposed upon him, as opposed to the lesser sentence Mr. Hutto received. **That aspect of the case is very troubling to this Court.** 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. Thus, the death sentence herein appears unconstitutionally dispar[a]te.**

(PC-R. 452). However, the circuit court found that Mr. Kight's disparate sentence argument was procedurally barred because it had been raised at the time of Mr. Kight's trial. This appeal followed.

## STATEMENT OF THE FACTS

### A. INTRODUCTION.

Mr. Kight was convicted and sentenced to death for the robbery and murder of Lawrence Butler, a taxicab driver. Mr. Kight and his co-defendant Gary Hutto were arrested on December 7, 1982, for the robbery of Herman McGoogin, another taxicab driver. Mr. Hutto gave a statement incriminating Mr. Kight; Mr. Kight declined to be interrogated. The Public Defender's Office was appointed to represent both Mr. Hutto and Mr. Kight; no one from the public defender's office visited Mr. Kight at the jail. After the discovery of Mr. Butler's body on December 14th, suspicion focused on Mr. Hutto and Mr. Kight. On December 17th, Mr. Kight gave two statements to the police indicating that he was present at the murder, but that Mr. Hutto was the actual killer. Mr. Kight, who cannot read, had been given a standard advice form by the Public Defender's Office; he had still not spoken to an attorney. Mr. Kight and Mr. Hutto were both arrested for the murder of Mr. Butler. The Public Defender's Office then moved to withdraw from representing Mr. Kight on December 22, 1982. Mr. Kight's statement to the police was cited in support of the motion to withdraw.

During pretrial proceedings, Mr. Kight's counsel moved to disqualify the Public Defender's Office from representing Mr. Hutto. Subsequent to the appointment of substitute counsel, Mr. Hutto entered a plea agreement with the State that allowed him to avoid the death penalty. The State allowed Mr. Hutto to plead

guilty to second-degree murder if his attorney disclosed the names of jailhouse snitches to whom Mr. Kight had allegedly confessed. The names of the snitches had been obtained on Mr. Hutto's behalf by the Public Defender's Office which had also represented Mr. Kight. The trial court denied a motion to exclude these witnesses due to the conflict of interest created by the Public Defender's Office's joint representation of Mr. Kight and Mr. Hutto.

Mr. Kight's attorney presented evidence that Mr. Hutto had made an incriminating statement to the police, that he had confessed to a friend the day after the murder, and that he had confessed while incarcerated. The evidence also showed that Mr. Hutto had the victim's watch and lighter when he was arrested and that the blood on his clothes was consistent with that of the victim but could not have been his own. The State's strongest evidence against Mr. Kight was that of the four jailhouse informants whose names had been provided to the State by Mr. Hutto pursuant to his plea agreement. This was only evidence to rebut the defense theory that Mr. Hutto was the actual killer and it also contained other prejudicial details such as Mr. Kight's plan to blame the crime on Mr. Hutto; Mr. Kight's laughter when asked whether he was worried about the charges; Mr. Kight's recounting of the victim's begging; and Mr. Kight's plan to get off by feigning insanity. The four snitches all testified that they had no expectations of receiving any benefit in exchange for their cooperation, and the State emphasized in closing argument

that the informants had already been sentenced and could not be helped by the State Attorney's Office. Mr. Kight's trial attorney suspected that the informants had deals with the State Attorney's Office and expected assistance in exchange for their cooperation but he lacked any evidence with which to impeach them.

These suspicions were confirmed in 1989 when Richard Ellwood and Charlie Sims, two of the snitches who helped to convict Mr. Kight, revealed that they had lied at the trial. They testified that Mr. Kight never confessed to them, that they learned details of the crime from television and from Mr. Hutto, that they were prepped for trial in the State Attorney's Office by reviewing depositions, police reports, crime scene photos, and the autopsy report. Most significantly, they revealed that the State Attorney's Office promised all four informants that they would receive assistance in exchange for their help in convicting Mr. Kight. Mr. Kight's attorneys presented documentary evidence proving that after Mr. Kight's trial the State Attorney's Office filed motions to vacate sentences on behalf of the snitches and stipulated to motions to reduce sentences. All of these motions specifically refer to the witnesses' participation in Mr. Kight's trial as the basis on which to grant them sentencing relief.

The hearing testimony of Mr. Ellwood and Mr. Sims is corroborated by newly discovered evidence that was presented in 1999. William O'Kelly testified that Mr. Hutto confessed to him when they were incarcerated together at the Duval County Jail.

Mr. O'Kelly testified that Mr. Hutto believed that because Mr. Kight is mentally retarded he could not get the death penalty and that Mr. Hutto planned to save himself by placing full blame for the murder on Mr. Kight.

The circuit court agreed that the newly discovered evidence presented by Mr. Kight proves that his death sentence is unconstitutional because his codefendant, who is at the least equally culpable to Mr. Kight, received a lesser sentence. Mr. Hutto entered a plea bargain with the State in exchange the names of witnesses (jailhouse snitches) who would corroborate his own testimony shifting the blame entirely to Mr. Kight. Evidence discovered since Mr. Kight's trial proves that the witnesses supplied to the State by Mr. Hutto were instructed by him about their testimony and that in exchange for their false testimony they also received lesser sentences and other assistance from the State. Mr. Kight's disparate sentence is the result of the State's decision to plea bargain with Mr. Hutto in order to secure evidence against Mr. Kight. While the jury that sentenced Mr. Kight to death was aware of Mr. Hutto's plea to second-degree murder and the fact that he could not be sentenced to death, it was misled about his participation in this crime.

**B. THE TRIAL RECORD.**

The main evidence against Mr. Kight at his trial consisted of his statements to the police, the testimony of Herman McGoogin, and the testimony of four jailhouse snitches. Mr.



Kight's statements and Mr. McGoogin's testimony all support the defense theory that Mr. Hutto had planned and committed the crime and that Mr. Kight was present but did not participate in the murder. The only evidence indicating that Mr. Kight was actually involved in the murder came from the testimony of the jailhouse snitches. All the other evidence, including the State's serology analysis, indicated that Mr. Hutto was the more culpable co-defendant who had acted alone in killing Lawrence Butler.

The State introduced two statements that Mr. Kight made after his arrest for the McGoogin robbery. In both statements, Mr. Kight admitted his presence at Mr. Butler's murder and told the police that Mr. Hutto had planned and committed the crime alone. Detective Ross Weeks testified that he had a conversation with Mr. Kight:

He said I am not afraid of the chair, man, and I said what chair are you talking about? And he said the electric chair because Hutto stabbed the guy and cut his throat and he's still got the man's watch. He was a taxicab driver.

(R. 1883). After making this statement, Mr. Kight, who is illiterate, was put in an interview room where he signed a form waiving his rights and made a statement to Detective Kesinger. At the trial, Detective Kesinger read the following statement which he had written during the interview:

I met this guy Hutto about two weeks ago. I don't know his first name but his nickname is Tiger. Hutto refers to me as Chuck or by my name Bear. On the 6th of December, 1982, I was at the Odessa Club at Main and Ashley Street. I got to the club around 10:00 a.m. in the morning and I stayed

around the club all day.

I was seeing a friend named Donut, a dark skinned female. Shortly after midnight Hutto arrived, we both sat at different tables in the bar talking to different people. Hutto had been to the bar earlier about 4:30 p.m. but he had left.

After a few minutes of Hutto being in the bar he came over and started talking to me. He said that he wanted to go out to Heckscher Drive to visit a friend. Hutto said he had already called a cab and he wanted me to go with him.

Hutto said his friend would be home at about 1:00 a.m. We then walked outside and waited about ten minutes and the cab finally arrived. The color of the cab was blue and a black male was driving.

Hutto got into the right front passenger's seat and I sat in the right rear seat. Hutto then told the cab driver he wanted to go out Heckscher Drive towards the ferry. We then drove north on Main Street and turned onto Heckscher Drive.

We drove for a while and Hutto directed the driver down a dirt road. We just went a short distance on this dirt road when Hutto put a knife to the driver's throat and told him to stop and put the cab in park.

The driver started reaching towards his left and Hutto stabbed him in his chest. The driver was able to get completely out of the cab and he started to run. Hutto jumped out and grabbed the driver and told him to take off all of his clothes.

The driver then started undressing. The driver was wearing a black leather jacket, a white shirt and dark trousers. The driver was stripped down to his underwear. By this time, I was standing out of the cab. Hutto then removed the man's watch and two rings. One was a golden wedding band and the other a silver ring with one stone.

The driver didn't want to give up the

wedding band but Hutto stabbed him in the chest again and told him to shut up. The driver then fell onto his back. He was still breathing. Hutto then stabbed him again in the chest and stomach. Hutto then dragged him back into the bushes. I went back into the bushes also and saw Hutto stab the victim again. Hutto also kicked the driver in the side and he then cut the driver's throat on the side because he was still breathing.

Hutto then give me the driver's knife he had. We then got into the cab and Hutto drove. He drove to Old Trout River Bridge on Main Street. The bridge had been barricaded off so you can't go across it any more. I believe we were on the south part of the old bridge headed north. There were no barriers and you can drive right off the end into the river.

Hutto got two bricks and placed them on the gas pedal. This made the engine run fast. He then placed the gear shift in drive and the cab started rolling. I heard the cab making scratching and crashing noises at the end of the bridge. Hutto wanted to go check and see if it was in the water but I didn't want to so we then left, walking.

We walked down on Main to the Clock Restaurant at 44th and Main Street. We then ate breakfast and Hutto paid for it. I talked briefly with a friend of mine who owns and runs the bar at 8th and Walnut Street. Roger is a white male. Roger gave me and Hutto a ride to 8th and Main Street. I guess it was about 3:45 a.m. in the morning.

Me and Hutto then walked to a condemned house where Hutto was staying. I believe the house i[s] just a couple of houses north of Sam's Liquors on the same side of the street. We went in the front door and into the downstairs room. Hutto put the rings into a medicine cabinet in one of the back rooms.

Hutto then give me \$23 cash which he possibly had taken from the cab driver during the robbery of the cab driver. I remember handling the driver's wallet. I picked it up from the seat and handled it. While in the

jail I saw an article in the paper about the murder of the cab driver. I cut this article out and kept it.

Also the night I went with Hutto I was drinking heavily and also took some Quaaludes seven fourteens. The next day I was arrested by the police. The knife they took from me is the one that belonged to the cab driver.

(R. 1913-16). This statement was written by Detective Kesinger (R. 1886). The police testified that Mr. Kight was cooperative and that he led them to the jewelry taken from the victim and the spot where the victim's taxi had been dumped in the river (R. 1887, 1916).

The State also presented Herman McGoogin who testified about another incident in which Mr. Kight and Mr. Hutto robbed him. Mr. McGoogin is also a taxi driver who picked up Mr. Kight and Mr. Hutto. After they got in the cab, Mr. Hutto directed him where to drive, when to slow down, and when to stop (R. 2134-35). He testified that after Mr. Hutto ordered him to stop the car, Mr. Kight put a knife to his throat and told him not to move (R. 2123). Mr. McGoogin testified that Mr. Hutto then "asked this guy here [Mr. Kight] what in the hell was he going to do" and Hutto "placed his hand on [Kight's] hand and started pressing the knife against me." (R. 2124, 2136). Mr. McGoogin felt that Mr. Hutto was daring Mr. Kight to do something with the knife (R. 2135).

Mr. Kight was convicted primarily on the basis of the false testimony of the four jailhouse snitches whose names had been provided to the State Attorney's Office by his co-defendant Gary

Hutto as part of his plea agreement. The informants all testified that Mr. Kight had confessed to them at the Duval County Jail. All denied receiving any promises or expecting any benefits in exchange for their testimony. Unlike the other evidence presented by the State which indicated that Mr. Hutto was the primary actor and Mr. Kight a minor accomplice, the snitches all placed full culpability for the murder on Mr. Kight.

Edward Hugo testified that Mr. Kight told him "that he would beat the case, that last week I cut a taxicab driver's throat." (R. 1992). Mr. Hugo elaborated:

Okay. We're still talking about the story of Charles Kight and he had befriended me, whatever, and he said at that point after they had been with him they took the taxicab and brought it back somewhere around the Ribault River, a dock behind the fish camp or bridge or something of that nature, I'm not exactly sure.

Okay. They ran the taxicab off the end of the bridge. Okay. It went over the bridge. Then they had taken some things, evidently it was a wallet and a ring and a watch. He was talking about there was a struggle over something, a ring that was on his finger or watch, I'm not exactly sure which one.

Okay. They had taken it off and taken it to an abandoned house somewhere, I have no idea where this abandoned house is.

(R. 1995). According to Mr. Hugo, Mr. Kight later said that "he wasn't going to catch a murder case, that there was somebody else with him that committed this crime and he was going to put it on him, that he wasn't going to go to jail for killing somebody. He was going to put it on another man." (R. 1997). On cross-

examination, Mr. Hugo admitted that he had met Mr. Hutto in drug rehabilitation class at the Duval County Jail (R. 2003). Mr. Hugo testified that he had not been promised any assistance in exchange for his testimony and that he did not expect any help from the State Attorney's Office (R. 2002, 2005). On redirect, Mr. Hugo explained why he was testifying against Mr. Kight:

"We're talking about a murder, you know, a heinous crime and I feel as though, you know, justice should be taught." (R. 2007).

Fred Moody testified that when he asked Mr. Kight whether he was worried about the murder charge, "he smiled and he laughs and says no, man, I am going to get off on insanity." (R. 2014-15). Mr. Moody also testified about a conversation he overheard at the jail between Mr. Kight and another cellmate: "he said that he stabbed a cab driver in the chest and that they robbed him and I don't know if he said I or we, but they dragged him outside of the cab into some bushes." (R. 2015). On cross-examination, Mr. Moody admitted that he had told Mr. Hutto he would help him on his case (R. 2019). On redirect, he explained that he offered to help Mr. Hutto because "from everything that I had heard about the trial I understood that Charles Kight was trying to put the whole thing off on Gary Hutto and that's why I made the offer." (R. 2022). Mr. Moody testified that he had no expectation of receiving assistance from the State in exchange for his testimony (R. 2021). In fact, Mr. Moody claimed that he had suffered a detriment as a result of his cooperation: "this trial has caused me to lose. I would have been out a couple of months ago." (R.

2023).

Richard Ellwood similarly testified that Mr. Kight had stabbed Mr. Butler: "when he [the victim] pulled out the knife Charles grabbed the knife from him and started sticking him in the chest." (R. 2026). Mr. Ellwood continued:

[H]e said there was a little struggle, then he said they went out behind the cab and they drug the man behind a bush and he said he could hear the man breathing through the holes, he was gurgling blood through the holes in his lungs and he said he went back behind the bush and cut the nigger's throat.

(R. 2027). Mr. Ellwood admitted on cross-examination that he knew Fred Moody and Charlie Sims and that he had attended the drug rehabilitation class with Eddie Hugo and Gary Hutto (R. 2030-31). Mr. Ellwood denied ever talking to Mr. Hutto about the case (R. 2033).

The fourth informant, Charles Sims, also testified that Mr. Kight had confessed to the killing and planned to incriminate his co-defendant: "He said he was in jail on a murder case and saying that him and another guy he was in the jailhouse with him with the murder case and he was going to tell the people that the guy killed this cab driver which the guy didn't kill the cab driver." (R. 2036). Mr. Sims elaborated:

No, the guy did not kill the cab driver. He's saying that he was going to tell the people that the guy killed the cab driver to get him off from getting time in jail for it because he wanted to get back home to his family and he was going to play crazy and try to go to the crazy house to get less time for him to get back out on the street real soon since this guy was a correctional officer at some place, he could tell the people that

he's the guy that killed the dude, right, and that the State wouldn't give him that much time because he used to work for the State.

(R. 2036). Mr. Sims also testified that he later had a fight with Mr. Kight over use of the phone, and Mr. Kight said "nigger, I will kill you the same way I killed that black cab driver." (R. 2037). On cross-examination, Mr. Sims admitted that Mr. Hutto had offered him money and cigarettes in exchange for his cooperation and that the State Attorney had promised to talk to his parole officer (R. 2040). However, Mr. Sims insisted that his motives for testifying were pure: "I come here to tell the truth about what I was told by Kight, what Kight told me. I didn't come here to get help." (R. 2041).

In his closing statement, Assistant State Attorney Baker King urged the jury to rely upon the testimony of the four snitches; he specifically vouched for their credibility by stressing that they had nothing to gain by testifying:

Now, you also heard testimony from four people in the jail, four people who are now in state prison, four people who overheard this man, Charles Kight, tell them what he had done. I was going to play it off as insanity. I went and told the police what happened, but I put it all on Hutto.

Ladies and gentlemen, consider those statements that they made, and Mr. Sheppard would have you believe that there is a giant conspiracy by these four individuals, but consider any of the factors that back that up. Was there ever shown any animosity or any reason to dislike Mr. Kight or was it ever shown that there was any animosity or reason to like Mr. Hutto or was it ever shown that there was any reason or benefit that they might have received from the State.



They are all under sentence. They don't have a pending case. They are not in a situation to cut any deal or to do anything. They are sentenced and in the state prison.

I'd submit if you look, you couldn't find one single reason for them to come in and testify to what they heard other than it's the truth. Plainly and simply, it's the truth.

(R. 2374-75). Mr. King later urged the jury to consider "the credibility of Mr. Hugo, Mr. El[l]wood, Mr. Moody and Mr. Sims who had nothing to gain by taking the witness stand." (R. 2381).

The defense evidence focused on the theory that Mr. Hutto had committed this crime. Gary Hutto testified that he graduated from high school with a "B" average (R. 2294). He had worked as a correctional officer for the State of Florida and as a truck driver; Mr. Hutto had also started his own lawn service company and had run his father's construction business (R. 2294-96). Mr. Hutto admitted that he had pled guilty to second-degree murder for Mr. Butler's death and that as part of his plea agreement, the names of four snitches were turned over to the State as witnesses against Mr. Kight (R. 2297).

Mr. Hutto denied that he had ever confessed to killing Mr. Butler (R. 2177). He denied that he ever told Detective Kesinger that the only reason he committed the crime was that he was "blasted" (R. 2177). He denied telling Lee Forman that he had stolen a leather jacket from Mr. Butler after stabbing him (R. 2177). He denied showing Ms. Forman a blood-stained knife and telling her that he had used it to kill a cab driver (R. 2178). He denied telling Clifford Cutwright that he had killed Mr.

Butler and was going to blame Mr. Kight for the crime (R. 2178).

Mr. Hutto claimed that he had passed out and woke up in the back seat of a taxi (R. 2180). Mr. Kight was at the rear of the cab, stabbing the driver who was in the trunk (R. 2181). Mr. Hutto tried to stop Mr. Kight because the victim was still alive (R. 2181). Mr. Butler ran to the bushes at the side of the road, and Mr. Kight followed; Mr. Hutto could not see what else happened (R. 2182). Mr. Hutto and Mr. Kight left the scene together, and Mr. Kight then ran the taxi off a bridge (R. 2183). Mr. Hutto claimed that he remembered nothing for four months (R. 2184). He admitted that he remembered this detailed story only after a twenty-hour meeting with his lawyer during which they basically "put the story together." (R. 2299).

The defense presented three witnesses who directly contradict Mr. Hutto's testimony that he never confessed to killing Mr. Butler. First, Detective Kesinger testified that Mr. Hutto made the following statement in regard to the Butler murder: "I was so blasted I could hardly walk, that's the only reason I done it." (R. 2199). When Detective Kesinger asked Mr. Hutto, "You mean kill or murder the man?", Mr. Hutto refused to talk any further, telling Detective Kesinger, "After I talk to an attorney I will get back with you and talk to you." (R. 2202).

Lee Forman testified that the day after the murder, Mr. Hutto was wearing a leather jacket and he told her "he had stabbed a nigger to get it." (R. 2204-05). Mr. Hutto also showed Ms. Forman a blood-stained knife and told her that he had used it

to stab someone (R. 2205).

Clifford Cutwright also testified that Mr. Hutto had confessed to him:

Discussions were that he admitted to murder. Gary thought himself that Mr. Kight did not know that the murder was going to happen, that when Gary Hutto called the taxicab company he had sent him on a hoax and they went out to a designated area and, therefore, Mr. Hutto had pulled a knife out of his pocket and started stabbing the cab driver, that Mr. Kight tried to stop him from stabbing the cab driver and while doing so he had got stabbed himself and when he proceeded to get out of the cab and run away and that Mr. Hutto called him -- pardon the language -- chicken shit and a wimp and then proceeded to kill the cab driver himself; Mr. Hutto, that is, and then had drug the cab driver from the cab into the bushes there for cutting his throat.

He took the ring, a ring, a watch and a jacket from the cab driver and put it on to keep himself from being seen with blood on him from the cab driver. He then took the cab, drove down the road, found Mr. Kight down the road, picked him up, told him to get in the cab. Mr. Kight indicated that he got in the back seat of the cab where he was originally in the beginning and therefore started coming to town and then furthermore he had went and stated that he had took the cab and drove it into a river of some sort, and that they had walked into town from there and went directly to a bar at which time he had bragged that he killed a cab driver to a bar maid of some sort and then after that he had told me that he was trying to get Mr. Kight by himself so he could kill Mr. Kight to keep him from telling on him for killing the cab driver.

(R. 2304-05). On cross-examination, Mr. Cutwright testified that Mr. Hutto "boasted about how he was going to get out of going to prison and send an innocent man to the electric chair." (R.

2312). He explained that he was testifying because "I wouldn't want to see he or a she of any kind be lied on and sent to the electric chair for something they did not do and did not participate in doing." (R. 2310).

The defense also presented evidence that the victim's watch and lighter were in Mr. Hutto's possession when he was arrested (R. 2194). In addition, the defense recalled the State's serology expert who had tested the blood found on Mr. Kight's and Mr. Hutto's clothes. Paul Doleman testified that "[t]here's no question that the blood on Mr. Hutto's jeans is consistent with Mr. Butler's and could not be his own." (R. 2219-20). Mr. Doleman repeated his previous testimony that "there is a possibility that the blood on Mr. Kight's jeans was, in fact, his own blood." (R. 2220).<sup>1</sup>

Mr. Kight's trial attorney attempted to present the testimony of Drs. Harry Krop and Carl Miller. Dr. Krop's testimony that Mr. Kight has an I.Q. of 69 and exhibits distinct personality traits was relevant to the defense theory:

"Essentially based on both the intellectual testing and the personality testing Mr. Kight demonstrated various personality difficulties of being a very dependent person, a very passive person, a person easily influenced, a person who had the need to impress others and would generally be a follower in almost any

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<sup>1</sup>The State lied in its guilt phase closing statement about the serology evidence: "Mr. Doleman testified that in his expert opinion the blood on the pants of Mr. Kight is consistent with that of the victim and not consistent with that of Mr. Kight." (R. 2373).

situation." (R. 2229-30). Dr. Krop also explained that "the lower a person is himself intellectually, the less likely that person would be able to manipulate in such a way as to make it appear that it is a genuine kind of act." (R. 2235-36). Dr. Krop also testified that Mr. Kight lacks the sophistication necessary to create an elaborate scheme to blame someone else for a crime he had committed (R. 2238). Dr. Carl Miller agreed with Dr. Krop that Mr. Kight is "essentially passive in the manner that he relates to the world and thus he would fall generally into the category of follower versus leader." (R. 2241). Dr. Miller also agreed with Dr. Krop's testimony that Mr. Kight is mentally retarded (R. 2244).

Mr. Kight's trial attorney, Bill Sheppard, explained that the expert testimony was relevant to restore Mr. Kight's credibility because the State had attacked his statement to the police incriminating Mr. Hutto as the killer. The expert testimony about Mr. Kight's retardation proved the defense theory that the statement was in fact true because Mr. Kight lacks the intellectual capacity to fabricate a confession implicating his codefendant and to manipulate the police (R. 2251-52). The expert testimony, therefore, was relevant to prove the identity of the actual killer (R. 2251). Mr. Sheppard summarized: "The primary reason that I think the Court ought to allow it is because of the peculiar facts of this case with regard to the credibility of the statement and our defense of mere presence and who is most likely to have been the leader and whether Charles

Kight was capable of being in a leadership position which testimony would reflect that." (R. 2252-53). The circuit court expressed concern that the testimony would confuse rather than enlighten the jury because there was no expert testimony regarding Mr. Hutto's intellectual capacity (R. 2257). Therefore, the jury that convicted Mr. Kight did not know that he is mentally retarded and functions in the lowest two percent of the population.

In his closing statement, Assistant State Attorney Mark Mahon responded to the defense evidence suggesting that Gary Hutto was the more culpable party. First, he told the jury that it is "irrelevant" whether Mr. Hutto actually killed Mr. Butler because Mr. Kight could still legally be convicted of first-degree murder (R. 2364). Mr. Mahon then urged the jury to convict Mr. Kight of first-degree murder despite the evidence of Mr. Hutto's guilt:

[U]ltimately what I was saying with regard to **the law, and allows you to breathe easier and allows you to relax** is ultimately what Mr. Sheppard is showing and what Mr. Sheppard was telling you and what Mr. Sheppard was trying to prove does not matter because under the law if you find that Mr. Kight knew what was going on that night, that they took Lawrence Butler out there and knew what he was doing and knew that there was a robbery going on, you -- and you should and **you must convict him of first degree murder, and the law is as simple as that.**

Mr. Sheppard wants you to try Mr. Hutto. **Mr. Hutto is not on trial here. With regard to his involvement it's a difficult question. It is honestly a difficult question, and that's why Mr. Sheppard wants you to concentrate on that. That's the difficult**

**question.**

Ladies and gentlemen, don't lose focus of this. Focus on Mr. Kight and consider what Mr. Kight did.

(R. 2380)(emphasis added).

The State also argued that Mr. Kight's statements to the police had been fabricated (R. 2371). Because the court excluded the expert testimony about Mr. Kight's mental retardation, the jury had no evidence with which to evaluate the credibility of Mr. Kight's statements or the State's argument that he was sophisticated enough to manipulate the police and incriminate Mr. Hutto. In addition, the false testimony that Mr. Kight had confessed to this crime provided the State with a sufficient basis to argue that Mr. Kight's statement to the police was false. Mr. Mahon described the snitch testimony:

[T]here is a thread of truth that runs through all of their testimony and that is that Mr. Kight was the man that did the stabbing and that Mr. Kight was the man that did the killing of Mr. Butler, and then Mr. Kight is the man that went over to the police and gave this statement, and Mr. Kight is the man that told them I put it all on Mr. Hutto. I put it all on Mr. Hutto. That's what they testified to.

(R. 2377). Mr. Mahon then told the jury to weigh Mr. Kight's credibility against that of the snitches:

See if you believe with all those factors that this statement is honestly the truth, that Mr. Kight was telling Detective Kesinger the truth. Read it carefully. Find one piece of involvement that Mr. Kight says he had and see if you think that's believable. Find one thing that Mr. Kight says in here that he did and see if you think that's believable.

Use your common sense when you weigh that. Use you common sense when you look at it. Ladies and gentlemen, I would submit that once you have done that, once you look at the statement and look at all the factors surrounding this murder, weigh the credibility of the witnesses, the credibility of Mr. Hugo, Mr. El[l]wood, Mr. Moody and Mr. Sims who had nothing to gain by taking the witness stand.

(R. 2381). The State relied upon the jailhouse informants not only as the sole evidence indicating that Mr. Kight had committed the murder, but also to rebut any suggestion that Mr. Kight was telling the truth when he said that Mr. Hutto was the actual killer. At the time of trial, the defense had little evidence with which to rebut this argument.

The focus of the penalty phase was Mr. Kight's mental retardation and his disadvantaged childhood. Dr. Harry Krop testified that Mr. Kight's I.Q. is 69 and that his intellectual functioning places him in the bottom two percent of the population (R. 2590-91). Mr. Kight functions developmentally at the level of an eight- or ten-year-old child (R. 2599). Dr. Krop also testified about Mr. Kight's personality: "he would be very passive, he would be very dependent, he would be very easily influenced, he could be very easily manipulated . . . he does not have the cognitive capacity to be able to reason to think things out, to think things ahead or to plan in any kind of completion kind of way." (R. 2593-94). Dr. Krop also testified that Mr. Kight "definitely [does] not have the ability to be a leader" and that "he would be easily influenced by another individual." (R. 2599-600). Mr. Sheppard presented this evidence not only to



argue that the death penalty was inappropriate for Mr. Kight but also to strengthen his argument that Mr. Hutto was the real killer:

Charles Kight is more likely not to act on his own. Charles Kight has a dependent personality. Charles Kight cannot fabricate on a sophisticated level. Charles Kight is the type of person who will tell people that he did things to be a macho, to show off because he's so socially immature.

Now, let's consider Gary Hutto for a moment. Gary Hutto was with Charles Kight on the 6th of December. Gary Hutto testified that he was also with Charles Kight on the 7th of December. I would submit to you as I have submitted before and I don't think by your finding Charles Kight guilty that you necessarily disagree with my argument before. I ask you not to disagree with it now.

. . . .

Gary Hutto is sophisticated, he graduated from high school with a B average, he became employed by the Florida Department of Corrections as a correctional officer, he was in charge of supervising convicted felons who were in the prison system. Gary Hutto is sophisticated. Gary Hutto knows what to say, he knows what to get other people to say and he knows how to take someone who is unsophisticated and operates at a level of an eight- or ten-year-old child and get them involved and is it appropriate to kill that child?

(R. 2671-72).

Mr. Kight's mother and sister also testified about Mr. Kight's disadvantaged childhood. Mr. Kight's mother, Ellen Warren, testified that her first husband, Mr. Kight's father, abused her and their son (R. 2550). He began abusing Charles when he was only two weeks old, and when Charles was a toddler,

his father would beat him when he wanted more to eat (R. 2547-48). Mr. Kight's father spent time in prison, and the children were taken from their mother and put in foster care for several months (R. 2548-49). Catherine Murillo, Mr. Kight's sister, testified that their foster father also abused Charles; on more than one occasion, she saw him hold Charles' head in a toilet bowl and flush it (R. 2575).

Mr. Kight's father left the family when Charles was three years old (R. 2551). Mrs. Warren remarried three years later, and her new husband was an alcoholic who also abused Charles (R. 2557-58). Ms. Murillo testified that their stepfather would hold Charles upside down by his ankles and beat him with a belt (R. 2579). Mrs. Warren also testified that by the time Charles was sixteen he had reached the ninth grade in school because he was passed along through the system although he never learned to read or write (R. 2561-62). The Kight family lived with other people because they were always too poor to live on their own (R. 2547, 2561). Their poverty was so severe that there was rarely enough for the children to eat, and, as Mr. Kight's sister explained, they had to scrounge for food or hope that the neighbors would feed them (R. 2576). In her cross-examination of Mrs. Warren, Ms. Watson asked her whether her son is retarded; Mrs. Warren admitted only that he is "slow" and stated that she is not qualified to diagnose him as retarded (R. 2567). In her closing statement, Ms. Watson mocked Mrs. Warren's reluctance to diagnose her son and also suggested that despite the expert testimony Mr.

Kight is in fact only "slow" because his own mother would not state that he is retarded: "Well, ladies and gentlemen, I submit to you if there's one thing a mother knows is whether or not her baby is retarded, for crying out loud." (R. 2655).

In her closing statement, Ms. Watson relied on the snitch testimony to refute the mitigating factor that Mr. Kight was an accomplice whose participation was relatively minor (R. 2651). To reject the mitigating factor that Mr. Kight acted under the substantial domination of another, Ms. Watson relied on the snitch testimony and Mr. Hutto's testimony that he was passed out in the taxi when Mr. Kight started stabbing the victim (R. 2652-53). Ms. Watson also relied on the snitch testimony to argue again that Mr. Kight fabricated his statement to the police and that this demonstrated his "street smarts" despite the expert testimony that he is mentally retarded:

Remember, back to the confession: All of the internal inconsistencies in the confession that cover up his participation in the crime and then he goes over to the jail and has a laugh of it: I put that one all over on Gary Hutto because I'm not taking responsibility for this thing, thinking that the guys in the jail aren't going to rat on him, so he goes over and tells them.

(R. 2657). The State used Mr. Kight's statement to the police, which it believed to be false, to argue that Mr. Kight was not retarded but that his fabrication of an exculpatory statement reveals his ability to manipulate.

This argument was accepted by the circuit court and appears throughout the sentencing order. The court rejected the

mitigating factor that Mr. Kight's ability to appreciate the criminality of his conduct was substantially impaired in part because he made an exculpatory statement to the police (R. 671). The court also referred to Mr. Kight's "avoidance techniques" in support of its rejection of this mitigator (R. 672). To reject the age mitigator, the court found that Dr. Krop's testimony that Mr. Kight functioned at the level of an eight- to ten-year-old was outweighed by his "shrewdness." (R. 672). The court again relied on its belief that Mr. Kight's statement to the police was fabricated to reject the mitigating circumstance that he acted under extreme duress or substantial domination of another; the court noted that "[t]he defendant was capable of and did fabricate and relate with credibility an intentional lie to mislead the police." (R. 671). If the State had not presented the false testimony of the jailhouse informants, there would have been no evidence to suggest that Mr. Kight's exculpatory statement was anything but the truth and the court would have found the presence of the mental health mitigating factors that were proven by Mr. Kight's mental retardation.

**C. THE 1989 EVIDENTIARY HEARING.**

At the 1989 evidentiary hearing, Richard Ellwood and Charles Sims admitted that they lied at Mr. Kight's trial. Both testified that Mr. Kight had never confessed to them, that they were promised assistance from the State Attorney's Office, and that the State Attorney knew that their testimony incriminating

Mr. Kight was false. Their testimony also impugned the veracity of the other jailhouse informants.

Mr. Ellwood testified that he lied at Mr. Kight's trial when he testified that Mr. Kight had confessed to him. Mr. Ellwood explained that Mr. Hutto told him about the case and told him that Mr. Kight was going to testify for the State against him; Mr. Ellwood agreed to help Mr. Hutto and decided he "was going to try to get [Kight] to admit to killing the guy." (R. 172). Mr. Kight would not talk to Ellwood about the case, but he "didn't have to get Kight to talk, it was every day in the newspapers and it was common talk about the case." (R. 173). Mr. Ellwood explained that Mr. Kight "would never elaborate anything about who actually did anything. I did everything I could to get as much as I could from him and I couldn't get a whole lot from him. Really, he wasn't comprehending any conversation that we had." (T. 176). Because Mr. Kight would not talk about the facts of the crime, Mr. Ellwood got the details of the case from television and newspaper reports, and Mr. Hutto "filled in a lot of blanks" (R. 176, 179).

Mr. Ellwood also told Assistant State Attorney Baker King that he had organized the snitches who provided false information incriminating Mr. Kight; he explained: "This wasn't something that I put together overnight. These are people that I had brought together over a long period of time. I was in contact with them. I went through the drug program with them. . . . Every one of them had Bob Link's card to call and I knew that

they could call his office." (T. 188-89). Mr. Ellwood explained that he, Fred Moody, and Eddie Hugo agreed that "Kight was going to get it and we were going to do everything we could to blow it." (T. 184). Mr. Ellwood later met Charlie Sims at Baker Correctional and learned that he had had a fight with Mr. Kight at the Duval County Jail; he then recruited Mr. Sims and gave him Mr. Hutto's lawyer's phone number (T. 192-93). Mr. Ellwood testified that he gave the information to Fred Moody, Eddie Hugo, and Charlies Sims and that Mr. Kight had not spoken to them (T. 189-92). He explained that he was the only source of information:

And it wasn't nobody really talked to Kight. They didn't want to talk to him. He was an idiot, why talk to him? So the only person that really talked to him was me and I'd come back and they'd say what did he say and I'd tell them but they didn't have what Kight told me, they didn't have nothing. Only thing they had is what you built.

(T. 191).

Mr. Ellwood told the State Attorney's Office that the testimony was false:

He [Baker King] told me he didn't care. Well I told him I said you know I'm lying. He said he didn't care, he didn't care what I had to say, he only cared about what was in the depositions, and what was in the statements.

(T. 187). Mr. Ellwood also told the State Attorney's Office that the other snitches were lying and that he was the source of their information: "I told Denise Watson, I told Baker King, I told Mark Mahon, I told just about everybody that was involved. . . .

The said they didn't care, all they wanted was what was in our depositions." (T. 190-91). Mr. Ellwood testified that the State Attorneys did not care whether the testimony was true and that they threatened perjury charges if the informants did not cooperate:

Well, they said it really doesn't matter because they are going to testify anyway, it's kind of hard, you know, after we got into the State Attorney's Office, it's kind of hard to not to testify. We were going to get perjury charges or we were going to get a deal.

(T. 195-96).

Mr. Ellwood also testified that the jailhouse informants were brought to the State Attorney's Office together before the trial to review their testimony. They reviewed depositions, police reports, the medical examiner's report, and crime scene and autopsy photos (T. 203, 205, 209-11). Mr. Ellwood explained why the State Attorneys showed them pictures of the victim: "For pointing out the grossness of the scene. I guess because it's how they wanted us to come across to the jury. . . . I know when I got on that stand by that point I had already convinced myself that I was doing what I was supposed to be doing because I had prepared myself for the last two days for this." (T. 210). Mr. Ellwood also explained that the snitches were given special treatment at the jail during the time they were cooperating with the State Attorney's Office; they were given cigarettes, provided access to a phone, and permitted to move outside the cell without handcuffs (T. 204-05).

During meetings at the State Attorney's Office, the snitches talked to the State Attorneys about what they expected in exchange for their cooperation:

A I had been raising them all day because I wasn't certain that I was going to get what I wanted out of it.

Q And what did you want out of it?

A I wanted a reduction in my sentence.

Q And why weren't you certain?

A Because they weren't willing to come right out and say exactly a set number of years that they were going to get taken off of my time.

Q Did any of the other inmates raise such objections?

A Well, I don't know if you call them objections. We kept discussing it, you know, exactly what each one of us expected.

(T. 212). Mr. Ellwood wanted his deal in writing, but the State Attorneys explained why that was not possible:

Denise Watson said it wasn't appropriate at that time to get anything like that in writing because at that point she said that the defense could ask me whether or not any deals were made and I'd have to say yes. She said if we can verbally state it and then get it later after the trial then you can go ahead and say no.

(T. 198). All of the snitches had been told to testify at the trial that no deals had been made (T. 201, 214-15).

Although Mr. Ellwood denied at Mr. Kight's trial that he had any expectation of receiving a benefit in exchange for his testimony, he revealed at the evidentiary hearing that he was



told that he "would definitely be able to get retention of jurisdiction dropped on [his] case." (T. 196). He explained:

A Yes, they questioned me over and over, am I going to get up there and do what I'm supposed to do or get up and try to blow the story.

Q What did you tell them?

A I told them it depends on what you're going to give me.

Q And did they respond in any way to that?

A Well, they told me I'd get rid of retention of jurisdiction, and the sentence would be reduced.

(T. 202). Mr. Ellwood was also present when the other snitches discussed their deals with the State Attorneys. Mr. Hugo was told that "if he cooperates that he will not go back to prison, that he will go to work release center and that's exactly where he went." (T. 200). Mr. Moody was told "that he would go back to the judge and get the escape time removed from him." (T. 200). Mr. Sims was told that he would be released early (T. 212-13).

Mr. Ellwood later met Mr. Hutto at Lake Butler Reception Center in 1985 and discovered the truth. Before that meeting, Mr. Ellwood "didn't know exactly what had happened, who did the stabbing." (T. 174). Mr. Ellwood testified that Mr. Hutto confessed that he had done the stabbing and that "Kight was going to burn for something he didn't do." (T. 174). Mr. Ellwood explained:

Q Did Charles Kight ever admit to you that he killed the cab driver?

A No, he didn't.

Q Did you lie at the trial?

A Yes, I did.

Q Did you lie with the understanding of the State of Florida realizing that you were lying?

A Yes, I did.

Q And did you expect to receive a reward in exchange for your testimony?

A I wouldn't have done it without it.

(T. 224-25).

Charles Sims also testified at the hearing that Mr. Kight had never talked to him about the case; he explained that "Kight was -- he was never -- he wasn't ever say nothing to nobody. He wouldn't bother nobody." (T. 282). Contrary to his trial testimony, Mr. Sims admitted that he got all the details of the case from Mr. Hutto (T. 277-79, 282). Mr. Sims also testified that Mr. Hutto had confessed to stabbing the victim (T. 278-79). After Mr. Hutto heard about the fight Mr. Sims had with Mr. Kight at the jail, he attempted to recruit Mr. Sims to testify against Mr. Kight:

Well, Hutto -- Hutto told me if I was to tell his P.D. that Charles Kight was the one that said -- told me that he the one killed the cab driver that he would get his people to send me some money in my account, but I told him I couldn't do that.

(T. 281).

Mr. Sims changed his mind about helping Mr. Hutto when he talked to the State Attorneys who were prosecuting Mr. Kight:

Q Did either Mr. Mahon or Ms. Watson offer you anything in exchange for your telling them about --

A Well, this is the way they put it. They say they couldn't really offer us nothing right at the moment till the case was over with but they was -- they will make sure that we will get what we ask for after the case was over with.

(T. 284). Contrary to his trial testimony, Mr. Sims admitted at the hearing that Ms. Watson made specific promises to help him if he cooperated by testifying against Mr. Kight:

Q Were you ever told that you would get any assistance from the state in exchange for your testimony?

A Yes. Denise Watson told me that she would give me -- she would go to the judge and get me time served for the five years I had.

(T. 285-86). Mr. Sims also heard the promises that were made by the State Attorneys to the other witnesses who provided testimony against Mr. Kight. He explained that "Denise [Watson] and Mark [Mahon] said well after the case was over with that they would make sure that they get -- everybody would get what they wanted."

(T. 286). Mr. Moody responded that "he would do anything, he would say anything to get out, to get out of jail." (T. 286-87). Mr. Sims testified that Mr. Moody and Mr. Hugo were told that they would be released after the trial, and Mr. Ellwood was told that his sentence would be reduced (T. 292).

Mr. Sims and the other snitches were instructed to testify that no promises had been made:

Q Did you ever hear any -- well, let me just ask you, Mr. Sims, nobody ever --

what was it that they said about that? Did anybody tell you if anybody asked you about that what you should say about that?

A She said if anybody asked us to tell us no.

Q Tell them no meaning what?

A Meaning that she didn't say she was going to help us, to say no because it would get her in trouble.

(T. 286; see also T. 297-98).

Mr. Sims explained that he was prepared to testify at the State Attorney's Office with the other snitches and that they were told to study depositions, police reports, and pictures of the victim (T. 289-90). He revealed the State Attorneys' strategy in showing graphic pictures of the victim: "They said this is what Charles Kight did to an innocent man that had children and a wife and they was wanting to get Charles Kight the electric chair for it." (T. 290). Mr. Sims' testimony was influenced by what the State Attorneys told him about the case and by their instructions to say that all of his information came from Mr. Kight (T. 290-91).

Mr. Sims knew from his conversations with Mr. Hutto that his testimony against Mr. Kight was false because "[h]e did more to the man than Charles Kight did." (T. 297). Mr. Sims knew this "because [of] the way Hutto was telling me how the accident happened." (T. 297). Mr. Sims testified that the State Attorneys knew his testimony about Mr. Kight's confession was false. He explained:

Q Did you ever tell any of the

prosecutors that -- the details of what you had heard about what happened came from Hutto?

A Yes, I did. I told Denise Watson what Hutto had told me about that he was doing the stabbing, also. She said she didn't want me to bring that up in the trial.

Q And did she ever tell you why or did Mr. Mahon ever tell you why?

A No, but the reason she didn't want me to bring it up she just wanted to put Charles Kight on death row.

Q Were you ever told the testify as if you heard everything from Charles Kight?

A Yes.

(T. 290). Mr. Sims knew that the State was seeking the death penalty against Mr. Kight based on conversations at the State Attorney's Office: "well, both of them [Watson and Mahon] was saying that they would like for -- to win the case because it will be the first case they ever won of a white man killing a black man. They wanted to make sure that Charles Kight get the electric chair." (T. 288).

Mr. Ellwood and Mr. Sims also testified about Victor Bostic, another inmate who was initially involved in the prosecution of Mr. Kight. Mr. Ellwood testified that Mr. Bostic was transferred back to Jacksonville and kept in the cell with Hugo, Moody, Ellwood and Sims (T. 183). He also remembered that Mr. Bostic was at the State Attorney's Office when the witnesses were reading depositions and police reports to prepare for the trial (T. 203). Mr. Sims testified that Mr. Bostic was at the State Attorney's Office the first time the informants were gathered to

prepare for the trial (T. 284). However, Mr. Sims testified that Mr. Bostic had a fight with someone, and the State Attorneys decided not to use him as a witness:

Q In response to whatever it was Mr. Bostic said did you hear what the prosecutor said to him?

A Said we are going to get him away from here.

(T. 285).

Mr. Bostic also testified at the evidentiary hearing about his involvement. He explained that Mr. Hugo had talked to him about becoming involved in Mr. Kight's case: "General subject matter at that particular time that we was going to get together make up this fictitious story about Charles Kight for what little Kight had told him and we was going to try to get free like that." (T. 449). Mr. Bostic admitted that Mr. Kight had never talked to him about the case (T. 450). However, he wrote a letter to the State Attorney's Office claiming that he "met Charles Kight and he told me exactly how they kill the cab driver." (Defense Exhibit 19). In the letter, Mr. Bostic states: "I am willing to testified for immunity from justice." (Id.). Mr. Bostic admitted that he had no information from Mr. Kight and that he only knew what Mr. Hugo had told him; he also testified that Hugo had told him he could get out if he provided evidence against Mr. Kight (T. 454-55).

After writing the letter, Mr. Bostic met with Mr. King:

A Asked me what I knew about the case and I told him what me and Hugo had put together.

Q Okay. Did you -- did he ask you if you would be willing to testify against Mr. Kight?

A Yes, sir.

Q What did you tell him?

A I told him at that time, yes, sir.

(T. 457). However, when Mr. Bostic was later brought to the State Attorney's Office with the other snitches, he decided not to cooperate:

Q All right. When you were in the room with the five or the four other individuals, Mr. Moody, Mr. Hugo, Mr. Ellwood, and Mr. Sims, was there any discussion going on about the Kight case?

A Yes, sir.

Q Okay. Clearly you were all there for the same reason?

A Yes, sir.

Q Did you at that time provide any further information to the State Attorney's Office.

A No, sir, none whatsoever.

Q Why did you not do that?

A Because I felt like it wasn't right, sir, when I found out what really coming down to I felt like it wasn't right so I decided to back up.

(T. 460). Mr. Bostic knew that he and Mr. Hugo had made up their story, and he heard Mr. Ellwood say that his story had also been fabricated (T. 463).

While he was involved in the case, Mr. Bostic heard the other snitches discuss the benefits they expected in exchange for

their testimony. He testified that "Hugo said they were going to send him to cook school . . . [b]ecause he was going to testify against Kight." (T. 461). He also heard Mr. Ellwood discuss a deal: "[He] had made a statement to all of us in the room that the state was going to get him some type of deal." (T. 462). Mr. Moody also expected help from the State in exchange for his testimony: "He made a statement about he was supposed to get out." (T. 462).

Counsel for Mr. Kight also offered documentary evidence proving that the State had assisted the witnesses who testified against Mr. Kight. On July 6, 1983, Mr. Hugo's motion for reduction of sentence was denied because the court found "no legal cause or reason . . . which would entitle [him] to a reduction." (Def. Exh. 3). After his participation in Mr. Kight's trial, Mr. Hugo, with the assistance of the State Attorney's Office, got the relief that had previously been denied. On March 20, 1984, Mr. Hugo wrote a letter to Assistant State Attorney Baker King stating: "I have also given you my peposition [sic] and it is my hope that you will help me with my situation as we have discussed." (Def. Exh. 2). Then, on February 7, 1985, Mr. King filed a Motion to Vacate on behalf of Mr. Hugo stating that "he rendered invaluable assistance in the case of State of Florida vs CHARLES KIGHT, a first degree murder case, which resulted in part upon his testimony in a conviction and the imposition of the death penalty." (Def. Exh. 35). The motion also states that Mr. Hugo "was very helpful in motivating



several other inmates to whom Kight had admitted his complicity in the case to cooperate and give testimony. This testimony added significantly to the case and helped secure a conviction." (Id.).

The Duval County State Attorney's Office also filed a Motion to Vacate on behalf of Charlie Sims after he helped the State convict Mr. Kight. On September 7, 1984, Assistant State Attorney Denise Watson requested that the balance of Mr. Sims' sentence be suspended based on his testimony against Mr. Kight:

In May of this year, Charlie Sims testified for the State in a first degree murder case as a witness to statements made by the defendant in that case.

The case resulted in a verdict of guilty and a sentence of death being imposed on the defendant.

(Def. Exh. 11). This motion was granted on the same day that Ms. Watson filed it (Def. Exh. 12). Prior to his involvement in Mr. Kight's case, Mr. Sims sought a mitigated sentence but was denied (Def. Exh. 10).

Mr. Ellwood also benefitted from his participation in Mr. Kight's case. On October 25, 1982, the State filed a Notice to Seek Enhanced Penalty against Mr. Ellwood (Def. Exh. 6), and on January 25, 1983, the State filed its Notice of Williams' Rule Evidence listing sixty-one (61) burglaries that had been committed by Mr. Ellwood (Def. Exh. 17). Documents from the Florida Parole and Probation Commission reveal that Mr. Ellwood's sentence was reduced by sixty (60) months due to Ms. Watson's actions on his behalf (Def. Exh. 25). In addition, after Mr.

Kight's trial, Mr. Ellwood's attorney filed two Motions to Reduce Sentence based on Mr. Ellwood's testimony at Mr. Kight's trial which "was instrumental in a conviction of the Defendant Kite [sic] in that trial, and subsequent death penalty that was imposed." (Def. Exh. 13 and 14). The order granting Mr. Ellwood's motions states that the motion was "agreed to and requested by" the State Attorney's Office and refers specifically to Denise Watson (Def. Exh. 7).

Mr. Moody similarly benefitted from his testimony against Mr. Kight. In January 1984, the court denied Mr. Moody's motion to mitigate his sentence (Def. Exh. 9). However, after Mr. Kight's trial, Ms. Watson stipulated to both the court's jurisdiction and to the grounds stated in a Motion to Vacate on behalf of Mr. Moody. The motion states that "[t]he defendant cooperated in the first degree murder prosecution of Kight by giving both pre-trial and trial testimony. . . . The defendant's participation in the prosecution of Kight ended with Kight's conviction on June 4, 1984." (Def. Exh. 30).

The State presented the testimony of Eddie Hugo. He testified that Mr. Kight confessed to him and said that he was going to blame his co-defendant (T. 510, 512). Mr. Hugo admitted that he knows nothing about Mr. Hutto's involvement in the murder: "I don't know if the other man helped him. I don't know nothing about that." (T. 514). Mr. Hugo admitted that he and Mr. Ellwood discussed Mr. Kight's case, but he denied that they fabricated a story together (T. 517). Mr. Hugo also denied

talking to Mr. Bostic about getting assistance in exchange for testimony against Mr. Kight (T. 518).

Mr. Hugo denied that he was offered or promised anything in exchange for his testimony against Mr. Kight (T. 514). He admitted that he talked to Baker King, who was a family friend, about getting into drug rehabilitation (T. 514-15). Mr. Hugo identified a letter written from a Department of Corrections psychologist to Mr. King informing him that Mr. Hugo could not get into a drug program unless his sentences were changed from consecutive to concurrent (T. 535-36). Mr. Hugo also wrote to Mr. King requesting assistance with his sentences based on their previous conversation that Mr. King would help him (T. 536). Mr. Hugo claimed that he had no idea that Mr. King filed a motion to vacate sentence on his behalf (T. 538).

Ms. Watson, Mr. Mahon, and Mr. King were questioned about the State Attorney's Office's policy regarding filing motions on behalf of criminal defendants. Ms. Watson testified that she had no specific recollection of it, but she was "sure it happened all the time." (T. 594). She testified that her office's policy is to "treat people fairly" and "do the right thing." (T. 594). Mr. Mahon testified that he never filed a motion on behalf of a criminal defendant and knew of no other prosecutor who had done so (T. 413).<sup>2</sup> In contrast, Mr. King testified that he filed

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<sup>2</sup>Two experienced criminal defense attorneys from Duval County testified that they had never seen a motion to reduce sentence filed by the State Attorney's Office on behalf of a criminal defendant in any case other than Mr. Kight's (T. 78, 621).

motions on behalf of defendants "all the time." (T. 334). In regard to the motion he filed on behalf of Mr. Hugo, Mr. King assumed that the information it contained about Mr. Hugo's assistance to the State in Mr. Kight's trial came from Ms. Watson or Mr. Mahon (T. 333-34).

Ms. Watson remembered nothing about the motion she filed on behalf of Charlie Sims (T. 563-64). She admitted that she stipulated to a motion filed on behalf of Mr. Moody after Mr. Kight's trial but before his sentencing (T. 568). Ms. Watson had no memory of disclosing this motion to Mr. Kight's attorney (Id.). In regard to Mr. Ellwood, Ms. Watson testified that she was aware of his extensive criminal history (T. 566). Ms. Watson remembered getting a phone call from Mr. Ellwood after Mr. Kight's trial in which he threatened to expose the false testimony that was presented (T. 580-81). Ms. Watson admitted that subsequent to the phone call, she stipulated to motions filed on his behalf (T. 578). Raymond David, Mr. Ellwood's attorney at the time, testified that Ms. Watson agreed to the motions he filed on behalf of Mr. Ellwood because he had assisted the State in Mr. Kight's case (T. 263-64, 270).

Bill Sheppard, Mr. Kight's trial attorney, testified that the jailhouse snitches were the "most serious evidence against Mr. Kight." (T. 44). Mr. Sheppard explained the effect of the snitch testimony at Mr. Kight's trial:

[I]t was detrimental because the theory of the State's case was that Charles Kight had originally lied in a statement, post-arrest statement, which he gave to law

enforcement which in effect put him present at the scene of the crime and pointed the finger at the codefendant and in effect what the State was able to do with these informant witnesses is say that Kight was a liar when he made an exculpatory statement and it all computed in the evaluation strategy of the case, how I tried the case.

(T. 56). The snitch testimony also had a devastating effect on the penalty phase of Mr. Kight's trial; Mr. Sheppard explained:

I think explicit in the sentencing order it was always my position and still my belief and my heart of hearts that Mr. Kight is very retarded and in the sentencing order the trial court found that there would not be any mitigation for retardation due to Mr. Kight's manipulation through the original false statement to law enforcement as it was evidenced by his quote confession, end quote to the jail house informers.

(T. 59). Mr. Sheppard explained that "Exhibit No. 1 in this case was Mr. Kight's exculpatory statement so the theory of the trial by the State was that he was a liar, and the best evidence of that from the State's view point and in my opinion was the testimony of these four individuals so I guess the sum and substance was Mr. Kight along with me lost credibility with the jury." (T. 59).

Mr. Sheppard testified that it was "critical" to Mr. Kight's defense to impeach the snitches' credibility (T. 58). To that end, he filed a pretrial motion requesting any information about deals made between the State and the informants and aggressively pursued this issue during depositions (T. 43, 48). Mr. Sheppard only received criminal histories; the State and the snitches adamantly denied that any deals had been made (T. 44-47).

Although he was suspicious of the informants' testimony that they had no deals with the State, he had no evidence with which to impeach their credibility (T. 98).

At the hearing, Mr. Sheppard examined the letters written to the State Attorney's Office by the snitches, the motions filed by Ms. Watson and Mr. King on behalf of the snitches, and motions to which the State Attorney's Office stipulated (T. 67, 73, 76, 121, 141). Mr. Sheppard testified that these documents confirmed his suspicions that the informants lied at Mr. Kight's trial when they testified that they had no expectations of a benefit in exchange for their testimony (T. 98). Mr. Sheppard testified that he would have used this evidence to show that the snitches had an interest in testifying, thereby impeaching their credibility (T. 71, 74, 79, 85, 109, 124, 137, 144). Mr. Sheppard explained how this information would also have supported his defense of Mr. Kight:

Well, if nothing else, it would have negated that these people didn't have feelings and they were here for neither to testify for the benefit of society which would have been nice to eliminate that impression to the jury and more importantly, it would have given me something to get on my band stand and argue that Mr. Hugo and on down the line were conspiring against Charles Kight in order to get self benefit concessions on their disposition of criminal cases that had been disposed of against them.

(T. 81-82).

The circuit court denied relief, finding that the informants "were not given any inducements for their testimony prior to [Mr. Kight's] trial." The court did not consider the documentary

evidence that corroborated the testimony of Mr. Ellwood and Mr. Sims regarding promises made to the four snitches before Mr. Kight's trial. On appeal, this Court recognized that the evidence was "conflicting," but held that it was within the circuit court's discretion to find the State's witnesses more credible than Mr. Kight's. 574 So. 2d at 1073.

**D. THE 1999 EVIDENTIARY HEARING.**

The focus of the 1999 evidentiary hearing was the newly discovered witness, William O'Kelly. In 1983 and 1984, Mr. O'Kelly was being held in the Duval County Jail on first-degree murder charges; he was cellmates with Gary Hutto (PC-R. 536). Mr. Hutto told Mr. O'Kelly that he had been arrested on first-degree murder charges (PC-R. 538). Mr. Hutto provided the following details about the crime:

A He said that they were -- said that, you know, that he was a codefendant, they were in for killing a taxicab driver.

Q And did he tell you what part he took in that crime?

A Yes.

Q Could you tell the judge what he said?

A He said that he stabbed a taxicab driver, a black taxicab driver.

Q Now, what did he tell you about Mr. Kight's involvement?

A He said that Charles Kight was his codefendant, that he's basically kind of -- I don't know if he said retarded or slow or stupid, whatever, and that -- that he didn't

think somebody of, you know, mentality like that could get a death penalty.

Q Did he tell you if Mr. Kight stabbed the cab driver?

A Did he tell me that Charles Kight stabbed the cab driver? No.

Q Did he say that anyone besides himself had stabbed the cab driver?

A No.

(PC-R. 538-39).

Mr. O'Kelly testified that Mr. Hutto told him that he personally stabbed the victim (PC-R. 553). Regarding Mr. Kight's involvement in the crime, Mr. O'Kelly testified:

A Did he tell me Charles Kight definitely did not stab the cab driver? I think what he told me was that -- led me to believe that he was responsible for the killing, you know. I don't know -- it's you know, it's all these pronouns; we, they, whoever. I -- he led me to believe that he was responsible for the death of a black taxicab driver.

Q When you say responsible, do you mean he was the one who stabbed him?

A Took his life.

(PC-R. 553-54). Mr. O'Kelly also testified about Mr. Hutto's plan to implicate Mr. Kight for the murder:

Well, he believed that, that, you know, like a retarded person couldn't get the death -- you know, couldn't get the death penalty, it's against the law to execute somebody who's incompetent and that he could probably save his own hide by putting everything onto Charles Kight.

(PC-R. 555-56). Mr. O'Kelly identified an affidavit that he had signed in September 1996 and verified that its contents are true



(PC-R. 544-45). Mr. O'Kelly had previously recanted this affidavit in a taped interview with representatives of the Duval County State Attorney's Office (PC-R. 358-61).

Mr. O'Kelly also testified about an incident that occurred in October 1998. Mr. O'Kelly was arrested outside his home in Chicago while he was loading his possessions onto a truck to move out of the state (PC-R. 545-46). At the police station, he was handcuffed to a rail on the wall of an interview room (PC-R. 546). Mr. O'Kelly was told by a Chicago detective that he had been arrested on a warrant in Colorado for assault on law enforcement officers; Mr. O'Kelly testified that he knew this was not true and that his only arrest in Colorado had been for misdemeanor criminal mischief (PC-R. 547). Mr. O'Kelly was then told there were people from Florida who wanted to talk to him; the detective made the following promise: "you help them and I'll see what I can do to help you." (PC-R. 547). Assistant State Attorney Laura Starrett and her investigator Barry Abramowitz entered the room with two Chicago police officers to interview Mr. O'Kelly (PC-R. 547). Mr. O'Kelly testified that he recognized Ms. Starrett and Mr. Abramowitz because he saw them with the Chicago police officers who arrested him at his home (PC-R. 547-48).

Mr. O'Kelly was frightened because his initial thought was that he was "[g]oing back to Florida . . . for my old case . . . to go do more time for the State of Florida." (PC-R. 548). When Mr. O'Kelly realized that Ms. Starrett was not there to talk

about his case but about Mr. Kight's, his main concern was getting out of the jail:

In my mind at that time I had -- I was just arrested, my apartment's standing open, my storage locker is standing open, I have property all over the ground out there where anybody could help themselves to anything they wanted, and my concern was getting out of here, getting out of this room, going back, getting my property and being on my way. That's what was on my mind.

(PC-R. 549). During his taped interview while he was handcuffed to the wall, Mr. O'Kelly told Ms. Starrett and Mr. Abramowitz what he believed would get him out of jail; he denied making the statements in his affidavit regarding Mr. Hutto's confession to the murder and plan to blame Mr. Kight (PC-R. 358-61). Mr. O'Kelly admitted that his signature was on the affidavit but denied that he was ever put under oath and claimed to have no memory of signing the affidavit (PC-R. 361).

At the evidentiary hearing, Mr. O'Kelly admitted that he did not tell Ms. Starrett the truth about Mr. Kight's case:

Q Now, when Ms. Starrett was asking you those questions in the jail in Chicago did you answer truthfully?

A No.

Q And why didn't you answer truthfully?

A Because from that day in Chicago I felt -- you know, I just wanted to be left alone. Just wanted to be left alone. Tell people what they want to hear and maybe by some act of God one day I'll be left alone.

(PC-R. 550). On cross-examination, Mr. O'Kelly repeated that he did not tell the truth about Mr. Kight's case when he was

questioned in Chicago; he told Ms. Starrett, "I lied to you. I apologize for lying to you but I did." (PC-R. 568). Mr. O'Kelly repeatedly explained that he said what he thought Ms. Starrett wanted to hear on the assumption that this would get him out of jail (PC-R. 571-73).

Barry Abramowitz<sup>3</sup> was called as a witness for the State to testify about Mr. O'Kelly's arrest in Chicago. Mr. Abramowitz testified that he interviewed Mr. O'Kelly in a holding cell in the Chicago police department; Mr. O'Kelly was handcuffed to a bar that was secured to the wall (PC-R. 620). Mr. Abramowitz testified that no promises or threats were made to Mr. O'Kelly (PC-R. 621). On cross-examination, Mr. Abramowitz admitted that he did not know what the Chicago authorities had said to Mr. O'Kelly before he and Ms. Starrett entered the holding cell; Mr. Abramowitz could not refute Mr. O'Kelly's testimony that he was promised help on the Colorado warrant in exchange for his cooperation with Ms. Starrett and Mr. Abramowitz (PC-R. 623).<sup>4</sup>

Mr. Abramowitz also testified that Mr. O'Kelly had been arrested in Chicago at the initiative of the Duval County State

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<sup>3</sup>Mr. Abramowitz's name appears as "Bromowich" in the hearing transcript.

<sup>4</sup>While Mr. Abramowitz denied that any promises had been made to Mr. O'Kelly, Ms. Starrett revealed during the hearing on Mr. Kight's pre-hearing motions that Mr. O'Kelly had called her from Colorado because he believed that she had requested that Colorado authorities hold him on an ankle bracelet while he was out on bond (PC-R. 510). Ms. Starrett indicated that she wrote a letter to Colorado authorities indicating that she did not want Mr. O'Kelly held on an ankle bracelet (Id.). Regardless of Mr. Abramowitz's testimony, Mr. O'Kelly clearly believed that the State Attorney's Office had some control over him.

Attorney's Office which had contacted Chicago authorities and requested that an NCIC search be done to uncover any outstanding warrants (PC-R. 627). Mr. Abramowitz admitted that he had never before travelled outside of Florida to assist in the arrest of a witness in a Florida case (PC-R. 625). In this instance, Mr. Abramowitz went with the Chicago authorities when they arrested Mr. O'Kelly; he explained that he "wanted to be there from the beginning" and he wanted Mr. O'Kelly to know that Mr. Abramowitz was there with the Chicago police (PC-R. 625).

Mr. Kight also presented the testimony of his trial attorney Bill Sheppard who testified about the effect of the newly discovered evidence on Mr. Kight's trial. Mr. Sheppard testified that his trial strategy was to prove that Mr. Hutto was the actual killer: "My theory of Mr. Kight's case was that the codefendant, Gary Hutto, was the actual killer, that Charles Kight was a follower and did not commit the crime, that Hutto committed the crime." (PC-R. 585). In addition to the evidence of Mr. Hutto's guilt, Mr. Sheppard explained that he tried to show the jury the differences between Mr. Hutto and Mr. Kight in order to support his argument that Mr. Hutto had committed this crime:

I also tried to prove that Gary Hutto was a pretty sophisticated individual having graduated from high school with honors, having worked with his father's construction company and indeed running that construction company, that he had previously been a correctional officer with the Florida Department of Corrections and that he was far superior to Charles Kight intellectually and developmentally and that he was the kind of

person who could manipulate someone who was retarded, such as Charles Kight, and that Gary Hutto was a unique individual. He remembered from memory his driver's license number. He remembered from memory the case number of his divorce file. He was very sophisticated.

I also tried to prove he was guilty because he was an out and out liar. He testified that he didn't remember a thing about this crime, although he had made a statement to Detective Kesinger to the effect that he only did it because he was blasted. He testified that he hadn't a memory of what happened for, I want to say two or three or four months, and of going over and over the events with his lawyer all of a sudden he has this very detailed memory of this event.

He also testified that he had smoked a pound of marijuana the day of the offense, that he had had 38 drinks, that he had eaten three hits of LSD and taken some Seconals, and I found that to be just absolutely a lie and so what I was trying to demonstrate was that you have an individual that the evidence showed had a developmental age, operated at the age of eight to ten years; who was -- had an IQ of about 69 I believe and was retarded; who was being manipulated by this very sophisticated individual who had vast experience with the criminal justice system and he was an incredible liar. That was my theory of defense.

(PC-R. 587-88).

Mr. Sheppard also testified about the information provided by Mr. O'Kelly regarding Mr. Hutto's statements. He explained how this testimony would have assisted his defense of Mr. Kight:

I would have called him without hesitation. I think Cutwright, who was the individual that I did call, had a similar type of testimony and it would have been corroborative of Cutright as well as Cutright would have been corroborative of O'Kelly and it would have been my theory of defense so there would be no downside in calling

O'Kelly. In fact, I would have been thrilled to have found him and called him, and particularly in light of the fact, and I felt that and I feel it today, there were I want to say four or five State witnesses that were in a drug class with Hutto and my theory of defense was that he had recruited these other inmates from this drug class to come forward as jail house snitches and I think to have had Mr. O'Kelly come, that would have countered that piece of -- or those pieces of the State's case which was what I was trying to do with Cutright but I felt I was out numbered so to have another one that says this would have been cross-corroborative and I believe would have pursued my theory of defense and given me more credibility with the jury.

(PC-R. 593).

Mr. Sheppard explained that Mr. O'Kelly's testimony would have assisted him at the penalty phase because his strategy was the same:

I suppose what I was doing was trying the case to the penalty phase from the outset because it was clear I wasn't going to get around the fact that Charles Kight was present and I was trying to make him the lesser of two and the ringleader had been given a deal by the State for second degree murder and did not have an exposure to the electric chair.

. . . .

[W]hat I was trying to do was probably more than demonstrate that he was retarded and that would be a bar from execution, that -- I was trying to show that because he was retarded and he was operating at the level of an eight or ten year old that he could be manipulated by someone that was clever enough to remember their driver's license number and who's been a correctional officer and who's run a construction company and that Gary Hutto was the prime mover and the killer here and if he got second degree we ought not to get the chair.

(PC-R. 595-96).

Mr. Sheppard also testified that Mr. O'Kelly's testimony would have been relevant to the aggravating and mitigating factors. If Mr. Sheppard had succeeded in proving that Mr. Hutto was the actual killer, the heinous, atrocious or cruel aggravator would not apply to Mr. Kight (PC-R. 598). The only remaining aggravator would have been during the commission of a robbery (PC-R. 597). Mr. O'Kelly's testimony would also have supported numerous mitigating circumstances and would have strengthened Mr. Sheppard's argument that Mr. Kight could not be sentenced to death if his more culpable codefendant was ineligible for the death penalty (PC-R. 599).

In addition, Mr. O'Kelly's testimony would have assisted Mr. Sheppard in arguing to the jury that Mr. Kight did not actually kill the victim, which was specifically found by the jury (PC-R. 601). He explained that preventing this finding of Mr. Kight's individual culpability would have strengthened his argument to the sentencing judge that the mental health mitigating factors apply to Mr. Kight; Mr. Sheppard explained: "it would have supported my theory of the defense that Charles was being manipulated by the true killer, Gary Hutto due in part to his retardation and level of operating at the age of eight to ten." (PC-R. 601). Mr. Sheppard explained the focus of his argument: "here's a guy that either did it and got second degree in which case it's fundamentally unfair to put this retarded fellow in the chair, or he was equally involved and he's got second degree and

it's still fundamentally unfair to put the retarded guy in the chair." (PC-R. 604-05).

The circuit court found that Mr. O'Kelly's testimony was newly discovered evidence and that he was a credible witness. However, the court found that Mr. Kight is not entitled to a new trial because he could be found guilty of felony murder despite Mr. O'Kelly's testimony (PC-R. 451). While the court did find that Mr. O'Kelly's testimony "could have been helpful to Mr. Kight during the penalty phase of the trial," it concluded that Mr. Kight had failed to prove that the outcome of his penalty phase would have been different:

This Court must also conclude that the new evidence would not probably produce a life sentence if a new penalty phase trial and sentencing hearing were granted. The new evidence would have been, at best, cumulative. The jury and trial judge already had evidence in the form of three other statements made by Mr. Hutto, as well as forensic evidence, to the same effect as the new evidence. It is hard to imagine how the new evidence, then, could have affected any significant conclusion drawn by the jury or the trial judge.

(PC-R. 452). However, the court found that Mr. O'Kelly's testimony proved that Mr. Kight's death sentence is unconstitutional:

In his trial memorandum, Defendant also placed great emphasis on the fact that the death sentence was imposed upon him, as opposed to the lesser sentence Mr. Hutto received. That aspect of the case is very troubling to this Court. 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. Thus, the death sentence herein appears



unconstitutionally dispar[a]te.

(PC-R. 452). Inexplicably, despite the presentation of newly discovered evidence, the court found the disparate sentencing argument procedurally barred because it was raised at Mr. Kight's trial (PC-R. 453). The circuit court was troubled over the evidence proving Mr. Hutto's involvement in the murder and found that Mr. Kight's death sentence is unconstitutional; however, the circuit court mistakenly believed that a procedural bar precluded granting Mr. Kight a life sentence.

### SUMMARY OF ARGUMENT

1. The circuit court erred in denying Mr. Kight sentencing relief after finding that his death sentence is unconstitutionally disparate. The circuit court found that Mr. Kight's co-defendant was at least equally culpable to Mr. Kight and that his lesser sentence renders Mr. Kight's death sentence unconstitutional. Despite this finding that the death sentence is unconstitutional, the circuit court denied relief because the disparate sentence argument had previously been raised by Mr. Kight. This argument is not barred because Mr. Kight has presented newly discovered evidence proving his co-defendant's greater culpability.

2. The circuit court erred in finding that Mr. Kight is not entitled to a new trial and sentencing. The court did not consider that Mr. O'Kelly's testimony proves that Mr. Kight lacks the requisite culpability and mental state to be sentenced to death. The court also ignored that Mr. O'Kelly's testimony would have changed the sentencing calculus and would have resulted in a life sentence for Mr. Kight.

3. The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Kight's trial. Mr. O'Kelly's testimony, in conjunction with the evidence presented at the 1989 evidentiary hearing, corroborates the defense evidence presented at Mr. Kight's trial and proves that Mr. Hutto is the actual killer and that Mr. Kight was convicted and sentenced to death on the basis of false testimony.

## ARGUMENT I

### THE CIRCUIT COURT ERRED IN DENYING MR. KIGHT SENTENCING RELIEF AFTER FINDING THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL.

The circuit court found that Mr. O'Kelly's testimony regarding inculpatory statements made by Gary Hutto was newly discovered evidence (PC-R. 451). The court also found that this evidence proves that Mr. Kight's death sentence is unconstitutionally disparate because Mr. Hutto received a life sentence:

In his trial memorandum, Defendant also placed great emphasis on the fact that the death sentence was imposed upon him, as opposed to the lesser sentence Mr. Hutto received. That aspect of the case is very troubling to this Court. 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. Thus, the death sentence herein appears unconstitutionally dispar[ate].

(PC-R. 452)(citations omitted). Despite this finding that Mr. Kight's death sentence is unconstitutional, the circuit court denied relief:

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

(PC-R. 453)(citing Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994)). The circuit court's contradictory conclusions that Mr. O'Kelly's testimony was newly discovered evidence but that the argument that evidence supports is procedurally barred must be reversed by this Court.

The circuit court's reliance on Steinhorst is misplaced. In that case, the defendant also raised the claim that his death sentence is unconstitutionally disparate because his co-defendants received life sentences. However, this Court found the claim to be procedurally barred because the evidence had been available since 1982 and was not newly discovered. In that case, this Court affirmed Steinhorst's death sentence on direct appeal after it had reduced one co-defendant's sentence to life imprisonment; therefore, that co-defendant's sentence could not be newly discovered evidence. In addition, this Court found in Steinhorst that the sentences were not disparate because the co-defendants who received lesser sentences were not equally culpable to Steinhorst; this Court explained that "[w]hen the codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence." Id. at 35. That is not the situation here, and Steinhorst cannot be relied upon to deny Mr. Kight the relief to which he is entitled.

The circuit court's conclusion that Mr. Kight's claim is procedurally barred would require that post-conviction defendants have only one chance to raise a claim and the discovery of newly discovered evidence in support of that claim would not warrant a new hearing. Clearly, that is inconsistent with Florida law and the purpose of newly discovered evidence. This Court routinely grants evidentiary hearings and/or relief when defendants raise claims that have previously been litigated but are proved by

newly discovered evidence. Scott (Paul) v. State, 657 So. 2d 1129 (Fla. 1995)(remanding for evidentiary hearing on disparate sentencing issue which had previously been raised by Scott based on newly discovered evidence of co-defendant's greater culpability); Jones v. State, 709 So. 2d 512 (Fla. 1998)(defendant had second evidentiary hearing on the issue of his innocence based on newly discovered evidence); Lightbourne v. State, 1999 WL 506961 (Fla. 1999)(ordering evidentiary hearing to take testimony of a newly discovered witness providing further evidence in support of Brady/Giglio claim that had previously been litigated). In all of these cases, the defendant presented newly discovered evidence in support of a claim that had previously been raised. The discovery of the new evidence prevented the claim from being found procedurally barred. The same principle applies here: the circuit court found that Mr. O'Kelly's testimony was newly discovered evidence; therefore, the claim that it supports -- that Mr. Kight's death sentence is unconstitutionally disparate -- is not procedurally barred.

This Court has recognized the importance of a defendant's culpability as an essential requirement of the individualized sentencing required by the Eighth Amendment and has overturned death sentences based on evidence of a codefendant's lesser sentence. In Slater v. State, 316 So. 2d 539 (Fla. 1975), this Court explained:

We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts.

When the facts are the same, the law should be the same.

Id. at 542. This Court overturned Slater's death sentence because his codefendant, the triggerman, received a life sentence, explaining that "[t]he imposition of the death sentence in this case is clearly not equal justice under the law." Id. See also Spivey v. State, 529 So. 2d 1088 (Fla. 1988)(remanding for imposition of a life sentence because the codefendants were the "primary motivators" and received lesser sentences); Hazen v. State, 700 So. 2d 1207 (Fla. 1997)(vacating death sentence based on life sentence for codefendant who was "a prime instigator").

However, a defendant seeking relief based on an unconstitutionally disparate sentence is not required to prove that a more culpable codefendant received a lesser sentence; rather, relief is mandated under the Eighth Amendment if an equally culpable codefendant received a lesser sentence. In Caillier v. State, 523 So. 2d 158 (Fla. 1988), this Court overturned a death sentence in a murder-for-hire case based on disparate sentencing. This Court explained: "While it is true that the murder was originally Caillier's idea and it does appear likely that she would have sought out another to do the deed if Payne ultimately refused, there was certainly evidence from which the jury could have concluded that Payne was as culpable as Caillier." Id. at 160 (emphasis added). See also Fernandez v. State, No. 84,700 (Fla. February 25, 1999)(remanding for imposition of a life sentence because appellant's degree of participation was similar to that of a codefendant who received a

life sentence after a plea negotiation); Scott (Paul) v. Singletary, 657 So. 2d 1129 (Fla. 1995)(remanding for an evidentiary hearing based on newly discovered evidence of a codefendant's culpability and recognizing that "[w]e repeatedly have reduced sentences to life where a co-perpetrator of equal or greater culpability has received life or less.").

In Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court held that death sentences are subject to collateral review under rule 3.850 based on newly discovered evidence of disproportionality and remanded for imposition of a life sentence in light of Scott's codefendant's life sentence that was imposed after Scott had been sentenced to death. This Court explained why Scott's death sentence was disproportionate: "the record in this case shows that Scott and [his codefendant] had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime." Id. at 468. The only differences between Scott and Mr. Kight's case are that the newly discovered evidence in this case concerns Hutto's level of culpability rather than his lesser sentence and that Mr. Kight and Mr. Hutto, a former correctional officer, do not have comparable IQs. The un rebutted expert testimony at Mr. Kight's trial proved that Mr. Hutto was clearly more intelligent and more sophisticated than Mr. Kight who has a 69 I.Q., functions at the level of an eight- or ten-year-old child, and falls developmentally and intellectually in the lowest two percentile of the population (R. 2590-91).

This Court has also addressed the disparate sentencing issue in cases such as this one where one co-defendant receives a lighter sentence in exchange for cooperating with the State.

In Brookings v. State, 495 So. 2d 135 (Fla. 1986), this Court remanded for imposition of a life sentence despite evidence that Brookings was the triggerman. This Court noted that despite his role as the actual killer, Brookings' death sentence was disparate because his codefendants received lesser sentences in exchange for their testimony against Brookings. This Court noted that the disparate sentences resulted from "the not infrequent difficult choices confronting prosecuting authorities when deciding who to prosecute and who to plea bargain with." Id. at 142. This Court faced a similar situation in Hazen v. State, 700 So. 2d 1207 (Fla. 1997), in which it noted that "the State made the strategic decision to give [Hazen's codefendant] a life sentence in exchange for testimony putting Hazen at the scene of the crime. In that respect, [the codefendant] was a crucial witness." Id. at 1212. The fact that the disparate sentences in that case were the result of the State's plea bargaining decisions did not prevent this Court from vacating Hazen's death sentence. See also Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979)(remanding for a life sentence due to "conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the State"). In this case, Mr. Hutto pled guilty to second degree murder and avoided the death penalty. In exchange, he provided the names of



four jailhouse snitches who testified falsely against Mr. Kight that he had confessed to killing Mr. Butler and planned to blame Mr. Hutto for the crime. The fact that Mr. Hutto's lighter sentence was received pursuant to an agreement with the State does not bar this Court from granting relief.

There is substantial evidence proving Mr. Hutto's guilt. Two witnesses testified at Mr. Kight's trial that Mr. Hutto confessed to stabbing Mr. Butler; one witness testified that Mr. Hutto was carrying a blood-stained knife which he identified as the murder weapon. He also made an inculpatory statement to the police in regard to Mr. Butler's murder that he was "blasted" and that's the only reason he did it. Mr. Hutto had the victim's watch and lighter in his possession when he was arrested, and the blood on his clothes was consistent with the victim's blood. Two of the snitches who testified against Mr. Kight have since testified that Mr. Hutto confessed to the killing; they also admitted that they received benefits in exchange for their false testimony at Mr. Kight's trial. Mr. O'Kelly's testimony that Mr. Hutto confessed to the murder is consistent with all of the evidence that has been presented in this case.

Most significantly, the conflicting evidence regarding the identity of the actual killer has mounted against Mr. Hutto. At the time of trial, Mr. Kight's attorney's strategy was to prove that Mr. Kight's statement to the police was true. In that statement, Mr. Kight admitted his presence at the crime but told the police that Mr. Hutto had committed the murder. The State

relied on the snitches' testimony to argue that this statement was false and that Mr. Kight's ability to fabricate a statement implicating his co-defendant was evidence of his sophistication. Basically, if Mr. Kight was smart enough to lie to the police and shift the blame to Mr. Hutto, he is not mentally retarded and the defense argument that Mr. Hutto was the main actor is rebutted. With the addition of Mr. O'Kelly's testimony, it has become clear that Mr. Kight was in fact telling the truth to the police. Mr. Kight has a 69 I.Q., functions on the level of an eight- to ten-year-old child, and lacks the sophistication necessary to manipulate the police. The newly discovered evidence has tipped the scale in Mr. Kight's favor and is sufficient to prove that his sentence is disparate in light of Mr. Hutto's life sentence.

The only difference between Mr. Kight's case and those in which this Court granted relief based on disparate sentences is that in this case it is the evidence about culpability and not the co-defendant's lesser sentence that is the newly discovered evidence. As the circuit court found, Mr. O'Kelly's testimony proves that Mr. Hutto's participation in the crime was, at the least, equal to Mr. Kight's and therefore Mr. Kight's death sentence is "unconstitutionally disparate." (PC-R. 452). The circuit court mistakenly found the disparate sentence argument procedurally barred because it had been raised at the time of Mr. Kight's trial (PC-R. 453). Because Mr. Kight's claim is supported by newly discovered evidence which has been found credible by the circuit court, it cannot be procedurally barred.

The circuit court has already found that Mr. Kight's death sentence is unconstitutional in light of Mr. Hutto's lesser sentence and the evidence proving his involvement in the murder. If not for the circuit court's mistaken belief that a procedural rule precluded him from granting relief, Mr. Kight would already have received a life sentence. Mr. Kight is entitled to relief based on the lesser sentence imposed upon Mr. Hutto who is, at the least, equally culpable.

## **ARGUMENT II**

### **THE CIRCUIT COURT ERRED IN FINDING THAT MR. KIGHT IS NOT ENTITLED TO A NEW TRIAL AND SENTENCING BASED ON THE NEWLY DISCOVERED EVIDENCE OF HIS CODEFENDANT'S INVOLVEMENT.**

Mr. Kight presented newly discovered evidence that his codefendant, Gary Hutto, was the actual killer. The circuit court found that Mr. Kight is not entitled to a new trial because "the `newly-discovered evidence' would not have in any way indicated that Mr. Kight was innocent of the felony murder." (PC-R. 451). The circuit court failed to consider that if the jury had Mr. O'Kelly's testimony it would not have convicted Mr. Kight of first-degree felony murder.

The court also found that Mr. Kight is not entitled to a new sentencing proceeding because "[t]he judge and jury already had evidence in the form of three other statements made by Mr. Hutto, as well as forensic evidence, to the same effect as the new evidence. It is hard to imagine how the new evidence, then, could have affected any significant conclusion drawn by the jury or the trial judge." (PC-R. 452). The circuit court failed to

consider that Mr. O'Kelly's testimony proves that Mr. Kight lacked the requisite mental state under Enmund v. Florida to be sentenced to death. In addition, the court ignored the effect that Mr. O'Kelly's testimony would have had on the sentencing calculus; this testimony would have changed the court's finding of aggravating and mitigating factors and would have resulted in a life sentence for Mr. Kight.

In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court established that the individualized sentencing that is required by the Eighth Amendment before the death penalty may be imposed must include a consideration of a particular defendant's culpability. The Court explained:

The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence, which means that we must focus on "relevant facets of the character and record of the individual offender."

458 U.S. at 798 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Woodson v. North Carolina, 428 U.S. 280 (1976)). In Enmund, the defendant had been sentenced to death for felony murder, and the sentencing court found the same two aggravating factors that were found in Mr. Kight's case: commission during a robbery (which was merged with the pecuniary gain aggravator) and heinous, atrocious or cruel.

The Supreme Court in Enmund concluded that the Eighth

Amendment prohibits imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Id. at 797. The Supreme Court found that the sentencing court had erred in failing to consider each co-defendant's individual culpability and instead had "attributed to Enmund the culpability of those who killed the [victims]." Id. In addition to Enmund's individual culpability, the Court also considered his mental state: "It is fundamental that `causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" Id. at 798 (citing H. Hart, Punishment and Responsibility 162 (1968)). The Court recognized that a death sentence for felony murder without a finding that the defendant possessed the requisite mental state would automatically qualify all defendants convicted of felony murder for the death penalty. This result would defeat the two social purposes served by capital punishment -- retribution and deterrence -- and would render capital punishment unconstitutional. Id. at 799. See also Godfrey v. Georgia, 446 U.S. 420, 433 (1980)(reversing death sentence because defendant's crime did not reflect "a consciousness materially more `depraved' than that of any person guilty of murder.").

Mr. O'Kelly testified that Mr. Hutto told him "that he stabbed a taxicab driver." (PC-R. 238). Regarding Mr. Kight's involvement, Mr. Hutto did not tell Mr. O'Kelly that Mr. Kight

was involved in the murder (PC-R. 539). Rather, Mr. Hutto's statements "led [Mr. O'Kelly] to believe that he was responsible for the killing." (PC-R. 553).<sup>5</sup> This testimony proves that Mr. Kight did not actually kill the victim and that he played no part in planning the murder. Mr. Kight's death sentence is unconstitutional because his participation was limited to assisting Mr. Hutto in the robbery; he lacked both the individual culpability and the requisite mental state to qualify him for a death sentence.

The circuit court also failed to consider the effect that Mr. O'Kelly's testimony would have had on the sentencing court's evaluation of the aggravating and mitigating factors. The court found two aggravating factors: during commission of a robbery and heinous, atrocious or cruel (R. 673-74). In support of the robbery aggravating factor the court noted the following:

FACT: The jury was instructed on the Edmunds [sic] requirement and recommended death. The Court agrees that the evidence in a light most favorable to the defendant shows his presence and knowing participation in the robbery. The evidence further supports a clear finding that defendant actually committed the homicide.

(R. 673). In support of the heinous, atrocious or cruel aggravator, the court again found that Mr. Kight had actually killed the victim: "FACT: The victim's death came only after

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<sup>5</sup>Mr. O'Kelly's testimony regarding Mr. Hutto's culpability for the murder must be considered in conjunction with that presented at the 1989 evidentiary hearing. With the addition of Mr. O'Kelly's testimony, the evidence proves that Mr. Hutto was the actual killer and that Mr. Kight is ineligible for the death penalty. See Argument III.

treatment by the defendant that was nothing less than torture." (R. 674). The State also argued that the murder was committed to avoid arrest or eliminate a victim, but the circuit court found this factor had not been proved beyond a reasonable doubt (R. 674). The court explained:

FACT: The evidence is in dispute as to who actually killed the victim.

FACT: Hutto testified that defendant went back to complete the murder of the victim when he heard gurgling sounds.

FACT: The defendant's statement does not mention the need to avoid arrest.

(R. 674). Although the court elsewhere found that Mr. Kight's statement to the police was fabricated and used this as proof of his sophistication and ability to manipulate, here the court accepted Mr. Kight's statement -- which indicates that Mr. Hutto alone committed the murder -- as true. In addition, the court's finding that the identity of the actual killer had not been proved precludes application of the heinous, atrocious or cruel aggravator to Mr. Kight because this factor applies only to the actual killer. The court's finding that the State had not proved the identity of the actual killer would render Mr. Kight ineligible for the death penalty under Enmund v. Florida, which requires proof of a defendant's individual culpability before a death sentence may be imposed.

If the defense had Mr. O'Kelly's testimony that Mr. Hutto confessed to stabbing the victim and that he was responsible for the victim's death, the court could not have found the heinous,

atrocious or cruel aggravating circumstance. First, the identity of the actual killer would not be in dispute and the court would have found that the evidence proved that Mr. Hutto was the actual killer. This evidence would limit Mr. Kight's participation to the robbery alone and would automatically render him ineligible for the death penalty. Second, the heinous, atrocious or cruel aggravator includes a mental state element which limits application of this factor to the actual killer. With the addition of Mr. O'Kelly's testimony, this aggravator would not apply to Mr. Kight. Even without Mr. O'Kelly's testimony, the court rejected the avoid arrest/eliminate a witness aggravator because of conflicting evidence as to the actual killer's identity and the fact that Mr. Kight's statement, which the State argued was false, did not include this motive.

The court's findings in regard to mitigation would also have been significantly changed if Mr. O'Kelly's testimony had been available to the defense. The court found the following mitigation: that Mr. Kight as a teenager had apprehended a robber and Mr. Hutto avoided the death penalty through his plea arrangement with the State (R. 673). The court rejected all of the statutory mitigating factors (R. 675). Based on its finding that Mr. Kight had fabricated an exculpatory statement to the police,<sup>6</sup> the court rejected the following mitigating factors: the defendant acted under extreme duress or under substantial

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<sup>6</sup>As discussed in the preceding paragraph, the court elsewhere in its sentencing order relied on Mr. Kight's statement.



domination of another person; the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and the defendant's age (R. 670-72).

In its discussion of the substantial domination of another mitigating factor, the court accepted the following facts: "the defendant was of passive personality and easily influenced by a dominant individual"; "the defendant was borderline mentally retarded"<sup>7</sup>; and "the defendant's personality was inconsistent with the facts of the homicide." (R. 670-71). However, the court rejected this evidence in part because "the defendant was capable of and did fabricate and relate with credibility an intentional lie to mislead the police." (R. 671).

The court's discussion of another mental health mitigating factor -- Mr. Kight's ability to conform his conduct to the requirements of the law was substantially impaired -- was similar. The court noted Dr. Krop's testimony that Mr. Kight is mentally retarded, that his mental age is eight years, and that he is easily influenced by others; however, the court again relied on the State's argument that Mr. Kight had fabricated an

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<sup>7</sup>Elsewhere in its sentencing order, the court found Mr. Kight to be "mentally retarded." The State attempted during its cross-examination of Dr. Krop to suggest that the defense was exaggerating Mr. Kight's mental retardation. The reference to "borderline" implies that Mr. Kight is on the boundary between retardation and normal intelligence. In fact, the unrefuted defense evidence proves that Mr. Kight functions in the lowest two percent of the population. The State offered no evidence to support its distorted suggestion that Mr. Kight was on a "borderline" anywhere near the level of average intelligence.

exculpatory statement: "the defendant made [an] exculpatory statement on the night of his arrest." (R. 671). The court concluded that Mr. Kight's "avoidance techniques" rebut the mental health evidence in support of this mitigator (R. 672). The court again relied on Mr. Kight's alleged ability to fabricate an exculpatory statement in its rejection of the age mitigator. After noting Mr. Kight's chronological age of 23 years and his developmental age of eight years, the court found that "defendant demonstrated a shrewdness and other abilities that detract significantly from Dr. Krop's testimony." (R. 672).

There was substantial defense evidence offered in support of these three mitigating factors that would have been accepted by the sentencing court if Mr. O'Kelly's testimony had also been available. The defense presented expert testimony about Mr. Kight's mental retardation and related personality disorder. Dr. Krop testified that Mr. Kight's I.Q. is 69 and that his intellectual functioning places him in the bottom two percent of the population (R. 2590-91). Mr. Kight functions developmentally at the level of an eight- or ten-year-old child (R. 2599). He also suffers from a personality disorder related to his mental retardation which is relevant to mitigation: "he would be very passive, he would be very dependent, he would be very easily influenced, he could be very easily manipulated . . . he does not have the cognitive capacity to be able to reason to think things out, to think things ahead or to plan in any kind of completion kind of way." (R. 2593-94). Mr. Kight also lacks the ability to

be a leader and would be "easily influenced by another individual." (R. 2599-600). These characteristics would be especially pronounced when Mr. Kight interacts with a person of higher intelligence -- which would include ninety-eight percent of the population -- and sophistication such as Mr. Hutto.

The State presented no evidence to rebut the expert testimony that Mr. Kight has an I.Q. of 69 and functions at the level of an eight- or ten-year-old child. However, the court found that the expert testimony was outweighed by evidence that Mr. Kight had fabricated an exculpatory statement to the police; according to the court, this demonstrated his ability to manipulate and rebutted any suggestion that he was dominated by Mr. Hutto and that he lacked the intellectual ability to plan this crime. The only evidence relied upon by the State to suggest that Mr. Kight fabricated his exculpatory statement was the false testimony of the jailhouse snitches that Mr. Kight had confessed to the murder and planned to blame Mr. Hutto. Mr. O'Kelly's testimony proves that the snitches were lying and that Mr. Kight's exculpatory statement was true. If Mr. Kight's statement was true, the defense evidence of his retardation and domination by the real killer Gary Hutto would have been unrebutted. The court would then have found these mitigating factors and would have imposed a life sentence on Mr. Kight.

The court would have had only one aggravating factor to support the death penalty -- during commission of a robbery -- and substantial statutory and nonstatutory mitigation. This

Court has repeatedly held that capital punishment is reserved for the most serious crimes:

Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). This Court later explained that proportionality review "is not a comparison between the number of aggravating and mitigating circumstances," but that it requires this Court to "consider the totality of circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

This Court has adhered to the principle expressed in Dixon and has consistently reversed death sentences when there is only one aggravating factor and substantial mitigation. In Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), this Court explained that death sentences supported by only one aggravating factor would be upheld only if there is "either nothing or very little in mitigation." This Court has recently reaffirmed this principle in Almeida v. State, No. 89,432 (Fla. July 8, 1999), in which this Court imposed a life sentence despite the court's finding of the prior violent felony aggravator based on the first-degree murder conviction of two women in the weeks preceding the capital murder. This Court found that the aggravator was outweighed by mitigation evidence including "a brutal childhood and vast mental health mitigation." See also

Woods v. State, 733 So. 2d 980 (Fla. 1999); Hardy v. State, 716 So. 2d 761 (Fla. 1998); Jorgenson v. State, 714 So. 2d 423 (Fla. 1998); Terry v. State, 668 So. 2d 954, 965 (Fla. 1996)(reversing death sentence supported only by prior violent felony and during commission of a robbery aggravators); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993)(reversing death sentence based on prior violent felony aggravator and heinous, atrocious or cruel where mitigation showed alcoholism, mental stress, loss of emotional control and potential to function well in prison); Nibert v. State, 574 So. 2d 1059 (Fla. 1991)(vacating a death sentence supported only by the heinous, atrocious or cruel aggravating factor).

This Court has consistently reversed death sentences supported only by the commission during a robbery aggravating factor, even when the defendant presented less mitigation than was presented in this case. In Jones v. State, 705 So. 2d 1364 (Fla. 1998), this Court reversed a death sentence in which the court found only the commission during a robbery aggravator and there was significant mitigation similar to that in this case, including a disadvantaged childhood, low I.Q., and developmental age of a child. See also Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 674 So. 2d 824, 827 (Fla. 1994)(same); Clark v. State, 609 So. 2d 513 (Fla. 1992); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985);

Rembert v. State, 445 So. 2d 337 (Fla. 1984).<sup>8</sup>

The mitigation in this case consisted of testimony from Mr. Kight's mother and sister regarding his disadvantaged childhood and expert testimony about his mental retardation. Mr. Kight's mother and sister testified about the extreme poverty and physical abuse that Mr. Kight endured during his childhood. Because of his mental retardation, Charles was the victim of all the men in his life who should have been fulfilling a caretaker role. Mr. Kight never received the special education services that he required. Unrefuted evidence at the trial also proved that Mr. Kight has a 69 I.Q., developmentally he functions like an eight- to ten-year-old child, and intellectually he falls in the bottom two percent of the population. While all of this mitigation was before this Court when it affirmed Mr. Kight's death sentence on direct appeal, the newly discovered evidence changes the sentencing calculus, particularly in regard to statutory mitigation. Because Mr. O'Kelly's testimony would have precluded the State from arguing that Mr. Kight was a

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<sup>8</sup>This Court has also found death sentences disproportionate when the State has proved more than one aggravating factor but there is significant mitigation. In two recent cases, this Court imposed life sentences based on mitigation evidence of child abuse and low intelligence such as that presented in Mr. Kight's case. Larkins v. State, No. 91,131 (Fla. July 8, 1999); Cooper v. State, No. 86, 133 (Fla. July 8, 1999). See also Snipes v. State, 733 So. 2d 1000 (Fla. 1999); Urbin v. State, 714 So. 2d 411 (Fla. 1998); Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Livingston v. State, 565 So. 2d 1288 (Fla. 1988). Even if this Court finds that the heinous, atrocious or cruel aggravator still applies to Mr. Kight's case despite Mr. O'Kelly's testimony, his death sentence is still disproportionate.

sophisticated criminal who manipulated the police with a fabricated statement incriminating his co-defendant, it would have led the sentencing court to find the statutory mental health mitigating factors. This Court must reconsider Mr. Kight's death sentence in light of the newly discovered evidence that disproves the heinous, atrocious or cruel aggravating factor and supports several statutory mitigating factors.

The circuit court denied a new sentencing proceeding because the jury already had evidence of Mr. Hutto's involvement and therefore Mr. O'Kelly's testimony was cumulative (PC-R. 452). The circuit court failed to consider how the conflicting evidence regarding Mr. Hutto's and Mr. Kight's involvement would have shifted in favor of Mr. Kight had Mr. O'Kelly's testimony been available. The State's strongest evidence against Mr. Kight was the snitch testimony that Mr. Kight confessed and planned to blame Mr. Hutto. The State's closing argument specifically vouched for the credibility of the informants and urged the jury to rely on their testimony. Mr. O'Kelly's testimony would have served a dual function at Mr. Kight's trial: first, it proves that the snitches were lying about Mr. Kight's confession, thus restoring the credibility of Mr. Kight's exculpatory statement; second, it supports the defense evidence that Mr. Hutto had committed this crime. This evidence is not merely cumulative but corroborates the evidence that was available and tips the scale in favor of Mr. Kight.

This Court has found that a co-defendant's inculpatory

statement can affect the outcome of the penalty phase. This Court has found that the failure to present such evidence undermines confidence in the outcome of a sentencing phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). In that case, only one of four perpetrators was sentenced to death, and the central focus of the trial was the identity of the actual shooter. As in Mr. Kight's case, the codefendant's inculpatory statements corroborated the defendant's own statements to the police and identified the codefendant as the actual killer. This Court's conclusion in Garcia that the defendant was prejudiced by his counsel's failure to present this evidence supports Mr. Kight's argument that his newly discovered evidence of Mr. Hutto's culpability entitles him to relief.

This Court's decision in Garcia also undermines Assistant State Attorney Laura Starrett's reliance on State v. Robinson, 711 So. 2d 619 (Fla. DCA 2d 1998), during closing statements before the circuit court. Ms. Starrett argued that because Mr. Hutto's confession to Mr. O'Kelly is hearsay admissible only as impeachment, relief should be denied. Pursuant to Garcia, the unavailability of impeachment evidence at trial may undermine confidence in the outcome of the trial and require relief during post-conviction. In addition, the court in Robinson reversed the circuit court's order granting relief because the effect of the newly discovered impeachment evidence was outweighed by the "abundant circumstantial evidence presented against Robinson." Consideration of the effect of the newly discovered evidence in



this case is not as simple where the defense presented substantial evidence of Mr. Hutto's guilt and the State's evidence against Mr. Kight consisted primarily of Mr. Hutto and the jailhouse snitches (two of whom have recanted) whose names were provided to the State by Mr. Hutto as part of his plea arrangement. In addition, Robinson was not a capital case so this Court must also consider that hearsay evidence would have been admissible at Mr. Kight's penalty phase. Mr. Kight is entitled to a new sentencing proceeding.

### ARGUMENT III

#### THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE NOT PRESENTED AT MR. KIGHT'S TRIAL.

The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Kight's trial as required by Kyles v. Whitley, 514 U.S. 419 (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial).<sup>9</sup> In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel and/or newly

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<sup>9</sup>That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

discovered evidence. Gunsby is exactly on point here and should have been followed by the circuit court. In Gunsby, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. This Court also addressed the State's argument that some of the defendant's evidence did not meet the test for newly discovered evidence:

In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington. The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the Rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Id. at 924. (citations omitted). The circuit court not only failed to consider the cumulative effect of Mr. Kight's new evidence but also ignored this Court's instructions in Gunsby to consider evidence that does not satisfy the newly discovered test for its support of an ineffective assistance of counsel and/or Brady claims. Had the circuit court examined all the evidence Mr. Kight presented throughout his capital proceedings, it would

have found that the previously unknown evidence, in conjunction with the evidence introduced at Mr. Kight's trial, undermines confidence in the outcome. Gunsby; Swafford. Had the jury heard all the evidence presented in Mr. Kight's post-conviction proceedings, the outcome of his trial and penalty phase would probably have been different.

Mr. O'Kelly's testimony is consistent with that presented at the 1989 evidentiary hearing and that presented by the defense at Mr. Kight's trial. Taken as a whole, the evidence proves that the State Attorney's Office made a deal in order to secure a conviction and death sentence against the less culpable of two co-defendants.<sup>10</sup> The less culpable co-defendant happened to be mentally retarded and incapable of assisting the State in prosecuting his co-defendant; as a result, it was the more culpable co-defendant, the former correctional officer with a "B" average in high school, who helped the State to convict his retarded co-defendant.

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<sup>10</sup>Ms. Starrett's and Mr. Abramowitz's actions with regard to Mr. O'Kelly prior to the evidentiary hearing reveal that the State Attorney's Office is relying on the same tactics of manipulating witnesses in its continued prosecution of Mr. Kight. Ms. Starrett and Mr. Abramowitz flew to Chicago and accompanied the police to Mr. O'Kelly's house when he was arrested on a misdemeanor warrant from Colorado. Ms. Starrett and Mr. Abramowitz then interviewed Mr. O'Kelly while he was handcuffed to the wall of a holding cell at the police station. While Mr. Abramowitz testified that he did not offer Mr. O'Kelly assistance on the Colorado warrant that was allegedly the basis for his arrest in Chicago, he could not refute Mr. O'Kelly's testimony that the Chicago detective promised Mr. O'Kelly assistance if he would cooperate with Ms. Starrett and the Florida authorities. The State once again used coercive tactics to prevent Mr. Kight from getting the relief to which he is entitled.

Mr. Kight had already given a statement admitting his presence at the scene but indicating that Gary Hutto had committed the murder alone (R. 1913-16). Despite this evidence that Mr. Hutto was the actual killer, which was later supported by other evidence known to the State, the State chose to make a deal with Mr. Hutto. In exchange for a plea to second-degree murder, which would enable Mr. Hutto to avoid the death penalty, he provided the names of four jailhouse snitches who would help the State convict Mr. Kight and send him to death row (R. 2297). These four witnesses were prepped together for the trial in the State Attorney's Office where they reviewed police reports, depositions, crime scene photos, and the medical examiner's report (T. 203, 205, 209-11, 289-90). They told the State Attorney that Mr. Kight had not confessed to them and that their knowledge of the case came from Mr. Hutto (T. 190-91, 290). They were told to testify as though all information came from Mr. Kight (T. 290-91). They were also told to testify that they were not receiving anything in exchange for their testimony although the State promised them assistance with their sentences (T. 198, 284-85).

The snitches performed according to Mr. Hutto's plan at the trial. Eddie Hugo testified that Mr. Kight confessed to murdering Mr. Butler and said that he was going to "put it on another man" and that "he wasn't going to get to jail for killing somebody." (R. 1997). Mr. Hugo testified that he was not receiving anything in exchange for his testimony and that he

simply believed that "justice should be taught." (R. 2002, 2005, 2007). Fred Moody testified that Mr. Kight confessed to him and that he was helping Mr. Hutto because he believed that Mr. Kight was going to assist the State in convicting Mr. Hutto (R. 2014, 2022). Mr. Moody denied that he expected any assistance in exchange for his testimony (R. 2021). Richard Ellwood offered a similar story that Mr. Kight confessed to stabbing the victim (R. 2027). He also denied expecting anything in exchange for his testimony (R. 2021). Charles Sims, the fourth informant, testified that Mr. Kight had confessed to the killing and had indicated that he was going to blame his codefendant who played no part in the murder (R. 2036). Mr. Sims admitted that the State Attorney had promised to talk to his parole officer, but he insisted that he was testifying only to tell the truth about what Mr. Kight had said (R. 2040-41).

At the 1989 evidentiary hearing, Mr. Ellwood and Mr. Sims admitted that they had lied on two crucial issues: Mr. Kight never confessed to the murder, and the snitches had all testified with the expectation of receiving a benefit from the State (T. 200, 212-13, 286). They also testified that the snitches told the State Attorneys that their testimony was false and that they were threatened with perjury charges if they did not testify consistently with their depositions (T. 195-96). Mr. Ellwood revealed that he had "organized" the snitches who provided false information against Mr. Kight and put them in contact with Mr. Hutto's lawyer (T. 189). Mr. Ellwood also admitted that he had

given the snitches the information, which he had gotten from Mr. Hutto, and that Mr. Kight never talked about the case (R. 176, 189-92). Mr. Ellwood also revealed that Mr. Hutto confessed to him after Mr. Kight's trial and said "that Kight was going to burn for something he didn't do." (T. 174).

The hearing testimony of Ellwood and Sims is corroborated by that of Victor Bostic, a potential jailhouse snitch who did not testify at Mr. Kight's trial. Mr. Bostic was approached by Mr. Hutto about creating "a fictitious story about Charles Kight." (T. 449). Although Mr. Bostic had no information about the case, he was willing to help Mr. Hutto by testifying against Mr. Kight if it would help him on his own charges (T. 454-55). Mr. Bostic wrote a letter to the State Attorney's Office and was interviewed by Baker King about testifying against Mr. Kight (T. 457). He told Mr. King about "what [he] and Hugo had put together." (T. 457). Mr. Bostic was later brought to the State Attorney's Office to be prepped for trial with the other snitches; however, he changed his mind about cooperating with the State "[b]ecause [he] felt like it wasn't right." (T. 460). Mr. Bostic knew that the snitches had fabricated their testimony because they wanted to get help on their sentences; he also heard them talking openly with the State Attorneys about what they expected in exchange for their false testimony against Mr. Kight (T. 461-63).

Mr. Sims and Mr. Ellwood also testified that the four snitches talked openly about what they expected in exchange for their testimony when they were together at the State Attorney's

Office. Mr. Ellwood expected to have his sentence reduced and retention of jurisdiction dropped (T. 196, 212, 292). Mr. Hugo was promised that he would go to work release rather than going back to prison (T. 200, 292). Mr. Moody was told that his escape time would be dropped (T. 200, 292). And Mr. Sims was told that he would be released early (T. 212-13; 285-86). The snitches were told that there would be nothing in writing before the trial and that they must testify that no promises had been made (T. 198, 286). The testimony that the snitches had expectations of receiving assistance from the State in exchange for their testimony is supported by documentary evidence. Baker King and Denise Watson filed motions to vacate on behalf of Mr. Hugo and Mr. Sims after Mr. Kight's trial; the motions specifically refer to their assistance in convicting Mr. Kight. The evidence also showed that prior to Mr. Kight's trial, both Mr. Hugo and Mr. Sims had filed motions to reduce their sentences which had been denied. Denise Watson also agreed to a motion on behalf of Mr. Ellwood reducing his sentence based on his testimony in Mr. Kight's case. In Mr. Moody's case, Ms. Watson stipulated to the court's jurisdiction over a motion to vacate sentence that was time barred and stipulated to the grounds in the motion.

When this Court affirmed the denial of relief after the 1989 evidentiary hearing, it recognized that there was "conflicting testimony" regarding the State's deals with the informants. Kight v. State, 574 So. 2d 1066, 1073 (Fla. 1991). With the addition of Mr. O'Kelly's testimony, which is consistent with

that previously offered by Mr. Kight during post-conviction, the evidence proves that Mr. Hutto confessed to this crime and gathered false testimony against Mr. Kight to save himself. Mr. O'Kelly testified that Mr. Hutto confessed to stabbing a taxicab driver (PC-R. 538-39, 553). While Mr. Hutto talked about Mr. Kight being his codefendant, he indicated that he was responsible for the victim's death (PC-R. 553-54). Mr. Hutto also told Mr. O'Kelly that he was going to save himself by blaming Mr. Kight for the murder (PC-R. 555-56). This testimony corroborates that of Mr. Ellwood and Mr. Sims that Mr. Hutto recruited them to provide false testimony against Mr. Kight and that Mr. Kight in fact did not confess to the murder.

This testimony and documentary evidence belies the State's repeated assertions to the jury that convicted Mr. Kight that the jailhouse informants had nothing to gain by testifying:

Ladies and gentlemen, consider those statements that they made, and Mr. Sheppard would have you believe that there is a giant conspiracy by these four individuals, but consider any of the factors that back that up. Was there ever shown any animosity or any reason to dislike Mr. Kight or was it ever shown that there was any animosity or reason to like Mr. Hutto or was it ever shown that there was any reason or benefit that they might have received from the State.

They are all under sentence. They don't have a pending case. They are not in a situation to cut any deal or to do anything. They are sentenced and in the state prison.

I'd submit if you look, you couldn't find one single reason for them to come in and testify to what they heard other than it's the truth. Plainly and simply, it's the truth.



(R. 2374-75). By vouching for the credibility of witnesses who were lying about Mr. Kight's involvement in the case and about their own motives for testifying, the State Attorneys intentionally misled the jury that convicted Mr. Kight and sentenced him to death on the basis of false testimony.

The evidentiary hearing testimony of Mr. Ellwood, Mr. Sims, Mr. Bostic, and Mr. O'Kelly is consistent with all of the other evidence in the case which supported the defense theory that Mr. Hutto was the actual killer. At trial, Mr. Kight's lawyer presented evidence that Mr. Hutto had confessed to two people that he stabbed a taxicab driver and had shown one of them a blood-stained knife that he claimed was the murder weapon (R. 2204-05, 2304-05). Mr. Hutto also made an inculpatory statement to the police that "I was so blasted and that's the only reason I done it."<sup>11</sup> (R. 2199). In addition, Mr. Hutto had the victim's lighter and watch when he was arrested and the blood on his clothes was consistent with that of the victim (R. 2194).

Mr. Hutto also testified and presented a detailed story of the murder. He claimed that he had blacked out after ingesting an incredible amount of drugs and alcohol (R. 2180). When he awoke, he saw Mr. Kight committing the murder, which he tried to prevent (R. 2181). Mr. Hutto denied that he had ever confessed to the crime and claimed that he remembered nothing about it for

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<sup>11</sup>Of course, the State was aware of this statement when it decided to make a deal with Mr. Hutto and use him as the primary source of its information against Mr. Kight. The State was probably unaware that Mr. Hutto had failed a polygraph test regarding his and Mr. Kight's involvement in the murder.

four months (R. 2177, 2184). He admitted that he put the story together during a twenty-hour meeting with his lawyer (R. 2299).

The defense evidence at trial directly contradicts Mr. Hutto's trial testimony and is consistent with the evidence that has been presented during Mr. Kight's post-conviction proceedings. The evidence discovered since the trial, when considered cumulatively and in conjunction with that presented by the defense at trial, proves that Mr. Hutto was the actual killer. The circuit court found the evidence of Mr. Hutto's culpability "troubling," but mistakenly believed that it was precluded from granting Mr. Kight a life sentence. This Court should also be troubled by the evidence proving Mr. Hutto's involvement. Mr. Kight is entitled to a life sentence.

CONCLUSION

On the basis of the arguments presented herein, Mr. Kight urges that this Honorable Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August \_\_\_\_, 1999.

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