IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2285

RICHARD M. COOPER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS AND PASCO COUNTIES, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Through nefarious actions, conflicts and incompetence, both the prosecutors and Mr. Cooper's own defenders deprived the trial court and jury of the opportunity to know the real Richard Cooper, and the real circumstances surrounding the crime for which he was convicted. Given the egregious actions of counsel on both sides, this Court can have no confidence that the jury's narrow recommendation for death or the trial court's death sentence were just. This proceeding, along with the simultaneously filed Habeas petition, challenges both Mr. Cooper's conviction and his death sentence. Mr. Cooper incorporates by reference the facts and legal arguments set forth in his Habeas brief and urges the Court to contemporaneously consider both briefs in order to achieve a just result in this matter.*

INTRODUCTORY STATEMENT ON REFERENCES

References to the Record on direct appeal of the judgments and sentences in this case will be denominated "(Dir. 123)." References to the Record in the post-conviction evidentiary hearing will be denominated "(ROA. 123)." Items that were not included in the post conviction Record as originally prepared by the Pinellas

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* In the event that the Court finds that any claim in this appeal is barred because it should have been raised on direct appeal, Mr. Cooper requests that the Court consider that claim as an ineffective assistance of appellate counsel claim in his Habeas petition.

County Clerk, but were listed in Mr. Cooper's three Motions To Supplement And Correct the Record will be denominated as "Supp." and will include the date filed, abbreviated document title and internal page number, e.g. "(Supp. 12/07/83 Skalnik Depo., p. 12)." Citations to transcripts include the correct spelling for names transcribed phonetically by the court reporter.

STATEMENT OF THE CASE AND FACTS

A. Richard Cooper

Richard Cooper is a 38-year-old man who has spent half of his life on death row. On June 18, 1982, the night of the crime, Richard was 18 years old and had an 8th grade education. He had never committed a violent crime before, and he has not committed one since. But prior to that night Richard Cooper had been the victim of violence. For years he suffered extreme physical and emotional abuse at the hands of his father and older brother. (ROA. 1236) Richard developed a dependent "follower" personality and at the age of 11 began medicating himself with drugs, alcohol and solvents to cope with his life. (ROA. 1234-36, Dir. 401) He was under the influence of both drugs and a dominant personality, J.D. Walton, on the night of the crime. (ROA. 1425, 1449, 1454-55)

When he was awaiting trial for the murders, Richard Cooper was so mentally distraught that he mutilated himself, attempted suicide in jail and had to be placed on psychotropic medication. (ROA. 612-31) Since his conviction, and during his lengthy incarceration, he has been a model prisoner who has adapted well to his surroundings. (ROA. 1256-57) From the time of his incarceration, through November 1999 when Dr. Fisher testified at the 3.850 hearing, Mr. Cooper had only 1 disciplinary report, issued 15 years earlier for disobeying an order. (ROA.

1235)

B. Procedural History

1. Trial & Sentence

Richard Cooper was indicted for three counts of first-degree murder on March 2, 1983 in Pinellas County, Florida. (Dir. 34) Trial began on Tuesday, January 10, 1984. (Dir. 182) The State's theory at trial was that Mr. Cooper individually caused the death of all three victims. The facts of the case are reported in the direct appeal, *Cooper v. State*, 492 So. 2d 1059 (1986). The jury convicted Mr. Cooper as charged on Friday, January 13, 1984. (Dir. 214-16)

A penalty phase hearing was conducted on Saturday morning, January 14, 1984. (Dir. 220) The State relied on the testimony of jailhouse informant Paul Skalnik to establish aggravators, and the defense adduced only the testimony of Juanita Kokx, Mr. Cooper's mother, to establish mitigators. (Dir. 1422-96) All testimony was concluded before noon on Saturday the 14th, and by the end of that afternoon, the jury returned its advisory sentence recommending death on each of the three counts. (Dir. 226-28) On March 14, 1984, a judicial sentencing proceeding was conducted and the Court imposed a sentence of death on each count of first-degree murder. (Dir. 236)

2. Direct Appeal

A notice of appeal was filed on March 20, 1984. (Dir. 249) The trial court's sentencing memorandum, filed 70 days later, on May 30, 1984, included the specific finding that Mr. Cooper delivered the fatal shot to Steven Fridella. (Dir. 243) On direct appeal, this Court affirmed Mr. Cooper's convictions and sentences. *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986). The United States Supreme Court denied certiorari on February 23, 1987. *Cooper v. State*, 479 S. Ct. 1101 (1987).

3. Collateral Attacks

On April 18, 1989, Governor Martinez signed a warrant of execution for Mr. Cooper. His execution was set for June 20, 1989. Mr. Cooper filed a Rule 3.850 motion on February 23, 1989 (ROA. 1) and an amended Rule 3.850 motion on May 18, 1989. (ROA. 126) An undated petition for habeas corpus and a petition for stay of execution (ROA. 729) were filed in the Florida Supreme Court and given FSC Case No. 74, 171. The trial court issued an indefinite stay of execution on June 7, 1989. (ROA. 774) The petition for habeas corpus, FSC Case No. 74,171 was denied without prejudice by the Florida Supreme Court on September 7, 1999.

On August 11, 1992, the trial court summarily denied some of the claims

raised in the amended motion post-conviction relief and granted an evidentiary hearing on the rest. (ROA. 810) After an evidentiary hearing was set, collateral counsel initiated litigation to obtain public records pursuant to Florida Chapter 119. The public records litigation culminated on February 19, 1997 in a 4-3[1] denial by this Court of Mr. Cooper's Petition for Writ of Mandamus.[2]

Judge Downey who took the case over upon the death of Judge Walker, conducted an evidentiary hearing on Mr. Cooper's 3.850 over nine days between September 3, 1999 and June 23, 2000. (ROA. 955-1843) On August 15, 2001, he entered an order denying remaining claims raised in Defendant's motion and amended motion to vacate judgment and sentence. (ROA. 2252) On August 30, 2001, the Defendant filed a motion for rehearing or clarification which Judge Downey denied on September 12, 2001. (ROA. 2680, 2687) Defendant timely filed this appeal on October 11, 2001. (ROA. 2767)

C. Mr. Cooper's Trial Counsel

The Court appointed Ronnie G. Crider to represent Mr. Cooper on February 3, 1983. (Dir. 25) At the time of the appointment Crider had just left the Pinellas

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[1] Justices Shaw, Anstead, and Kogan would have issued the order to show cause.

[2] Appellant respectfully requests that the Court take judicial notice of the Petition for Writ of Mandamus, case no. 84-390, as it was a separate proceeding before this Court, and therefore not in the record for this case.

County State Attorney's office where he had begun his legal career a little more than three years earlier. (ROA. 707) At the State Attorney's Office, Crider never had primary responsibility for a capital case. (ROA. 707) On March 10, 1983, Crider requested, and the trial court granted, the appointment of a second attorney Ky Koch, to assist in the defense. (Dir. 40, 42)

Koch was an Assistant State Attorney for Pinellas County from 1976 to 1979 then entered private practice. Koch had no experience trying capital murder cases either as a prosecutor or defense attorney before undertaking Mr. Cooper's defense. (ROA. 712, 1016-17) Crider and Koch shared the $3,500 maximum fee then provided by Florida statute for capital defense. (ROA. 708)

While in private practice, Koch occasionally dealt with a process server named Paul Skalnik. (ROA. 1519) In 1982 Koch represented Skalnik in proceedings related to a violation of probation concerning a grand theft charge in which Skalnik misrepresented himself as a lawyer. (ROA. 711, 1044)

D. The State's Sole Penalty Phase Witness: Skalnik the Snitch

On May 31, 1983 Mr. Cooper was placed into a cell with Skalnik. Two weeks later, on June 14, 1983 Skalnik provided Sheriff's Department detectives with statements allegedly made by Mr. Cooper about the crime. (Dir. 518) The State subsequently listed Skalnik as a witness. On November 18, 1983, Crider

deposed Skalnik in connection with the Cooper case. In that deposition, Crider informed Skalnik that Mr. Cooper was also represented by Koch who had worked with and formerly represented Skalnik. (ROA. 1826) Crider requested, and Skalnik agreed, to waive any conflict stemming from Koch's former representation of Skalnik. (ROA. 1826) The State was present at that deposition and therefore knew about Koch's prior representation of Skalnik. (ROA. 1826) Despite that former representation, Crider and Koch agreed that Koch would be primarily responsible for the examination of Skalnik at trial. (ROA. 712, 1021)

1. Skalnik's Background and Snitching Activities

In the early 1970s Skalnik worked as a police officer in Texas. (Dir. 483) He began accumulating felony convictions in Florida in the early 1980s. In November of 1982 Mr. Skalnik was incarcerated in the Pinellas County maximum-security jail pending five felony charges. (Dir. 480) In March 1983, he was sentenced to five years in prison on those charges. **(**Dir. 481**)** Skalnik's convictions have primarily been for grand larceny based on fraudulent activities.

While in the Pinellas County jail, Skalnik made a practice of informing on his fellow inmates. He gave notes of interviews with inmates to a detective so that they would be given to the State Attorney's Office to assist them in these cases. (Dir. 485) Skalnik was known to jail personnel as an informant. An undated

memorandum discussing a jail house investigation in August of 1983 contains the following notation, "Note: Skalnik has been working as a confidential informant on jail activities for Detective O'Brian . . . " (ROA. 611) At the time of Mr. Cooper's trial, Skalnik estimated that he had informed on nearly thirty defendants. (Dir. 493)

In January, 1983 Skalnik was placed in a two-man cell to protect him from the general population because he had received numerous threats stemming from his snitching activities. (Dir. 482, 493) In fact, Skalnik was never transferred to the state prison system because of his status as an informant. Conveniently, his lengthy stay in county jail allowed him to obtain information on additional inmates awaiting trial. (ROA. 494-96**)** In June of 1984, Skalnik was sent to Arizona to serve his time, rather than to Florida prison. (ROA. 577)

2. Skalnik's Testimony

Skalnik did not testify in the guilt phase, but he was the only substantive prosecution witness in the penalty phase.[3] Defense counsel had attempted to preclude or limit Skalnik's testimony with pre-trial motions in limine and to suppress. The basis for the motions was a *Henry/Massiah* claim that Skalnik was acting as an agent of the State when he obtained statements from Mr. Cooper. The

[3] The State did call the case agent in the penalty phase, however, the only purpose of his testimony was to confirm that Skalnik provided credible evidence concerning the location of a ski mask used in the crime. The existence of the mask did not support an aggravator, but merely served to bolster Skalnik's testimony.

trial court conducted an evidentiary hearing on those motions on the first morning of trial.

a. Pre-trial testimony

Koch began the hearing by questioning Skalnik about "how many instances and in how many cases have you provided information to law enforcement officers since your incarceration in November of 1982." (Dir. 482) At no time did Koch specifically ask Skalnik about the number of times he had snitched on defendants in prior incarcerations. Skalnik could not specifically recall how many defendants he had testified against, but he knew it was a number of people and said that several people could be involved in one case. (Dir. 482) **When queried about the timing of his cooperation, Skalnik testified that Mr. Cooper was the first, or possibly the second, person against whom he had informed.** (ROA. 486-88) Later, while on cross-examination by the State, Skalnik provided a modest accounting of his snitching activities: "Q. I believe you indicated that you testified before in several other cases. A. Yes sir, only about two or three, yes sir." (Dir. 496) In reality, Skalnik had, prior to Mr. Cooper's trial, testified against **ten**

defendants.[4]

The State perpetuated Skalnik's deception through its objections. First, when Koch attempted to determine whether Skalnik ever told "Mr. Cooper that you routinely provided information to the State Attorney's office." The State objected, "Objection, again leading. It's indicated that Mr. Cooper was the first individual in this that he provided information for." (Dir. 492) Later that morning, in his argument to the court on the motions to preclude or suppress Skalnik's testimony, the prosecutor again argued, "The testimony is that this was the first instance of the case that he has testified he provided information. . . ." (Dir. 527) At the conclusion of the evidentiary hearing, having been deprived of the true history of Skalnik's activities as an informant, the trial court found that Skalnik was not an agent of the state and permitted him to testify.

Despite his adoption of Skalnik's deception during the hearing, after the hearing, Crow confronted Koch about the way he conducted his examination. (ROA. 784) Specifically, Crow asked Koch why he had not brought out the fact that Skalnik had testified during **prior** incarcerations. (ROA. 784) He advised

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4 Prior to testifying against Cooper Skalnik testified against: Clarence Clark, 80-889; Roger Peterson, 80-9918; Peter Pfluger, 81-17175; Franklin Gale, CRC81-2332C; Jerome Hall, CRC81-3533; Orestes Troche, 81-3534, Lee Green, 81-4013; Guillermo Cortina, 81-4103, Melvin Glazner 81-6157-60; Fernando Fernandez 81-6720

Koch of Skalnik's having previously testified for the State and offered to have Skalnik retake the stand and relate the details of those incidents for the court's consideration. (ROA. 784) Koch did not take Crow up on his offer. (ROA. 784)

In response to the instant 3.850 motion, the State discussed the foregoing Skalnik testimony by asserting that, "the state made no attempt to keep Skalnik's past from defense scrutiny and **assumed** they were aware of it." (ROA. 783) (emphasis supplied) The State alleged that "Both Crider and Koch had been Assistant State Attorneys during the timeframe in 1981 that Mr. Skalnik was a witness for the State;"[5] and "Koch had represented Mr. Skalnik in a sentencing motion in November 1982." (ROA. 783) Interestingly, the State did not assert that defense counsel knew about Skalnik's past due to its disclosure of *Brady* material.

b. Trial Testimony

At the penalty phase hearing, Skalnik essentially repeated the details of the crime that Mr. Cooper had provided in his confession to the police five months before Mr. Cooper and Skalnik were housed together. Skalnik also testified extensively about Mr. Cooper's alleged lack of remorse and bragging about the crime, and that the jury would not convict because he was so young. (Dir. 534)

The cross-examination of Skalnik by Koch, Skalnik's former lawyer,

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[5] Actually Koch left the State Attorney's Office in 1979.

occupies only three pages of the trial transcript. (Dir. 1454-1458) Less than a page and a half of that transcript is devoted to impeachment. The cross- examination is more notable for what it does not contain, than what it does. For example, Koch never asked Skalnik how many times he had been convicted of a felony. Koch simply asked about the charges for which Skalnik was then serving time. Other than a passing reference to a charge of masquerading as a lawyer, Koch made no effort to explore the details of either Skalnik's current or past convictions. (Dir. 1457) Likewise, Koch failed to explore, in any detail, Skalnik's relationship with the government. Koch made no effort to show that Skalnik was promised or expected to receive benefits for his testimony. On re-direct examination, Skalnik testified that he was promised nothing in exchange for his testimony and that he did not expect a sentence reduction. (Dir. 1458-59)

3. Skalnik's Post-Trial Activities and Recantations

In March, 1985 Skalnik was released from custody in Arizona where he was sent to serve the remainder of his Florida sentence. (ROA 577) Upon his return to Florida he worked for Bruce Young, one of the prosecutors in this case, who had by then left the State Attorney's office. (ROA 577, 1403) Skalnik was charged in 1986 with grand larceny (ROA 577) and was booked into jail again in 1988. (ROA. 609) In April of 1989 he plead guilty to charges of grand larceny, in exchange for a

five-year sentence to run current with a Texas sentence. (ROA 578) After his guilty plea, Skalnik met with prosecutors to prepare for his testimony in Mr. Cooper's post conviction proceedings. (ROA 578)

Between the summer of 1988 and February of 1989, Skalnik wrote or at least signed a number of pleadings, letters and affidavits bearing on his testimony in the Cooper case. On August 7, 1988 Skalnik verified a Motion to Dismiss for Prosecutorial Misconduct in which he alleged that "he has always worked in the capacity as an agent for the State." (ROA. 562) He also stated that in Mr. Cooper's case, among others, he was coached in testimony, supplied facts, and instructed how to answer questions about agreements with the state to make it appear that he had no such agreement, when in fact he did. (ROA 563) He also alleged "that the Defendant at all times was told that what he was doing was proper and that such testimony was proper, notwithstanding that such testimony deceived the jury in over fifty (50) cases the Defendant testified in." (ROA. 562)

On February 16, 1989 Skalnik signed an affidavit asserting that Mr. Cooper was placed in his cell so he could obtain information; that the Cooper prosecutors promised that they would take care of him in exchange for his cooperation; and that he was coached prior to his testimony (ROA. 606) In May of 1989 Skalnik revised, initialed and signed an affidavit prepared by an attorney from the Volunteer

Lawyer Resource Center. (ROA. 574) In it he detailed some of his snitching activities prior to Mr. Cooper, discussed how he had been coached prior to his testimony; recounted the prosecutor's statement that Skalnik was going to get out of pending charges based on his cooperation in Cooper; and stated that he was warned about speaking with defense counsel for Mr. Cooper. (ROA. 574-78) At the 3.850 hearing, Skalnik recanted his statements, claiming that they were made in anger. (ROA. 1482)

E. Mitigation Presentation

1. Defense Mitigation Presentation at Trial

At Richard Cooper's penalty phase proceedings, the only witness called by the defense was Juanita Kokx, Mr. Cooper's mother. Ms. Kokx testified that Richard's father was very hard on the children; that on one occasion Richard witnessed his father physically abusing her; and that Richard was not an assertive person. (Dir. 1469-77) After she had testified for a half an hour, the prosecution asked for an ongoing objection to relevance since Ms. Kokx's testimony was "nothing that relates to any of the mitigating circumstances." (Dir. 1479) The objection was overruled, but defense counsel concluded its presentation shortly thereafter. (Dir. 1479-1481) Ms. Kokx's abbreviated testimony did not begin to paint an accurate picture of Richard Cooper's life.

2. Mitigation Fact Witnesses Available to the Defense but Not Presented at Trial

At the 3.850 hearing, counsel presented the testimony of several witnesses to paint a complete picture of Richard Cooper's life from his childhood to the time of trial. They demonstrated first, that Richard's father was not merely "hard" on his children, but repeatedly and violently abused Richard. Second, that Richard's older brother, Donnie continued that abuse. And third, that as a consequence of the abuse at the hands of these older men, Richard Cooper was shaped into a dependent personality easily led by strong-willed older men. These witnesses were willing and able to testify on Richard's behalf, but were not contacted by Richard's trial counsel. A brief summary of their testimony follows:

a. Peggy Jo Cooper-Chipman

Richard Cooper's older sister by seven years, (ROA. 1160) Peggy described their father as a controlling, violent man who mercilessly beat his children on a daily basis. She testified that their father would "bang our heads together. And he would make us grab our ankles and bend over, and he would either beat us with a belt or he would kick us in the butt with the point of his cowboy boots." (ROA. 1161) One of his favorite pastimes was beating the children with a belt until they could not stand. (ROA. 1162) The violence permeated the Cooper household on a daily basis. Peggy stated, "I can hardly ever remember a day going

by where we didn't get hit and beat for some reason or sent to bed without dinner." (ROA. 1165) When asked about a purported five-year period of peace in the family she said: "Peace in our family?…No, sir, never." (ROA. 1170)

Richard received the brunt of their father's abuse. Their father would "pick [Richard] up and throw him against the mobile home. He literally dented the mobile home with Donnie's head. Richie got thrown around a lot." (ROA. 1163) Peggy explained that Richard and his older brother Donnie got a lot of beatings. (ROA. 1163-64) Donnie would make Richard do things he didn't want to do and they would both "get the heck wailed out of them." (ROA. 1164)

Donnie and Richard were especially close. (ROA. 1164) Nonetheless, Donnie was just as controlling and violent as his father. Peggy testified that "Donnie was a control freak and he had to have control. And a lot of times Richie, he mostly drug Richie around and told Richie, you do this or I'll beat you up. And he would. And then we'd tell dad and then dad would beat Donnie. And then Donnie would beat Richie." (ROA. 1163-64) Peggy succinctly summed up life in the Cooper household: "I've never met anyone that had to live through the hell and torture that we did." (ROA. 1167)

When asked about why she did not testify for Richard at trial she stated that nobody invited her to the trial or told her she could testify. (ROA. 1176)

b. Donnie Cooper

Donnie Cooper is Richard's older brother by about five years. (ROA. 111) Donnie described their father as a very hard, strict man who beat his children on a routine basis. Their father began beating Richard when he was barely out of diapers and continued every day thereafter. (ROA. 1133) Donnie explained that he and Richard received the worst of the beatings. (ROA. 1147) For example, their father punched Richard, kicked him, and slammed him up against a wall with his feet off the floor. (ROA. 1118) Their father would punch them with his fist, and beat them with a board, switches, belts and even horsewhips. (ROA. 1119) Donnie described one incident with a horsewhip:

> He had this horsewhip. He come at me first and started slashing the whip at me, just swinging it wildly and I jumped out of the bed. . . . When I got to Richie's area in the bed, he was hitting Richie. But every stroke dad swung he hit me or one of us kids with this whip…but the whole time it was hollering and screaming, a bunch of little kids screaming is what it was.

(ROA. 1136)

This was an average day in the Cooper household. Indeed, Donnie could not "recall ever a time in [his] whole family's life that things were what you call calm." (ROA. 1153)

Richard's father was also a heavy drinker. (ROA. 1122) His cruelty would intensify when he drank. (ROA. 1123) Donnie explained that "it seemed like when

dad drank that he would go to further extremes to punish us than if he hadn't been drinking. *Id*. Additionally, their father – a man who had been to prison for manslaughter and kept guns in the house – even threatened to shoot his children. (ROA. 1120-23)

Throughout their tormented childhood, Donnie and Richard formed a close bond. (ROA. 1118) Donnie and Richard would often run to the hills together to try and escape their father's brutality. (ROA. 1121) Despite this close relationship and the damage their father's beatings had done to the children, Donnie took his frustrations out on Richard and, like their father, brutally abused Richard daily.

Donnie "exercised control over Richie and all [his] siblings." (ROA. 1124) Donnie often would beat Richard. Donnie explained: "I used to get Richie down on the ground and used to pound him in his chest . . . I've punched him in his face. I burned him with a magnifying glass out in the sun." (ROA. 1123) Donnie even agreed that he went to the extent of actually "torturing" Richard. (ROA. 1151)

Needless to say, a life of abuse deeply affected Richard. Donnie explained: "Richie talked about killing himself many times…I believe he tried to cut his wrists a couple of times and stuff. Up on top of the mountain he would get really upset and hit himself in his face and stuff and said I just want to kill myself." (ROA.

1156) Donnie also testified that Richard abused many substances, including marijuana, acid, downers, and even huffed paint. (ROA. 1124)

According to Donnie, he didn't testify at Richard's trial because "[n]obody bothered to involve [him] in it." (ROA. 1148) If someone had said he was needed to testify back at the time of the trial, he would have done so. (ROA. 1159)

c. Ralph Pomeroy

Mr. Pomeroy was the principal of the Queen Creek Elementary School in Queen Creek, Arizona when Richard Cooper was a student. It was a small school of 200 to 255 students in a small town. Mr. Pomeroy testified that he remembered Richard who lived out in the desert in a mobile home without running water. He remembered that Richard's father had a reputation for being a mean and dangerous person, (ROA. 1087), and also that of a heavy drinker who would "beat up the kids when he was drunk." (ROA. 1091) Basically, Richard's father was a man "you didn't dare cross." (ROA. 1088)

Mr. Pomeroy also knew of the violence inflicted on Richard. He knew that Richard had been abused through what the other boys told him, from teachers, and because he saw the marks and bruises on Richard. (ROA. 1084) From talking with Richard he learned that the abuse ranged from hitting, whipping with "belts and things," and punching. (ROA. 1092) Mr. Pomeroy noticed that the abuse occurred

on a regular basis. (ROA. 1086) The abuse was so severe that Mr. Pomeroy would not report any problems Richard had at school because he was afraid it would provoke further abuse. (ROA. 1102)

Overall Mr. Pomeroy felt that Richard "did the best he could under the circumstances." (ROA. 1086) Mr. Pomeroy would have testified on Richard Cooper's behalf if he had been asked to do so by trial counsel. (ROA. 1109)

d. Lisa Harville

Ms. Harville was Richard's girlfriend. (ROA. 1187) Richard and his siblings often told her about their father's abuse. (ROA. 1188) She saw Donnie "abusing Richard quite frequently." *Id.* Donnie picked up where their father left off and beat Richard on a daily basis. (ROA. 1189) Lisa explained: "[Richard] was always scared of Donnie and he said that he thought since his dad had passed away that there wouldn't be that abuse anymore. But then Donnie stepped in and more or less took the place of his father and continued beating him." (ROA. 1191)

Lisa also knew of Richard's drug use: "I've seen Richie drunk, smoking pot, tripping on acid, anything to escape reality." (ROA. 1192) She also saw Richard "huffing" glue and gasoline. (ROA. 1192-93) She talked to Richard the night of the murder and could tell he was high. (ROA. 1194-95) If she had been contacted she would have testified at trial. (ROA. 1198)

3. Testimony of Co-Defendants

a. Jeffrey McCoy

The State brought Mr. McCoy to testify in the Walton sentencing – held at the same time as the Cooper sentencing. His availability to testify was disclosed to defense counsel the morning of sentencing as he had just agreed to plead guilty in exchange for a life sentence. The State vehemently opposed Mr. Cooper's request for a continuance so that they could debrief McCoy before cross-examining him. Prosecutor Crow told the court, "we feel there is absolutely nothing mitigating he could say about Mr. Cooper." (Dir. 394) When pressed, Crow suggested that Koch could question McCoy about mitigating circumstances from the stand, but adamantly opposed a delay. (Dir. 394) Ultimately, Crow withdrew McCoy as a witness and the Court denied the motion. (Dir. 396)

At the evidentiary hearing, McCoy testified that all of the co-defendants were taking drugs at the time of the offense. (ROA. 1425) He also testified that he heard shots being fired when Richard Cooper was already outside the house running to the car. (ROA. 1427) At the trial of co-defendant Van Royal, McCoy described how his older brother J.D. Walton influenced the others, supplied them with drugs and let them hang out at his house. (Van Royal Record on Appeal, pgs. 1560-62)[6]

[6] Cooper respectfully requests that the Court take judicial notice of the Record On Appeal in the Van Royal case FSC Case no 66144.

McCoy testified that Walton was a "dominant figure" who "called all the shots" the night of the crime. (Van Royal Record on Appeal, pgs. 1584-85)

b. Terry Van Royal

Another co-defendant, Terry Van Royal, also testified at the evidentiary hearing. Mr. Van Royal testified Richard Cooper was under the influence of drugs at the time of the incident. (ROA. 1454-55) He also stated that J. D. Walton was a dominant personality and that all of the co-defendants idolized him at the time. (ROA. 1449) More importantly, however, Mr. Van Royal confirmed Jeffrey McCoy's testimony that Richard Cooper did not fire the final shots. (ROA. 1458) Terry Van Royal was tried, convicted and sentenced to death. His sentence was premised in part on the judge's finding that Van Royal killed Steven Fridella. *See Van Royal v. State*, 497 So. 2d 625, 629 (Fla. 1986) (Ehrlich, J. concurring). Mr. Van Royal's death sentence was set aside because of the lengthy delay between sentencing and the issuance of a sentencing memorandum.

4. Testimony of Mental Health Experts

At Richard Cooper's penalty phase, trial counsel presented no mental health testimony, despite having retained Dr. Sidney Merin to develop a mental health background on Mr. Cooper. Merin did testify at Richard Cooper's sentencing hearing and again at the evidentiary hearing. However, at the time when it mattered

most – when Merin might be able to influence whether Richard Cooper lived or died – he knew very little about Richard Cooper. Indeed, Merin's conclusions at the sentencing hearing were based entirely on his "conversations with Mr. Cooper, the testing and [the] sparse information from Mr. Crider's office." (ROA. 1683)

At the evidentiary hearing, collateral counsel presented mental health testimony from an expert who did know Richard Cooper. Dr. Brad Fisher is a clinical forensic psychologist and was accepted as an expert in these proceedings. (ROA. 1228) Dr. Fisher first became involved in this case in 1989, when he conducted an evaluation of Richard Cooper. (ROA. 1229) At that time, Dr. Fisher also made contact with various family members, and reviewed extensive background materials, including birth, hospital, school, jail and medical records pertaining to the defendant, and affidavits from family and friends of Richard. (ROA. 1229-31) He also reviewed the deposition and sentencing testimony of Merin, the defense mental health expert at trial. *Id*. He conducted a new evaluation in 1999, sat in on portions of the evidentiary hearing and reviewed the testimony of the witnesses. *Id*. He also had the results of psychological testing conducted by himself both in 1989 and 1999 and that of Merin. *Id*.

Dr. Fisher explained that the background investigation and materials he reviewed were crucial to a thorough mental health examination:

> The data that I got was useful to me – critical to me. You know, it's not unusual. It is, in fact, the norm that in a case like this you receive data about the family and the background and the – the possibility of whether drugs have been abused, alcohol has been abused, and the nature and extent of all that. I have all that. I don't think [Merin] did. I think all he had was – I may be mistaken, but it was my understanding that all he had was the self-report from Richard and the conversations with the attorneys.

(ROA. 1240)

Armed with sufficient background information, Dr. Fisher was able to reach four major conclusions regarding Richard Cooper. First, Richard Cooper was the product of a physically abusive developmental background. (ROA. 1233) Dr. Fisher testified that Richard "is a person who from the get go, meaning age zero, through when he leaves, was the product of an abusive home, specifically the father before the father's death and following after it through Donnie his brother, of physical abuse." *Id*. Second, Richard Cooper has a dependent personality disorder. (ROA. 1234) Dr. Fisher explained that the description of Richard up through his time in Ohio and when he came to Florida "is consistent with someone who is not a leader, but who is the follower." *Id*. Richard Cooper would adjust well in incarceration. *Id*. Finally, Richard Cooper suffers from brain damage. (ROA. 1236) Indeed, Richard's history of substance abuse and the beatings he continuously received as a child likely led to neurological difficulties. *Id*.

F. Public Records Litigation

In post-conviction proceedings Mr. Cooper repeatedly and unsuccessfully sought disclosure of records pertaining to Mr. Skalnik, the jailhouse snitch, pursuant to Chapter 119, Florida Statutes.

1. The 1988 Public Records Request

Cooper's original post conviction counsel, Thaddeus Miller, filed a public records request on November 11, 1988 to prepare for the drafting of the original 3.850. The first request sought "any and all Sixth Judicial Circuit files and records . . . relating to Mr. Cooper and any witnesses or potential witnesses relating to the crime for which Mr. Cooper was convicted." (Supp. 6/15/95 Motion to Continue, Tab 2). Mr. Cooper made another request in January of 1989, seeking "any and all Sixth Judicial Circuit State Attorney files and records . . . relating to Mr. Paul Skalnik in any cases in which he testified or provided information to the State, including but not limited to cases involving [eleven specifically named defendants]." (Supp. 6/15/95 Motion to Continue, Tab 7). In response to this request, the State provided redacted public records. The State's response to the Miller public records request did not assert that it was withholding responsive documents because they were exempt from production as public records. Nor did it specify the grounds for the numerous redactions in the documents provided. Counsel subsequently learned that there were numerous Skalnik related documents that the

State withheld. Miller therefore was forced to file the original and amended 3.850 without the benefit of what he was entitled to under Chapter 119.

2. The 1995 Public Records Request

a. The Request

On June 14, 1995, subsequent post-conviction counsel requested all public records regarding Mr. Cooper's case and all public records in the possession of said State Attorney relating to Paul E. Skalnik. That request specifically asked the State to assert any exemptions with particularity as the Public Records Act requires.[7]

b. The Response

On June 23, 1995, the State Attorney responded to this public records request listing the cases in which Mr. Skalnik appeared as a defendant, and those in which he appeared as a witness for the State. It asserted a blanket – not document-by-document, but case-by-case manner – a variety of public records exemptions. (Supp. 2/22/96 Notice of Filing). Eventually, the State produced thousands of pages of documents to Mr. Cooper, many of which contain redactions. The State

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[7] The request stated, "With respect to **each such document** claimed as exempt,…
(a) identify and describe the document claimed as exempt, including the author, date, subject matter, and to whom, if anyone, it was sent; (b) state the basis of the exemption claimed, including the statutory citation to any exemption created or afforded by statute; and (c) state with particularity the reason for his conclusion that the record is exempt. (emphasis supplied)

also gave Judge Downey an undesignated and undetermined number of documents for his *in-camera* inspection.

To this day, Mr. Cooper does not know how many documents were submitted for *in-camera* inspection, but he believes the number is quite large. As Judge Downey stated at a March 1, 1996, hearing: "I've got eight boxes. Boxes that are that big, that high, you know." (ROA 896) Many of these documents, according to Judge Downey, pertain to "Skalnik supply[ing] statements to the Sheriff's Office from what he learned while he was in jail." (ROA 947)

c. Litigation Concerning Withheld/Redacted Documents

While the State purported to comply with the 1995 request, it never--despite Mr. Cooper's repeated requests--identified with particularity the exemptions that apply either to the withheld documents or to the redacted documents. The State's only attempt to assert exemptions came in a letter to Mr. Cooper's counsel in which it listed a number of exemptions, but made no effort to explain which exemptions apply to which documents and why. (Supp. 2/22/96 Notice of Filing)

Judge Downey refused to require the State to comply with the requirements for asserting exemptions. Indeed, Judge Downey ruled precisely contrary to the "with particularity" requirement in Chapter 119. In an order on August 30, 1996, he ruled that the State was not required to state in writing and with particularity its

reasons for concluding that documents submitted either to Mr. Cooper or to the court for in-camera inspection were exempt. (Supp. 9/3/96 Order on Def. Motion to Compel Discovery of Ch. 119 Documents)[8]

Judge Downey ordered Mr. Cooper to provide the State with a copy of each document about which he desired an explanation. (Supp. 9/3/96 Order Denying Motion to Compel, pg. 3) Only then would the State be required to follow the provisions of Chapter 119 regarding the identification and statutory citation of exemptions. Mr. Cooper filed a notice of compliance stating that he could find "no principled basis" to ask the State to state the basis of the exemption for some, but not all of the documents. Thus, Mr. Cooper requested that the State:

> state the basis of each exemption claimed to apply to each document referred to in [Judge Downey's] order, including the statutory citation to each such exemption created or afforded by statute, and state in writing and particularity the reasons for the State Attorney's conclusion that each such document is exempt.

(Supp. 9/17/96 Def. Notice of Compliance , pg. 1-2)

The State did not respond to this Notice, and Mr. Cooper moved to compel the State to respond. (Supp. 10/24/96 Def. Motion to Compel Pltff. to Provide Information) Judge Downey denied this motion on November 8, 1996. (Supp.

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[8] This Order was amended on 9/19/96, to clarify that the State had not waived any objections to records subject to the 1989 request or that were provided in response to the 1989 request. (Supp. 9/19/96 Amended Order 96 Order on Def. Motion to Compel Discovery of Ch. 119 Documents pg. 1-2).

11/14/96 Order Denying Def. Motion to Compel)

On November 26, 1996, Mr. Cooper filed a petition for Writ of Mandamus in this Court, Case No. 89,390, Richard M. Cooper v. the Honorable Brandt C. Downey III, as Circuit Judge for the Sixth Judicial Circuit, and State Attorney for the Sixth Judicial Circuit in and for Pinellas County. In the petition for mandamus, Mr. Cooper asked this Court to issue a writ first, compelling Judge Downey to require the State to assert any exemption it claims to the redacted documents provided to him in response to the 1988 and 1995 public records requests in conformance with Chapter 119. Second to provide Mr. Cooper with a list of documents submitted to Judge Downey for in-camera inspection, stating with particularity the reason for its conclusion that the documents are exempt. On February 19, 1997, this Court entered its order denying, without opinion, Mr. Cooper's petition for a writ of mandamus. Justices Kogan, Shaw, and Anstead dissented, noting that they would issue an order to show cause. (Supp. 2/24/97 Order Denying Petition for Writ of Mandamus)

SUMMARY OF ARGUMENT

In June of 1982 Richard Cooper was eighteen years old and the survivor of repeated extreme physical and emotional abuse meted out by his father and older brother. Richard tried to cope with his difficult life by self medicating with illegal drugs, alcohol and huffing solvents. The years of abuse at the hands of older men shaped Richard Cooper into a dependent personality, a young man who was willing to follow a strong male leader.

On the night of June 18, 1982, after abusing drugs, Richard Cooper went along with his substantially older "friend" J. D. Walton, Walton's younger brother, Jeff McCoy, and Terry Van Royal to steal drugs and money from the home of Steven Fridella. Things did not go as planned and in the heat of a frenzied moment, and at the insistence of J. D. Walton, Van Royal and Richard fired shotgun blasts that killed three men. When he was later awaiting trial, Richard was so mentally distraught that he attempted suicide in jail and had to be placed on anti-psychotic medication.

Today, Richard Cooper sits on death row because of the complicity between and deception of a conniving snitch and the State. The misdeeds of the State and its snitch at Mr. Cooper's penalty phase proceedings were actually reinforced by Mr. Cooper's trial counsel who was seriously ethically compromised.

Indeed, Mr. Cooper's trial counsel previously represented the very snitch that the State colluded with to obtain Mr. Cooper's death sentence. These fundamental deprivations of Mr. Cooper's constitutional rights were further compounded by the fact that no one, not trial counsel, the jury or the judge knew who Richard Cooper was and why he did not deserve the death penalty.

The State's chief witness in Mr. Cooper's penalty phase was Paul Skalnik, a snitch who falsely testified that Richard Cooper was the first defendant against whom he had testified when in fact he had testified against ten other defendants. The State knew that Skalnik provided false testimony. The State did nothing to correct Skalnik's deception and reinforced his lies throughout the trial. Further, although Skalnik disclaimed any deals with the State, he did receive substantial benefits for his testimony. Again, such benefits were never disclosed during Mr. Cooper's trial. To this day, the State continues to obscure the truth by denying Mr. Cooper access to public records that could substantiate his claims.

Law enforcement officers deliberately used Skalnik to try to elicit information from Mr. Cooper about the crime. Indeed, Skalnik purposefully crafted his testimony to provide aggravators to support Richard Cooper's death sentence. Skalnik testified that he obtained confessions from Mr. Cooper while jailed with him and told the jury about Mr. Cooper's alleged lack of remorse and his purported

defense strategy. This damning, albeit fabricated testimony, was never adequately challenged by Richard Cooper's trial counsel. The reason Skalnik was not investigated or impeached is because Richard Cooper's trial counsel previously represented Skalnik – a fact that was never disclosed to the trial court. If the foul play of the State and its snitch were not enough to deprive Richard Cooper of a fair trial, Mr. Cooper's own counsel inflicted the most heinous foul blow by placing the snitch's interests above Richard Cooper's – the defendant on trial for his life.

The only evidence the State presented at the penalty phase was the testimony of Skalnik. The only evidence the defense produced was the testimony of Richard Cooper's mother, Juanita Kokx. Ms. Kokx basically testified that Richard's father had been tough on him. This is what the jury thought it knew about Richard Cooper when it sentenced him to death: he confessed to Skalnik; he showed no remorse; he thought he could escape a death sentence by acting crazy; and his father had been tough on him. What the jury did not know is that Richard Cooper suffered extreme emotional and physical abuse at the hands of his father and brother; his childhood was one of poverty and depravation; the torment he suffered throughout his life caused him to turn to substance and inhalant abuse at a young age; and throughout his life he was easily dominated.

Richard Cooper is not the man the State portrayed at the penalty phase.

Unfortunately, trial counsel did not know who Richard Cooper was. Due to the foul deeds of the State, its snitch, and Mr. Cooper's own counsel, neither the judge nor jury knew Richard Cooper before passing judgment on whether he should live or die.

ARGUMENT

Because of the misdeeds of the prosecution, and the conflicts and incompetence of trial counsel, the judge and jury were prevented from learning accurate information about Richard Cooper and his role in the murders.

I. THE PROSECUTION MADE ITS CASE THROUGH A SERIES OF FOUL BLOWS BEFORE AND DURING TRIAL.

In their zeal to obtain a conviction and death sentence, the State Attorneys prosecuting Mr. Cooper lost sight of their role in the criminal justice system. As Justice Sutherland stated, nearly fifty years before the trial in this cause, the prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78 (1935).

In this case, the State was not satisfied when it obtained a conviction against Mr. Cooper, so the prosecutors resorted to numerous foul blows in their efforts to secure a death sentence for Mr. Cooper. Their improper methods procured a wrongful sentence of death. To begin with, the State played fast and loose with the facts throughout the proceedings. They were willing to say whatever it took to prevail at every stage of the proceeding.

A. The Evidence Introduced And Argued by the State At Trial

1. Skalnik's Relationship with Police and Prosecutors

Skalnik testified at the penalty phase, that he obtained the confessions from Cooper while jailed with him.[9] In a pre-trial hearing on the defense's *Henry /Massiah* motion in limine, Skalnik testified that Cooper was the first defendant against whom he had testified. Later he amended that to say that he had actually testified in "about two or three cases." But when defense counsel tried to ascertain whether Skalnik routinely provided information to the government, the State objected since Skalnik had testified that Cooper was the first person against whom Skalnik had testified. (Dir. 492) The State reiterated that position in its argument on the motion. (Dir. 527) Skalnik claimed that he was not promised anything for his testimony and that he could not get his sentence reduced. (Dir. 1458-59)

[9] Although he did admit that he had informed on 28 or 30 people all together.

2. Cooper's Role In The Offense

Skalnik was the State's only substantive penalty phase witness. Skalnik's testimony was not essential to establish guilt because Cooper had himself already provided a confession to investigators. So, being the smart and experienced informant that he was, Skalnik crafted his testimony to suit the prosecution's purposes, he provided testimony on aggravators to support a death sentence.

At the penalty phase hearing, Skalnik testified to a number of "jailhouse admissions" from Cooper, most of which could have been gleaned from Cooper's five month old confession. He testified extensively about Mr. Cooper's reported lack of remorse and bragging about the crime. According to Skalnik, when Cooper was told by co-defendant Walton that the victims were going to be killed, he said "Good." (Dir. 1446) Skalnik also claimed that Mr. Cooper told him the shooting was "not a big deal." (Dir. 1448) He even claimed that Cooper bragged about the offense. (Dir. 1435) Over defense objection, Skalnik was allowed to testify that Cooper showed no remorse. (Dir. 1448)

Skalnik also testified about Cooper's purported defense strategy. Skalnik told the jury that Cooper's defense lawyers had already had him see one psychiatrist and were scheduling another. Skalnik was asked whether Cooper ever discussed with him what he (Cooper) thought his chances were of receiving the

death penalty. Skalnik said that Cooper told him "[N]o jury would ever sentence him to the death chair because he's 19-years-old and because he's got that little baby face, and with the help of friends from his community and the psychiatrist saying that he's a little unstable and having only an 8th Grade education or less that they would never convict." (Dir. 1453**)**

With regard to the actual murder, Skalnik said that Mr. Cooper admitted firing only two shots during the entire episode, then later admitted to firing more than two shots. Upon being confronted with the discrepancy he said he was in error and had only fired twice. (Dir. 1444) According to Skalnik, Mr. Cooper first said he shot one victim twice, the first shot missing across the man's chest. (Dir. 1444) Mr. Cooper and some of the others then left the house. Someone, Skalnik did not know who, hollered to Mr. Cooper that the man he had shot was getting back up, and Mr. Cooper then reloaded the shotgun, returned to the house, and shot the man near the back of his head.

Skalnik's testimony provided primary basis for two aggravators: HAC and CCP. As the sole penalty phase witness, Skalnik's credibility is of utmost importance. *Rogers v. State*, 782 So. 2d 373, 384-85 (Fla. 2001) ("Whenever the government's case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness's credibility is an important

issue in the case." (citations omitted))

B. What The State Knew All Along

1. Skalnik Lied In Order to Curry Favor With The Government

The truth about Skalnik began to emerge in the 3.850 proceedings. Thus we now know the following. Paul Skalnik began working for the state to obtain confessions from his fellow inmates in 1981. After his release from jail in 1981 and carrying through until 1982, Skalnik continued to work on the street as informant for Detective Rusher. (ROA. 575, 1417) When he returned to jail in 1982, Skalnik participated in an investigation to help jail officials catch an inmate smuggling drugs into the jail and resumed working as a "confidential informant on jail activities for Detective O'Brian." (ROA. 611) By the time of Mr. Cooper's trial, Skalnik had in fact testified against **ten** defendants prior to Richard Cooper.

Skalnik had a good track record as a "reliable" snitch. So reliable, in fact that he had received death threats from other inmates and was housed in a protective custody cell when Mr. Cooper was moved in with him. While the government was smart enough to refrain from cutting any advance deals with Skalnik, he knew from his course of conduct that he would benefit from providing the State with information obtained from Mr. Cooper. He actually did secure substantial benefits; he was able to stay out of Florida prison, being incarcerated

first in jails and later being transferred to the Arizona prison system. Additionally, prior to his departure to Arizona, at Skalnik's request Sheriff's deputies "checked him out of jail" and took him to have lunch with his family.

Before and at Mr. Cooper's trial, Skalnik disclaimed any deals with the State. But after the bloom was off and Skalnik no longer believed he was getting the benefit of his bargain, Skalnik made the following statements about his relationship with the State:

He was used as a jailhouse and street informant in nearly 50 cases. (ROA. 562, 572, 574)

He had been offered leniency and other forms of favored treatment in exchange for cooperation with the State. (ROA. 576)

He was coached on what to do and what to stay on the stand. (ROA. 562, 555-56, 606)

Mr. Cooper was placed in his cell so he could obtain incriminating statements. (ROA. 575, 606)

He expected to receive a reward for his testimony against Mr. Cooper from the State after trial. (ROA. 576, 606)

By the time Skalnik was called to testify in Mr. Cooper's 3.850 evidentiary hearing, however, he was back to being at peace with the State. He testified that all

the foregoing statements were made in anger, but were untrue. Given Skalnik's track record, it is as hard for an outsider to determine when Skalnik is telling the truth as it is for him to decide what is truthful or not. Despite Skalnik's very loose grip on truthfulness, the limited records on Skalnik corroborate his assertions of receiving favorable treatment in classification, housing placement, and contact visits. When Skalnik testified against Mr. Cooper he was already an experienced snitch, and former law enforcement officer. The suggestion that he would testify out of the goodness of his heart, with no promise of reward is absurd.

2. Mr. Cooper's Role in the Offense

Mr. Cooper's state of mind at the time he allegedly made the "lack of remorse" comments to Skalnik must be viewed in light of what we now know about Mr. Cooper's mental health at the time. During his pre-trial incarceration, Richard Cooper was so mentally ill that he repeatedly mutilated himself. Jail medical staff even had to administer the psychotropic drug Mellaril in their effort to stabilize him. (ROA. 612-31) To the extent that Skalnik's uncorroborated statements about Mr. Cooper's attitude toward the crime can be believed to be anything more than pure fabrication, they must be viewed in light of his mental illness at the time.

Likewise, Mr. Cooper's admission that he returned to the house to fire additional shots at Fridella must also be discounted in light of the subsequent

testimony elicited by the state. At the trial of co-defendant Van Royal which took place nine months after Mr. Cooper's trial, the state had the benefit of the testimony of co-defendant McCoy. McCoy's testimony was deemed credible, and was used by the Van Royal trial court to establish that Van Royal killed Fridella. Whether Mr. Cooper confessed to returning to fire the final shots out of delirium, mental illness, or a desire to protect his friends was never established on the record. But the facts now show that the State knew, if not at Mr. Cooper's trial, then by sentencing, that Mr. Cooper did not fire the final shot at Fridella.

C. The State's Case was Based on Lies[10]

1. *Giglio* Claim

Skalnik's critical penalty phase testimony was procured by and consisted of a pack of lies in violation of the prosecution's obligations under *Giglio*. In order to establish a *Giglio* violation, a defendant must show "that the testimony was false; 2) the prosecutor knew the testimony was false; and 3) the statement was material." *Ventura v. State*, 794 So. 2d 553, 562; (Fla. 2001) *Rose v. State*, 744 So. 2d 629, 635 (Fla. 2000) (citing *Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998)); *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). Unlike a *Brady* claim, in a *Giglio* claim

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[10] Both the *Giglio* and *Brady* claims entail mixed questions of law and fact and are therefore subject to an independent review, with deference to the trial courts findings of historical fact. *Rogers v. State,* 782 So. 2d 373, 377(Fla. 2001); *Way v. State,* 760 So.2d 903, 914 (Fla. 2000).

the defendant need not demonstrate a reasonable probability that the **result** of the pleading would be different. Instead, defendant need merely show that "there is a reasonable probability that the false evidence **may have affected** the judgment of the jury." *Ventura*, 794 So. 2d at 563 (citing *Routly*, 590 So. 2d at 400 (emphasis supplied)). That is, the record must suggest a reasonable likelihood that during deliberations the jurors (or in this case the judge) could have considered the false evidence or argument. This does not entail an inquiry into whether the evidence might have made a difference in the outcome.

At the January 10th pre-trial hearing, Skalnik falsely testified that Mr. Cooper was the first case in which he testified against a defendant. Yet at the time of Skalnik's testimony the State knew that Skalnik had testified against other defendants during his previous incarceration beginning in 1981, two years before he met Richard Cooper. (ROA. 784, 1823-25) In actuality, Skalnik had testified against ten defendants in fifteen different cases prior to meeting Richard Cooper. Yet, the government let Skalnik falsely testify that the first time he provided law enforcement with information was in the summer of 1983. (Dir. 487) The State attempts to characterize the testimony as "ambiguous" rather than false. (ROA. 1823-24)

Yet rather than step forward and correct the "ambiguity" created by his

witness' testimony, Crow reinforced and expounded on Skalnik's lie. During the hearing when Mr. Cooper's counsel tried to elicit information concerning Skalnik's routine practice of providing information to the state, the State interposed an objection stating, "It's indicated that Mr. Cooper was the first individual in this that he provided for." (Dir. 492) Later in his argument on the motions to preclude or suppress Skalnik's testimony, the prosecutor again argued, "The testimony is that this was the first instance of the case that he has testified he provided information. . . ." (Dir. 527)

Crow admits that he knew that Skalnik's testimony was false. The State Attorney's Office had used Skalnik extensively in the three year period prior to Mr. Cooper's trial. In 1981, Crow himself prosecuted a murder case in which Skalnik testified. *See State v. Pfluger*, Case no. CRC81-01715CFASO. Finally, in a post conviction pleading, the State asserts that Crow took Koch aside during the hearing to remind him that Skalnik had given prior testimony and offered to allow Koch to re-open the questioning. (ROA. 784) Koch declined, and the State allowed the false testimony to stand uncorrected. The prosecutor's private conversation with defense counsel did not fulfill the State's obligation to correct false testimony. Thus the second element of the *Giglio* claim is met.

Finally, Skalnik's testimony was material. The materiality standard under

Giglio is more defense-friendly than that under Brady. Thus, rather than having to show a reasonable probability that the result of the proceeding would have been different, under *Giglio*, the defendant need only show that "there is a reasonable probability that the false evidence may have affected the judgment of the jury." *Ventura*, 794 So. at 563 (citing *Routly*, 590 So. 2d at 400). The trial court stated that it not only considered, but relied on the testimony that Mr. Cooper was the first person against whom Skalnik testified in reaching his decision on the *Henry/Massiah* claim. Skalnik's false testimony therefore had an effect on the trial court's decision. Most likely, truthful testimony at the pre-trial hearing would have resulted in no testimony before the jury – thus would have affected deliberations.

The other lie extracted by the State and uttered by Skalnik was Skalnik's assertion to the jury that he had been promised nothing in exchange for his testimony. While no evidence of a concrete deal was discovered during the 3.850 proceedings,[11] Mr. Cooper did put into evidence numerous post-trial statements by Skalnik setting out his expectation of reward for his testimony. Skalnik testified as to the government's promises to "take care" of him and how they coached him to avoid exposing the agreement. As courts have noted, the fact that a promise is

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11 Of course, Cooper was precluded from examining the documents in the eight boxes of sealed records wrongfully withheld in the public records litigation.

tentative rather than explicit **increases** the significance of that deal for purposes of assessing credibility. *Porterfield v. State*, 472 So. 2d 882, 884 (Fla. 1st DCA 1985) (citing *Campbell v. Reed*, 594 F. 2d 4 (4th Cir. 1979)) (emphasis supplied). "Since a tentative promise of leniency could be interpreted by the witness as being contingent on his testimony, there would be an even greater incentive for him to 'make his testimony pleasing to the prosecutor.'" *Id*. Had the jury been told the truth, it would have considered the fact that Skalnik expected favorable treatment in assessing his credibility. Skalnik's lie was material and this case should be remanded for a new trial.

This case provides a stark contrast to the facts in *Ventura*. In that case the wrongfully undisclosed information was found to be immaterial because there was significant impeachment of the witness and corroboration of the witnesses statements. Neither element is present here. As discussed more fully below, there was no real impeachment of Skalnik and none of his critical testimony concerning aggravators was corroborated. In sum, the State's promotion of Skalnik's lies was devastating to Mr. Cooper.

2. *Henry/Massiah* Claim

Although the State perpetuated Skalnik's lies about his background and has continuously prevented Mr. Cooper from obtaining complete information about

Skalnik's career as a jailhouse informant, the record establishes that Skalnik was acting as an agent of the State when he obtained information from Mr. Cooper. Law enforcement officers, prohibited from directly interrogating Mr. Cooper on the murder charge, used Skalnik to deliberately elicit information from Mr. Cooper about the crime in violation of Mr. Cooper's Sixth Amendment right to counsel. *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S. 264 (1980). As this Court explained in *Rolling v. State*, 695 So. 2d 278, 291 (Fla. 1997), the "violation of a defendant's right to counsel turns on whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively." The "active efforts" requirement may be satisfied by "the intentional placement of an inmate in a certain location in order that the inmate may elicit conversations from a defendant." *Rolling*, 695 So. 2d at 291 (citing with approval the trial court's reasoning).

The evidence detailed in the fact section shows Skalnik's extensive history as a government agent prior to the time that Mr. Cooper was placed into his cell. Had the true facts been known to the trial court it is likely that the trial court would have found Skalnik to be an agent of the state and precluded his testimony. Proof of this assertion is found in the trial court's ruling during the hearing on motion for new trial. At that hearing Crider asserted that Skalnik was an agent of the state

because his snitching was part of an ongoing "course of conduct" in dealing with the state. (Dir. 372-73) The trial court did not reject that argument on the law, but rather on the facts, finding that Skalnik may have done more informing after Mr. Cooper, but had not been a snitch as of the time he informed on Mr. Cooper.

The colloquy begins with the Court:

> Court: Just because I make a good witness and I am smart, does that make me an agent of the state?
>
> Crider: If there was a course of conduct where you did it over numerous occasions where you had testified against some ten or twenty people or given testimony against twenty or so individuals.
>
> Court: But that's not the situation. I think on the record it indicates as far as this particular conversation, notes or anything of that nature. He may have done more later. But what happened then, I just don't see it as an agent of the state.
> (Dir. 377-78)

Thus, this Court should find that the sum of the evidence supports Mr. Cooper's assertion that Skalnik was acting as an agent of the State when he obtained information from Mr. Cooper. Alternatively, this Court should reject all of Skalnik's testimony as wholly unreliable given his recantations. Either way, the Court should remand for a new penalty phase trial excluding Skalnik's testimony.

3. State's Deception At Sentencing

In addition to Skalnik's false testimony, the State itself deceived the trial court and defense counsel about the availability of mitigating evidence. On the

morning of sentencing, the state sprung the availability of McCoy on defense counsel. When Mr. Cooper's counsel appropriately requested a continuance in order to debrief McCoy to learn of possible mitigating testimony, the State vehemently objected. Instead, it suggested that Mr. Cooper's counsel explore mitigation on cross examination --a recommendation that counsel correctly declined. When defense counsel pressed further on the need to interview McCoy, the State assured the court that McCoy had had "absolutely nothing mitigating he could say about Mr. Cooper." (Dir. 394) Finally, rather than risk a possible continuance, the State withdrew McCoy as a witness.

The State's assertion about McCoy's testimony is a bald faced lie. Either the prosecutors had debriefed McCoy and knew that he had not only mitigating, but exculpatory testimony. Or they had not debriefed McCoy and therefore had no basis to claim that McCoy could not offer mitigation. As for mitigators, McCoy ultimately did testify that Walton exercised substantial control over the other defendants – and would have provided evidence in support of a statutory mitigator. (Van Royal Record On Appeal pp. 1581, 1584-85) Moreover, McCoy also testified that Mr. Cooper was the first to return to the car and stayed there – thus casting serious doubt on the State's assertion that Mr. Cooper returned to the house to shoot Fridella. (Van Royal Record On Appeal p. 1586)

Richard Cooper's death sentence cannot be premised on lies perpetuated and uttered by the State. This case must be remanded for a new sentencing hearing in order that the truth can be presented to jury and sentencing judge.

D. The State Suppressed Exculpatory and Impeaching Evidence

In addition to the State's lies and perpetuation of lies, the State failed to provide Mr. Cooper with material that would either exculpate him or could have been used to impeach state witnesses. Judge Downey rejected this claim, finding that Mr. Cooper failed to prove the existence of any such documents. Yet during the course of the 3.850 litigation the State deposited several boxes of documents, mostly related to Skalnik,[12] with the court. To this day, Mr. Cooper's counsel have been denied access to those documents. *See* Argument II below.

The failure to provide the defense with documents concerning Skalnik was a *Brady* violation. There are three components to a *Brady* violation: "1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued." *Ventura*, 794 So. 2d at 561; *Rose*, 774 So. 2d at 634.

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[12] Judge Downey reviewed the boxes and said "there are a lot of times that Skalnik supplied statements to the Sheriff's office while he was in jail." (ROA- 947)

First, every piece of evidence concerning Skalnik's prior course of dealing with the state bears directly on the credibility of his testimony and every bit of it should have been produced as impeachment material. Second, even on the first day of trial, prosecutor Crow was not certain whether or not he had provided defense counsel with information about Skalnik's prior testimony and orally informed Koch about some of Skalnik's past. (ROA. 784) Indeed, the State is still withholding that evidence in the form of the unproduced public records. Thus the State's actions must be deemed willful.

Finally, Mr. Cooper was severely prejudiced by the withholding of this evidence. The prejudice prong is satisfied by showing that "if the evidence had been disclosed to the defense, the result of the proceedings would have been different." *Rogers v. State*, 782 So. 2d 373, 378 (Fla. 2001). Although Mr. Cooper's counsel were improperly precluded from reviewing both *Brady* material and public records concerning Skalnik's previous testimony, the State's own list of the cases in which Skalnik testified is astounding. Skalnik testified in at least 15 criminal cases involving 10 defendants in cases that were opened prior to the opening of the Mr. Cooper's file. Post-conviction counsel have, however, been hampered in their efforts to demonstrate the complete extent and nature of the relationship between Skalnik and the State because they have been continuously

deprived of access to the public records relating to Skalnik.

If, however, the trial court had known about Skalnik's lengthy course of dealings with the State, it would have been far more likely to find him an agent of the State and preclude his testimony under *Henry.* Secondarily, if the testimony were nonetheless permitted, those dealings could have been used to impeach Skalnik's credibility at the penalty phase of the trial.

The State cannot escape its duties under *Brady* by contending counsel did not exercise due diligence in obtaining information on Skalnik in discovery. This Court has specifically held that due diligence is not the test for *Brady.* Rather, the "'ultimate test' . . . is whether 'confidence . . . is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.'" *Way v. State* 760 So. 2d 903, 912 (Fla. 2000) (citing *Young v. State*, 739 So. 2d 553 (Fla. 1999)). Where the State possesses information about a witness' lengthy, repeated, and on-going relationship with the State, yet fails to provide that information in discovery, the Court's confidence in the proceedings must be shaken to the core.

THE PROSECUTION PERPETUATED ITS DECEPTION AFTER TRIAL BY WRONGFULLY RETAINING PUBLIC RECORDS RELATED TO SKALNIK.

After obtaining the much sought after judgment and sentence, the State

continued its foul blows by preventing defense counsel access to exculpatory and impeaching materials in its handling of Mr. Cooper's public record request.

A. Introduction

In November of 1988, while preparing his first 3.850 motion, Mr. Cooper requested public records from the State. Now, more than thirteen years later, the State still has not complied with Chapter 119 in responding to that request. The State not only refused to provide Mr. Cooper access to documents essential to the preparation of his 3.850 motion, but also refused to provide him with any meaningful explanation as to why those documents were withheld. Judge Downey refused to require the State to perform its statutory duty to specify with particularity the exemptions on which it was relying for each and every document withheld and for each and every redaction in the documents produced. With Judge Downey's ruling, the State excluded Mr. Cooper, Judge Downey himself, and even this Court from the determination of whether the asserted exemptions applied. This is not a mere technical violation of the statute; it is a violation of Mr. Cooper's most fundamental state and federal due process rights. Mr. Cooper was severely prejudiced by being forced to proceed to hearing on his 3.850 motion without all the necessary evidence. The time has come for this Court to right that wrong and grant Mr. Cooper the information to which he is entitled under Chapter 119.

B. Chapter 119 Requires the State Attorney to State with Particularity the Basis for Any Claimed Exemptions

Under Florida law "all state, county, and municipal records shall at all times be open for a personal inspection by any person." § 119.01(1), Fla. Stat. (1995); art. I, § 24 Fla. Const. Courts must construe the Public Records Act "to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974); *see also City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971) (statute's purpose is "to block evasive techniques"). Any exemptions from disclosure must be construed **narrowly**. *Tribune Co. v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986). And of course, the State must disclose any *Brady* material even if exempt under Chapter 119. *Walton v. Dugger*, 634 So. 2d 1059, 1062 (Fla. 1993). A records custodian who contends that a record, or any part of a record, is exempt must: (1) state the basis of the exemption which applies to the record, including the statutory citation; and (2) if requested by a person seeking public records, **state in writing and with particularity the reasons for concluding the record is exempt**. § 119.07(2)(a), Fla. Stat. (1995). When refusing to produce public records, State Attorneys must "identify with specificity either the reasons why records were believed to be exempt, or the statutory basis for any exemption." *Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000);

see also Woolling v. Lamar, 764 So. 2d 765, 768 (Fla. 5th DCA 2000) (State Attorney failed to show entitlement to exemption where there was no stipulation of fact, sworn testimony, or even an affidavit specifying "which sections of Chapter 119 [the State Attorney] is relying upon, **nor a recitation as to why that section of the statute applies to the requested records.**") (emphasis supplied).

The Chapter 119 "particularity" requirement is similar to the privilege log frequently used in civil litigation. In civil litigation, a party claiming a privilege in response to a discovery request is required to "make the claim expressly" and "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, **will enable other parties to assess the applicability of the privilege or protection.**" Fla. R. Civ. P. 1.280(b)(5) (emphasis supplied). As the emphasized language suggests, the purpose of the privilege log is to allow the other parties (and the court) to determine whether an asserted privilege applies. Under this rule, a blanket statement of privilege is insufficient. *Progressive Am. Ins. Co. v. Lanier*, 800 So. 2d 689, 691 (Fla. 1st DCA 2001). The rule does not precisely detail what information should be included in a privilege log. But the Fourth District, noting that the state rule is identical to the federal rule, has cited with approval a local rule of the Southern District of Florida which provides that as to

documents for which privilege is claimed, the privilege log must contain the following information:

> (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document and, where not apparent, the relationship of the author and addressee to each other.

TIG Ins. Corp. v. Johnson, 799 So. 2d 339, 341 (Fla. 4th DCA 2001) (quoting So. Dist. Fla. Local Rule 26.1(G)(3)(b)). The court also cited with approval a federal case explaining that a privilege log should:

> describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing [the privilege.] . . . This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor.

Id. (quoting *Abbott Labs. v. Alpha Therapeutic Corp*., 2000 WL 1863543 (N.D. Ill. Dec. 14, 2000)). Similarly, in the case of a claimed exemption, the burden is on the records custodian to prove entitlement to the Ch. 119 exemption. *Barfield v. City of Ft. Lauderdale Police Dep't*, 639 So. 2d 1012, 1015 (Fla. 4th DCA 1994).

In opposing Mr. Cooper's request for a privilege log, the State relied on

Lorei v. Smith, 464 So. 2d 1330 (Fla. 2d DCA 1985), in which the court acknowledged the liberal construction to be given Chapter 119 in favor of disclosure, but declined to require the records custodian to identify the documents as to which the exemption was claimed:

> [W]e reject appellants' suggestion that we engraft upon the Act the wholly pragmatic devices of "specificity, separation, and indexing," which the United States Court of Appeals for the District of Columbia Circuit perceived in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), to be essential to the administration of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). We believe a *Vaughn*-type remedy to potential problems arising from an *in camera* assessment of disputed documents is better left for another day or, perhaps more accurately, the legislature.

Lorei, 464 So. 2d at 1332. The most important thing to note about *Lorei* is that the court was construing a previous version of Section 119.07(2)(a) that **did not** contain the provision that the statute now includes, requiring that the State set forth **with particularity** its reasons for claiming various exemptions from disclosure. The Legislature added the "particularity" language in 1984. (Supp. 2/12/96 Supplemental Memorandum in Support of Defendant's Motion to Compel, Exh. A) The "particularity" language appears to have been the legislative enactment that *Lorei* invited. Section 119.07(2)(a), as amended in 1984, provides that the basis for an exemption must be stated "in writing" and "with particularity." The legislative history of the 1984 amendment to Chapter 119 shows that *Lorei* does not control

the issue of a privilege log. The House Judiciary Committee said in a staff summary that the bill proposed amending the Public Records Act "in order to clarify and strengthen the procedures and enforcement of open government laws." *See Fla. H.R. Comm. on Judiciary,* May 2, 1984, *Staff Summary.* Thus, *Lorei* does not control the issue of a privilege log.

C. The State Failed to Comply with Section 119.07(2)(a)[13]

On November 11, 1988, Mr. Cooper made his first public records request seeking "any and all Sixth Judicial Circuit State Attorney files and records . . . relating to Mr. Cooper and any witnesses or potential witnesses relating to the crime for which Mr. Cooper was convicted." (Supp. 6/15/95 Motion to Continue, Tab 2) This request clearly covered all files related to Skalnik, but Mr. Cooper made a more specific request in January of 1989, seeking "any and all Sixth Judicial Circuit State Attorney files and records . . . relating to Mr. Paul Skalnik in any cases in which he testified or provided information to the State. . . . " (Supp. 6/15/95 Motion to Continue, Tab 7) In response, the State provided **redacted** documents, but did **not** assert exemptions, except as to a document unrelated to Skalnik. Mr. Cooper filed another public records request on June 14, 1995. (Supp. 6/15/95 Def.

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13 Whether §119.07(2)(a) requires the State to provide a privilege log is a pure question of law, subject to de novo review. *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Motion to Continue, Tab 27) The State gave the trial court eight boxes of documents for in-camera review. (ROA 896) Many of these documents relate to Skalnik giving the State with information he obtained in jail. (ROA 947)

Mr. Cooper specifically asked that the State assert any claimed exemptions **with particularity**, as the Public Records Act requires. The request stated: "With respect to each such document claimed as exempt, [Mr. Cooper] requests that the State Attorney be ordered to:

> (a) Identify and describe the document claimed as exempt, including author, date, subject matter, and to whom, if anyone, it was sent;
> (b) State the basis of the exemption claimed including the statutory citation to any exemption created or afforded by statute; and
> (c) State with particularity the reason for his conclusion that the record is exempt.

(Supp. 6/15/95: Defendant's Motion to Compel Disclosure of Documents Pursuant to Chapter 119.01, Et Seq., Fla. Stat., pg. 10-11) (emphasis supplied)

By letter dated June 23, 1995, the State provided Mr. Cooper a list of asserted exemptions. (Supp. 2/22/96 Notice of Filing) Despite the statutory requirement that exemptions be asserted in writing and with particularity, **the letter did not indicate which exemption applied to which document or redaction**. The letter did not even provide a list of documents tendered—instead it listed entire case files by name and case number only. By submitting undelineated boxes of

records to the trial court, the State sidestepped the particularity requirements of Section 119.07(2)(a). The State must first identify the documents that have been submitted to the trial court and must then identify which of those documents it claims are exempt under which provision of Chapter 119. Without a privilege log of the documents submitted for in-camera review, Mr. Cooper – as well as Judge Downey and this Court -- has no way of knowing what documents are claimed to be exempt, the nature of each document, whether any of the documents should be produced in redacted form or whether any particular document is appropriately covered by the claimed exemption. Mr. Cooper could not challenge any exemptions that the State was asserting and the trial court could not competently rule on whether the exemptions applied. Nor can this Court. The State's conduct violated both the letter and spirit of the Public Records Law and Article I, Section 24 of the Florida Constitution and prejudiced Mr. Cooper's defense. If the State is not compelled to follow the requirements of Chapter 119, Mr. Cooper will be forced to accept the State's blanket, self-serving assertion that the documents submitted in camera are exempt. So was Judge Downey, and so will this Court unless it acts to compel the State to comply with Chapter 119.

Mr. Cooper has alleged that the State unlawfully used Skalnik to obtain incriminating information after his right to counsel had attached. Mr. Cooper

cannot be expected to accept that the State acted in good faith in asserting that its Skalnik-related documents are exempt. Nor does Section 119.07(2)(a) require him to do so. The State can no longer continue to shield its conduct—the very conduct in question in all of Mr. Cooper's Skalnik claims—by refusing to produce public records that could reveal this conduct or by refusing to assert exemptions with the required particularity. The State's blatant disregard of the law should not be condoned, particularly because Mr. Cooper faces execution. As Justice Anstead recognized: "If there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re: Amendments to Fla. R. of Crim. Pro.--Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 477 (Fla. 1996) (Anstead, J., specially concurring).

Mr. Cooper sought to compel the State to fulfill its statutory duty to identify exemptions with specificity. But rather than enforce the law, Judge Downey adopted the State's suggestion that the burden be shifted to Mr. Cooper to seek clarification on exemptions. Judge Downey gutted the Public Records Act and ruled, **contrary** to the "particularity" requirement in the statute, that the State was **not** required to state with particularity its reasons for concluding that documents submitted for in-camera inspection and redacted portions of documents given to

Mr. Cooper were exempt. (Supp. 9/19/96, Amended Order on Defendant's Motion to Compel Discovery of Documents Pursuant to Chapter 119.01, et seq., Fla. Stat.; *see* ROA 986) Turning the statute on its head, the trial court inexplicably shifted the burden to Mr. Cooper and ordered him to provide the State with a copy of each document about which he desired an explanation. (Supp. 9/19/96, Amended Order; pg. 3) Only then would the State be required to follow the provisions of Chapter 119 regarding the identification and statutory citation of exemptions. This procedure obviously precluded Mr. Cooper from obtaining any further information regarding the in-camera documents. Mr. Cooper filed a notice of compliance with the Court's order and requested that the State provide the basis of each exemption claimed to apply to each document, and state in writing and with particularity the reasons for the conclusion that each such document is exempt. (Supp. 9/17/96 Defendant's Notice of Compliance; pg. 1-2) When the State failed to respond to this Notice, Mr. Cooper filed a motion to compel (Supp. 10/24/96 Defendant's Motion to Compel), which the trial court denied. (Supp. 11/14/96 Order Denying Defendant's Motion to Compel) Mr. Cooper petitioned this Court for a writ of mandamus compelling the trial court "to require the State to release public records as required by Chapter 119 and to assert any claimed exemptions with particularity as required by Section 119.07(2)(a)." In a 4-to-3 decision, this Court denied the

petition without opinion. Justices Shaw, Anstead and Kogan would have issued an order to show cause to the State. (Supp. 2/24/97 Order Denying Petition for Writ of Mandamus) As a result of the State's failure to comply with Chapter 119, Mr. Cooper was forced to proceed to hearing on his 3.850 motion without all the necessary documents. This violated his fundamental state and federal due process rights. *See Griffin v. State*, 598 So. 2d 254, 256 (Fla. 1st DCA 1992) ("fairness, state and federal constitutional due process rights and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony") (quoting *Hill v. State*, 535 So. 2d 354, 355 (Fla. 5th DCA 1988)).

All of the boxes of documents provided to Judge Downey for in-camera review are included in the Record on Appeal. Mr. Cooper invites this Court to examine these documents, along with the State's June 23, 1995 letter, (Supp. 2/22/96 Notice of Filing), and try to determine which exemptions apply to which documents. That it will be unable to do. Only the State knows which exemptions apply to each document and redaction. Judge Downey did not know that; Mr. Cooper's counsel does not know that; and this Court cannot know that. This process gives the State unfettered discretion in determining which documents to

produce, even though the State has been accused of acting improperly in using Skalnik to illegally obtain incriminating information from Mr. Cooper. The State's failure to comply with Chapter 119 makes judicial oversight impossible.

D. Relief Requested

Mr. Cooper must finally be given an opportunity to participate in a meaningful way in the Public Records process. He asks this court to remand to the trial court with instructions to order the state to comply with the statute and specify with particularity for each and every document produced, and for each and every redaction, the exemption that applies and why. The Legislature has determined that a records custodian can be required to undertake this task. This Court must enforce that provision. After the State has complied, then the trial court must conduct a hearing, at which Mr. Cooper will finally have the opportunity to intelligently argue whether the exemptions apply and whether additional documents must be produced. If, as a result of the hearing, the State is required to produce additional documents, then Mr. Cooper must be given the opportunity to analyze those documents and to amend his 3.850 motion to include any additional claims, including Brady claims, that are revealed. *See Provenzano v. Dugger*, 561 So. 2d 541, 547 (Fla. 1990). A new hearing on the amended 3.850 motion must then be held if Mr. Cooper finds evidence to support an amendment to his 3.850 motion or

which supports his previously filed 3.850 motion.

THE PROSECUTION'S FOUL PLAY WAS AIDED BY THE DEFENSE ATTORNEYS' CONFLICT AND INCOMPETENCE.

Richard Cooper did not have a fighting chance at a fair trial. For not only was he subject to the foul blows of the State, but he could not even rely on his own court appointed counsel to zealously and effectively deflect those blows. Both of his attorneys had a conflict of interest in representing him. Neither of his attorneys had any experience trying a capital case; and neither of them provided him with effective assistance at crucial stages of the proceedings.

A. Both Defense Counsel Should Have Withdrawn Due to Conflict of Interest

1. Background on the Conflicts

Crider accepted appointment as Mr. Cooper's attorney just one month after leaving the State Attorney's office. (Dir. 25, ROA. 707) Crider was still employed as a prosecutor in that office when the murders were being investigated and was present for a conversation between the investigators and his friend who was the head of the division responsible for the case. (ROA. 707) Prior to becoming a lawyer, Crider was a police officer and was still friendly with his former colleagues who were the detectives investigating the murders. (ROA. 706) The issue of Crider's potential conflict of interest was raised at a pre-trial hearing held on May

27, 1983. (Dir. 317) Crider told the trial court that he had checked with the State Attorney's office and there was no conflict because he did not take part in or have specific knowledge of the investigation. Further he checked with the attorney handling the investigation and was assured that there was no problem with his representing Mr. Cooper. (Dir. 317-18) The Assistant State Attorney likewise told the Court that there was no conflict in Crider's representation. In fact, the prosecutor "objected" to any conflict. (Dir. 318)

Apparently these representations were sufficient for the trial court to conclude that no conflict existed, because it never raised the issue with Mr. Cooper. The entire "conflict" discussion took place at a bench conference out of Mr. Cooper's hearing. (R. 317-8) The trial court never inquired of Mr. Cooper, nor did it ask Crider whether Mr. Cooper had knowingly waived any conflict.

Once the State named Skalnik as a witness for the prosecution Koch had an unwaivable conflict of interest that required him to withdraw from representing Mr. Cooper. Koch obtained confidential information about Skalnik during his criminal representation of Skalnik. When Skalnik became a witness against Mr. Cooper, Koch was placed into an adversarial position with Skalnik. Koch could therefore no longer plan and conduct his representation of Mr. Cooper without taking into consideration his continuing duty to Skalnik. Koch was ethically compromised and

obliged to withdraw because his judgment was unquestionably impaired, his loyalty divided, and he could not exercise independent judgment on behalf of his client.[14] Koch's continued representation after the conflict arose was a per se denial of effective assistance of counsel, that entitles Mr. Cooper to a new trial on the guilt and penalty phases.

2. Standard for Ineffective Assistance Due to Conflict

In order to demonstrate ineffectiveness due to actual conflict of interest, Mr. Cooper must show that "his counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance." *Thompson v. State*, 759 So. 2d 650 (Fla. 2000) (citing *Quince v. State*, 732 So. 2d 1059, 1063 (Fla. 1999)); *see also Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475,481 (1978).[15]

a. Koch's Successive Representation Was An Active Representation of Conflicting Interests.

At the same time that Koch was supposed to be zealously advocating for Mr. Cooper by investigating and examining Skalnik, he had to be concerned with

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[14] Canon 5, A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client**,** of the 1983 Florida Professional Code was in effect at the time of Koch's representation pertinent sections are EC 5-1, EC 5-14, EC 5-15 and DR 5-105.

[15] Ineffective assistance of counsel claims are subject to plenary review, with deference being given to the trial court's findings of fact, but independent review of the trial court's legal conclusions. *Sweet v. State*, 2002 WL 122156 (Fla. Jan. 31, 2002)

not revealing information he received in confidence when he represented Skalnik. "An attorney's previous relationship with a client who has become a witness for the government and plans to testify against the attorney's current client presents a dilemma of divided loyalty." *Kolker v. State*, 649 So. 2d 250, 251 (Fla. 3d DCA 1994). It is exactly that divided loyalty that constitutes "active representation of conflicting interests." As the court explained in *United States v. Ross*, there are two alternatives faced by a counsel successively representing a witness and a defendant. Either, "the conflict could cause the defense attorney improperly to use privileged communications in cross examination . . . [or] the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client. . . ." 33 F. 3d 1507, 1523 (11th Cir. 1994). Either type of conflict results in the lawyer providing ineffective assistance to the defendant.

Accordingly, Florida courts have repeatedly found that a defense attorney's prior representation of a prosecution witness establishes an actual conflict of interest. In *Spaziano v. Seminole County*, 726 So. 2d 772, 774 (Fla. 1999) this Court found that the public defender's office was conflicted out of representation where it previously represented a prosecution witness, even though prosecutor

removed witness' name from the witness list prior to the hearing.[16]

b. Koch's Prior Representation of Skalnik Had An Adverse Effect On His Representation of Mr. Cooper

Koch's representation of Mr. Cooper was adversely affected by the Skalnik conflict in two key areas. First, Koch admitted under oath that he refrained from interviewing Skalnik prior to trial because of his prior representation. Second, the record makes it clear that he refrained from vigorously examining Skalnik at both the pre-trial hearing and at trial. Although not binding, the test set out in *Freund* is instructive in determining "adverse effect." *Freund* requires that in order to establish adverse effect, 1) the defendant must point to "some plausible alternative defense strategy or tactic [that] might have been pursued; 2) the defendant must demonstrate that the alternative strategy or tactic was reasonable under the facts - - although he need no show that the strategy would necessarily have been successful if it had been used; and 3) the defendant must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. *Freund v. Butterworth*, 165 F. 3d 839 (11th Cir. 1999) (*en banc*) *cert. denied* 528 U.S. 817,

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16 *See also Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980) ("appellant was denied his right to the effective assistance of counsel by the joint representation of the appellant and a state witness."); *Thomas v. State*, 785 So. 2d 626 (Fla. 2d DCA 2001) (prior representation of witness was conflict even where prosecutor agreed that witness would admit prior felony convictions); *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997) (prior representation of witness was conflict even if parties stipulated to prior convictions, eliminating need for cross on that subject.); *Kolker v. State*, 649 So. 2d 250 (Fla. 3d DCA 1994) (trial court's disqualification of attorney upheld despite defendants waiver of conflict).

120 S. Ct. 57 (1999). That test is easily satisfied by the facts of this case.

i. Failure To Investigate:

First, the alternative defense strategy would be to pursue all records concerning Skalnik's snitching activities and to personally interview Skalnik prior to deposition or trial. Second, a full investigation of a key witness is not just reasonable under the facts, but was Koch's ethical obligation. At the 3.850 hearing, Koch admitted that he declined to interview Skalnik because he had previously represented him.

ii. Failure To Vigorously Examine:

First, Koch failed to pursue a defense strategy of undermining Skalnik's credibility as a witness by exposing Skalnik as a repeat offender of crimes of dishonesty and perennial government informant. Second, under the facts, it was entirely reasonable, and in fact only responsible for the defense to do everything in its power to undermine Skalnik's credibility. There was no strategic reason to refrain from attacking Skalnik's credibility - he was not a victim, was not sympathetic, and did not provide any testimony beneficial to the defense. Third, the only logical explanation for Koch's failure to lay a glove on Skalnik is because of the "grave" ethical compromise he was operating under due to successive representations. In looking back on his performance at trial, Koch admitted that he

limited his examination of Skalnik to incidents that occurred after November, 1982, but he just could not recall why. (ROA. 1029) The reason why is evident from the facts. Koch faced the very real concerns expressed by numerous courts considering how an attorney could ethically cross-examine his former client. He could have compromised his duties to Skalnik and excoriated him on cross. Instead, Koch failed in his duty to Mr. Cooper by choosing to only lightly dance around Skalnik's past.

Koch's actual conflict of interest adversely affected his representation of Mr. Cooper and therefore caused him to be ineffective. Accordingly, Mr. Cooper is entitled to a new guilt and penalty phase trial.

c. Crider's Conflict

This Court should also have grave doubts about Crider's ability to exercise independent judgment on behalf of Mr. Cooper. Crider had not been out of the State Attorney's Office for a whole month before he undertook the representation. Although he personally did not participate in the investigation, his friends and colleagues in both the police department and the State Attorney's office did. Crider's ability to independently evaluate and challenge aspects of the State's investigation may have been impaired by these close relationships. At the very least, the question of the conflict or the appearance of a conflict should have

triggered a judicial inquiry that involved the defendant.

3. Mr. Cooper Did Not and Could Not Waive His Right To Conflict Free Counsel

The State's contention that Mr. Cooper waived his right to a conflict free counsel is not supported by the facts.[17] "[T]hree requirements must be independently proven before a conflict can be waived: 1) the defendant must be made aware of the conflict of interest; 2) the defendant must understand that the conflict could affect his defense; and (3) the defendant must be informed of the right to obtain other counsel." *Forsett v. State*, 790 So. 2d 474, 475 (Fla. 2d DCA 2001) (citing *Lee v. State*, 690 So. 2d 664, 669 (Fla. 1st DCA 1997) and *Lazelere v. State*, 676 So. 2d 394, 403 (Fla. 1996)). The trial record is devoid of any reference to Koch's prior representation of Skalnik. Contrary to Koch's wishful thinking,[18] there is no evidence to show that the trial court was informed of the Koch/Skalnik relationship. Naturally then, the trial court was unable make an appropriate inquiry of Mr. Cooper about the conflict.

The only "evidence" to support an assertion that Mr. Cooper waived his right to have a conflict-free attorney comes in the form of Koch's 3.850 testimony.

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17 In its closing argument in the 3.850 proceeding, the State asserted that "[Koch] had discussed the representation with Defendant who appeared to understand and did not object." (ROA. 1955)

18 When asked whether he informed the trial court about his prior representation of Skalnik he stated, "You know, I hope I did. I have no recollection of that." (ROA. 1027)

Koch, whose memory of the facts of this case was frequently hazy, testified that he told Mr. Cooper about the conflict and thought he "appeared accepting of it." (ROA. 1035) Koch did not testify that he explained how the conflict could affect his defense. Indeed **Koch admitted that he did not tell Mr. Cooper that his investigation or examination of Skalnik might be limited by the prior investigation.** (ROA. 1035) Moreover, Koch did not testify that he informed Mr. Cooper of the right to the appointment of another attorney who had no conflict. Given the gravity of the decision to waive such a prejudicial conflict, no court could find a knowing waiver based on Koch's scant recollection of his conversation with Mr. Cooper.

Even Koch himself recognized the "gravity" of the ethical compromise created by his former representation of Skalnik. (ROA. 1027). He just failed to comply with his ethical obligation to disclose the conflict and withdraw from representation. Koch apparently thought he resolved the conflict by informing Mr. Cooper of his former representation of Skalnik, but then admitted that he did not inform Mr. Cooper of all the consequences of the conflict.[19]

With regard to the Crider conflict, it is clear that the matter was discussed by

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[19] Likewise, co-counsel Crider may have thought he resolved the conflict by getting Skalnik to acknowledge and waive the conflict at his deposition. But despite Skalnik's "waiver" Koch failed to fully examine him.

the attorneys before the judge at a side bar. No one informed. Mr. Cooper of the nature of the conflict, its consequences, or his right to conflict free counsel.

4. Counsel Deprived the Court Of Its Duty To Insure That Cooper Received A Fair Trial with Conflict Free Counsel

The trial court was deprived of the duty to insure a fair trial because it was never informed of the grave conflict of interest that Koch was facing. Both the defense lawyers and the prosecutors knew that Koch had previously represented Skalnik. Yet no one brought the matter to the trial court's attention. Upon learning of the conflict, Koch had a duty to disclose it to Mr. Cooper and to the trial court. *Culyer v. Sullivan*, 446 U.S. 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of a trial.")

Likewise, Crow knew that Koch had previously represented Skalnik. (ROA. 1826) He also knew that Koch's representation was materially impaired by that former representation when Koch deliberately limited his pre-trial suppression hearing examination of Skalnik to after November 1982 – that is after Koch no longer represented Skalnik. Crow did not disclose that information to the trial court. Instead, Crow allegedly attempted to "remedy" the situation by speaking with Koch outside of the courtroom after the suppression hearing. (ROA. 784)

But a conflict of this magnitude cannot merely be resolved between an

attorney and his or her client. Disclosure to the trial court allows it to make the proper inquiry concerning the conflict. *Holloway v. Arkansas*, 435 U.S. 475 (1978). *Wood v. Georgia*, 450 U.S. 261, 272 (1981). As this Court noted, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980) (citing *Glasser v. United States*, 315 U.S. 60, 71 (1942)). [20] The trial court was prevented from assuring Mr. Cooper's rights when it was not informed of the conflict.

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[20] Because of this fundamental obligation to insure fairness in the justice system, numerous courts have denied defendants efforts to proceed with defense counsel who previously represented a prospective government witness. *Wheat v. United States*, 486 U.S. 153, 163 (1988); *United States v. Ross*, 33 F. 3d 1507 (11th Cir. 1994); *Kolker*, 649 So. 2d at 251.

B. If Defense Counsel's Conduct Was Not Unethical Then It Was The Result of Inexperience and Incompetence That Rose To the Level of Ineffectiveness[21]

Koch's performance was deficient because he was operating under a severe conflict of interest in the successive representation of Skalnik and Mr. Cooper. That conflict alone established a prima facie violation of Mr. Cooper's Sixth Amendment guarantee of effective assistance, as it explicitly includes the right to be represented by counsel free from conflict. *Quince v. State*, 732 So. 2d 1059, 1063 (Fla. 1999) (citing *Strickland*, 466 U.S. at 688). But, whether this Court concludes that counsel's deficient performance was attributable to his conflict of interest, or finds it merely the product of inexperience or incompetence, the facts demonstrate that counsel was constitutionally inadequate and that Mr. Cooper should be granted a new penalty phase hearing.

To establish ineffective assistance of counsel, Mr. Cooper must show that 1) his counsel "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and 2) that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Sweet v. State of Florida*, 2002 WL 122156 (Fla. 2002) (citing *Strickland*

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21 Ineffective assistance of counsel claims are subject to plenary review, with deference being given to the trial court's findings of fact, but independent review of the trial court's legal conclusions. *Sweet v. State*, 2002 WL 122156 (Fla. Jan. 31, 2002)

v. Washington, 466 U.S. 668, 687 (1984) and *Rutherford v. State*, 727 So. 2d 216, 219-20 (Fla. 1998)). Claims of ineffective assistance of counsel entail mixed questions of fact and law and are therefore subject to plenary review. *Sweet*, 2002 WL 122156 (citing *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 1999)).

1. Koch's Examinations of Skalnik Fell Far Below Professional Standards

The first prong of the *Strickland* test, deficiency of performance, requires that "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Sweet*, 2002 WL 122156 (citing *Strickland* 466 U.S. at 688).

Koch conducted the pre-trial evidentiary hearing concerning Skalnik, as well as cross-examining Skalnik during the penalty phase of the trial. His performance in both was appallingly deficient. Although Sections I D and II of the Argument make it clear that defense counsel did not have all the information necessary to impeach Skalnik, the record makes it equally clear that counsel was deficient for failing to conduct a sufficient investigation and to use what information they did have.

a. Performance at Pre-Trial Hearing

The extent of Skalnik's relationship with the State as a snitch was vital to the defense's efforts at the pre-trial hearing to suppress Skalnik's testimony. Koch

knew something about Skalnik's past convictions and snitching, yet deliberately chose to limit his examination of Skalnik to matters that arose after Skalnik was jailed in 1982. At the conclusion of the pre-trial hearing, because of Koch's deficient performance, the trial judge thought that Mr. Cooper was the first person against whom Skalnik had testified. There was no strategic reason, intended to benefit Mr. Cooper, that motivated Koch's conduct.

To the contrary, Koch testified at the 3.850 hearing that his representation of Mr. Cooper was ethically compromised by his former representation of Skalnik. Koch admitted that he did not interview Skalnik in preparation for the hearing because of his former representation. Remarkably Koch later testified that even if he had not previously represented Skalnik he would have felt ethically precluded from interviewing him because Skalnik was on the State's witness list and was in jail. The record is not clear as to Koch's reasoning for this position. If Koch believed there was an ethical prohibition against interviewing a prosecution witness without notice to the prosecutor then he was mistaken as a matter of law. The duty of zealous advocacy requires defense attorneys to investigate potential witnesses. Moreover, there is no legal or ethical requirement that the prosecution be notified of such investigations.

b. Performance at Penalty Phase of Trial

At the 3.850 hearing, Koch further admitted that his cross examination of Skalnik in the penalty phase was similarly limited to Skalnik's then current incarceration. Indeed, Koch's three page cross examination of Skalnik during the penalty phase left Skalnik unscathed. (Dir. 1455-58) When cross examining the sole penalty phase witness, Koch failed to ask the fundamental questions that would impugn Skalnik's character, raise doubts about his credibility and expose his true motivation for testifying.

Koch did not make a strategic decision to avoid those types of questions. In fact he started down the right path, but stopped far short of effective cross examination. For example, Koch got Skalnik to confirm that he was currently serving a sentence for 5 counts of grand theft. But then Koch failed to ask the follow up questions that would have exposed the fact that Skalnik's grand thefts were actually procured by fraud, thus crimes of dishonesty. Koch also failed to follow up with questions concerning the details of Skalnik's prior convictions, which likewise were crimes of dishonesty.[22] **At the end of the penalty phase, the jury had no idea how many times the State's key witness had been convicted of crimes of dishonesty.**

[22] Skalnik did admit that he was once charged with impersonating a police officer.

Koch likewise failed to expose Skalnik as a criminal whose method of operation was deception. Because of his self-imposed time limitation, Koch barely scratched the surface of the relationship between Skalnik and the State. He merely elicited the fact that Skalnik had snitched on nearly 30 other defendants. But because of self-imposed time limit, Koch did not establish a time frame for Skalnik's cooperation. Perhaps even worse was the fact that Koch did not make any inquiry as to whether Skalnik received any governmental benefit from his frequent snitching. It stretches credulity for a witness to snitch on 30 or so defendants and claim no expectation of receiving a governmental benefit. Yet after re-direct, when the State brought up the issue of Skalnik's expectations for testifying, Koch made no effort to question Skalnik's assertion that he was receiving nothing in exchange for his testimony. There were a host of cross-examination avenues that Koch could have used. For example, Koch knew that Skalnik was receiving special treatment in reference to serving his time in county jail rather than state prison. Yet once again, Koch utterly avoided this productive line of questioning.

The government's penalty phase case depended almost entirely upon the testimony of Skalnik – thus his credibility was of utmost importance in Mr. Cooper's defense. *Rogers v. State*, 782 So. 2d 373, 384-85 (Fla. 2001). While

Skalnik's guilt related testimony was largely corroborated by Mr. Cooper's own confession, the crucial penalty phase information – Mr. Cooper's alleged lack of remorse – was entirely uncorroborated. The prevailing professional norms require that the defense counsel aggressively cross-examine a key witness unless there is a specific strategic reason to refrain from doing so. *See Tyler v. State*, 793 So. 2d 137, 144 (Fla. 2d DCA 2001) ("It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief." (citations omitted)) The record establishes no legitimate reason for Koch to have refrained from thoroughly cross-examining Skalnik.

The only fair reading of the record shows that Koch was significantly impaired by his ethical compromise. His inexperience or other incompetence may also have contributed to his deficient performance in this case. But ultimately the cause for his deficient performance is irrelevant. The simple fact remains that Koch failed to provide Mr. Cooper with effective assistance of counsel.

2. Koch's Deficient Examinations of Skalnik Were Highly Prejudicial to Mr. Cooper

The second prong of the *Strickland* test requires the defendant to demonstrate prejudice. That is: "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sweet*, 2002 WL 122156 (citing *Strickland*).

Had Koch performed adequately at the pre-trial hearing, the trial court would have concluded the hearing with a much clearer picture of Skalnik's extensive relationship with the State. Mr. Cooper's claim that Skalnik acted as an agent of the State when he obtained information from Mr. Cooper would have been given far greater weight if all the facts were exposed. The trial court itself acknowledged the possibility of a different outcome on Mr. Cooper's pre-trial *Henry/Massiah* claim in the hearing on the motion for new trial. Given what is now known to be an ongoing and extensive relationship, this Court's confidence in the outcome of that hearing must be thoroughly undermined.

Likewise, this Court's confidence in the jury's decision to recommend death must also be undermined. If Skalnik was precluded from testifying, the jury would not have heard any testimony regarding Mr. Cooper's alleged "lack of remorse." Even if Skalnik was permitted to testify, but was thoroughly cross examined, his credibility would have been so undermined that a jury would be hard pressed to give the uncorroborated portions of his testimony serious consideration. Koch's cursory cross examination of the State's key witness fell fare below the accepted

standards of practice in capital defense at a significant price to Mr. Cooper.

MR. COOPER IS MORE DESERVING OF LIFE THAN WAS SHOWN AT TRIAL

Unless a sentencer can consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant will be treated not as a unique human being, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This is exactly what happened to Richard Cooper. Not only was the State witness in the penalty phase completely incredible, but compelling evidence of who Richard Cooper was and where he came from was never presented to his sentencer. Indeed, his trial counsel lacked any understanding of the factors that comprised Richard Cooper.

A. Trial Counsel Was Deficient in Preparing For and Presenting Testimony at Mr. Cooper's Penalty Phase[23]

The only State witness at Mr. Cooper's penalty phase was Paul Skalnik. Skalnik crafted his testimony to suit the prosecution's purposes and provided testimony on aggravators to support a death sentence. Indeed, over defense objection, Skalnik testified that he obtained confessions from Mr. Cooper while

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23 Ineffective assistance of counsel claims are subject to plenary review, with deference being given to the trial court's findings of fact, but independent review of the trial court's legal conclusions. *Sweet v. State*, 2002 WL 122156 (Fla. Jan. 31, 2002)

jailed with him and told the jury about Mr. Cooper's alleged lack of remorse and his purported defense strategy. However, as explained above, Skalnik is completely incredible. He lied at Mr. Cooper's penalty phase in order to curry favor with the government and the State suppressed impeachment evidence regarding Skalnik. Once again, the State struck a foul blow at Mr. Cooper by basing its penalty phase case on lies.

In contrast to the State's case, the defense presented the testimony of one witness: Juanita Kokx, Mr. Cooper's mother, who testified that Richard's father had been tough on him. (Dir. 1463-89) At the time of Mr. Cooper's penalty phase, that was the extent of information trial counsel knew regarding Mr. Cooper's life.

Here is what Richard Cooper's novice lawyers did for him in his penalty phase proceeding: On the Saturday morning following his Friday evening conviction on three counts of first degree murder, Mr. Cooper's mother testified for a little over a half an hour. Both the State and the trial court agree that her testimony contained not one scintilla of mitigation evidence. Then the State's only witness at that hearing, a conniving snitch whose long history of working for the State was well known to Mr. Cooper's seriously conflicted lawyers, was cross-examined for three pages. If that is not ineffective assistance of counsel, there is no such thing as ineffective assistance of counsel.

1. Trial Counsel Failed to Develop Richard Cooper's Background and Present Mitigation Witnesses

If trial counsel conducted a competent investigation they would have uncovered a wealth of mitigation. While fully set forth in The Statement of the Case and Facts, Mr. Cooper's collateral investigation revealed that Richard Cooper was brutally physically abused as a child.[24] Richard also suffered emotional abuse at the hands of both his parents and his brother.[25] Richard grew up in a trailer with no running water.[26] Richard had an extensive history of alcoholism and drug abuse and regularly "huffed" inhalants.[27]

Koch admitted at the evidentiary hearing that his investigation had been inadequate, there was more that he could have and should have done to develop an understanding of Richard's background, and there was no strategic reason for failing to conduct an adequate investigation. (ROA. 1036-37) Likewise, Crider

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[24] Child abuse is an accepted mitigating circumstance. *See Jackson v. State,* 704 So. 2d 500, 506-507 (Fla. 1997) ; *Chandler v. State,* 702 So. 2d 186, 200 (Fla. 1997); *Boyett v. State,* 688 So. 2d 308, 310 (Fla. 1996).

[25] Emotional abuse is an accepted mitigating circumstance. *See Pomeranz v. State,* 703 So. 2d 465, 472 (Fla. 1997); *Hunter v. State,* 660 So. 2d 244, 254 (Fla. 1995); *Turner v. State,* 645 So. 2d 444, 448 (Fla. 1994).

[26] Growing up impoverished is an accepted mitigating circumstance. *See Foster v. State,* 614 So. 2d 455, 461 (Fla. 1993) ; *Maxwell v. State,* 603 So. 2d 490, 492 (Fla. 1992); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991).

[27] History of alcohol, substance, and inhalant abuse is an accepted mitigating circumstance. *See Mahn v. State,* 714 So. 2d 391 (Fla. 1998); *Morgan v. State,* 639 So. 2d 6, 14 (Fla. 1994); *Knowles v. State,* 632 So. 2d 62 (Fla. 1993); *Clark v. State,* 609 So. 2d 513, 516 (Fla. 1992).

testified that he had no strategic decision for not developing mitigation in Mr. Cooper's case. (ROA. 1357) Trial counsel stated that they felt they needed to hire an investigator to look into Mr. Cooper's background and develop mitigation, however, the trial court denied counsels' request for funds. (ROA. 1054-55; 1357)

There could be no strategic decision for trial counsels' failures during the penalty phase. Trial counsel is under a duty to independently investigate, evaluate, and present all statutory and nonstatutory mitigation in a capital case.[28] Failure to investigate available mitigation constitutes deficient performance.[29]

Furthermore, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F. 2d 1449, 1462 (11th Cir. 1991). Indeed, there can be no strategic decision attached to trial counsel's decisions during the penalty phase because decisions simply were never made. *See Heiney*, 620 So. 2d at 173 ("Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that

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28 *Rose v. State*, 675 So. 2d 567, 570-72 (Fla. 1996); *Heiney v. State*, 620 So. 2d 171, 173 (Fla. 1993); *Stevens v. State*, 552 So. 2d 1082, 1087-88 (Fla. 1989); *State v. Michael*, 530 So. 2d 929 (Fla. 1988); *Porter v. Singletary*, 14 F. 3d 554, 557 (11th Cir. 1994).

29 *Rose*, 675 So. 2d at 570-72; *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993); *Heiney*, 620 So. 2d at 173; *Phillips v. State*, 608 So. 2d 778, 782-83 (Fla. 1992); *Mitchell v. State*, 595 So. 2d 938 (Fla. 1992); *State v. Lara*, 581 So. 2d 1288 (Fla. 1991); *Stevens*, 552 So. 2d at 1087-88; *Bassett v. State*, 541 So. 2d 596 (Fla. 1989).

mitigating evidence existed.").

The lower court acknowledged that collateral counsel presented evidence at the evidentiary hearing that Richard Cooper had an impoverished childhood, a history of substance abuse, physical abuse, and possible mental illness. (ROA. 2269) However, the lower court dismissed the substantial mitigation evidence presented at the evidentiary hearing as merely being cumulative to what was presented at the penalty phase. (ROA. 2264)

It is difficult, if not impossible, to imagine how any person could conclude that the evidence presented at the evidentiary hearing was simply cumulative to that at the penalty phase. Indeed during closing arguments, the prosecutor summarized the absence of mitigation presented at the penalty phase:

> When their big chance came to establish mitigating circumstances what did you hear? . . .
>
> Of all the people this guy has probably had contact with, with all the people that know him, what do you get? You get a letter that he wrote and it was never received. Now that's pretty pathetic. That's how desperate they are for evidence of this guy's character, this little piece of paper, no witnesses, a little piece of paper that he wrote. . . .
>
> All they have to make you have to say otherwise is this little piece of paper, no witnesses. . . . As a matter of fact, I'm not even sure his mother even had much to do with him until the last four, five years. He was living with his father. And it was only from January to June that she really had much contact with him.

(Dir. 1577, 1580, 1584-85) Near the end of the testimony of Juanita Kokx, the State interjected the following objection: "Judge, can I have a continuing objection for relevance. We have gone about a half-hour. **We have nothing that relates to any of the mitigating circumstances**." (Dir. 1479) Nor did anything else that Juanita Kokx testified to in her few brief remaining minutes on the stand relate to any mitigating circumstances.

The best evidence, however, that the testimony presented at the evidentiary hearing was not cumulative to what was presented at the penalty phase is the trial court's sentencing order. The trial court found **no** mitigating circumstances. (Dir. 243-48) If Juanita Kokx did not, as the State correctly asserted, testify to any mitigating circumstances, and if the trial judge therefore correctly found no mitigating circumstances on the record presented to him, there could be no **cumulative** mitigation presented in the 3.850 hearing because there was no penalty phase mitigation evidence to cumulate in the 3.850 hearing.

The lower court also found that trial counsel testified that they thoroughly investigated witnesses. (ROA. 2267) However, this fact is belied by trial counsels' actual testimony. Moreover, trial counsel were hindered by the trial court in their investigation. Trial counsel believed they needed to develop more mitigation and requested funds from the trial court in order to do so. However, the trial court

denied their request and rendered them ineffective in Mr. Cooper's penalty phase.

Additionally, the court found that the Mr. Cooper's nomadic lifestyle made finding witnesses difficult. (ROA. 2266) However, this is not a sufficient reason for not conducting an adequate penalty phase investigation in Mr. Cooper's case.[30] Indeed, two of Mr. Cooper's siblings testified at the 3.850 hearing. Certainly these witnesses were not difficult to find and both stated that they would have testified at Mr. Cooper's penalty phase if they had been asked.

Mr. Cooper's case is similar to several cases where post conviction relief was granted because of deficient performance of penalty phase counsel. In *Rose v. State*, this Court remanded for a new sentencing because Mr. Rose received ineffective assistance of penalty phase counsel. Rose grew up in poverty, was emotionally abused, neglected as a child, was a slow learner with a low IQ, had suffered head trauma, and was diagnosed as schizoid. *Rose*, 675 So. 2d at 571.

In *State v. Lara*, the trial attorney representing Mr. Lara did not investigate the defendant's background and did not properly utilize mental health experts. 581 So. 2d at 1290. The only person to testify for the defense at the penalty phase was his aunt who briefly testified that Mr. Lara's father treated him badly and beat him a

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30 There is no evidence that Mr. Cooper failed to help his trial counsel develop mitigation. *See Ragsdale v. State*, 798 So. 2d 713, 719 (Fla. 2001).

lot.[31] *Id.* at 1289. At a post conviction hearing, Mr. Lara presented the testimony of eight background witnesses and mental health testimony that established compelling mitigation that should have been presented to the jury. *Id.*

Likewise, in *Ragsdale v. State*, this Court found defense counsel was ineffective for failing to investigate and present mitigation evidence relating to the defendant's abuse as a child, extensive drug and alcohol use, marginal intelligence and mental problems. 798 So. 2d 713, 716-19 (Fla. 2001). This Court reasoned that "counsel essentially rendered no assistance to Ragsdale during the penalty phase of the trial" by failing in his strict duty to present the abundance of potential mitigating evidence that existed. *Id.* at 716. Indeed, just as in this case, testimony from relatives as well as experts was available to present Mr. Ragsdale's abusive background and history of mental problems, but it was not presented during the penalty phase. *Id.* at 719.

The only thing that Mr. Cooper's jury knew about him was that his father was tough on him. Collateral counsel presented the testimony of several lay witnesses that established significant mitigation. The jury never knew Richard Cooper. They should have known about the horrors he suffered in his life.

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[31] Compare the testimony of Mr. Cooper's mother: Mr. Cooper's mother generally testified that Richard's father was tough on Richard, but did not hint at the atrocities he suffered as a child and young adult.

Mr. Cooper has established deficient performance under *Strickland v. Washington*, and this Court's precedent. The above identified acts or omissions of penalty phase counsel were deficient and outside the range of professionally competent assistance. *See Williams v. Taylor*, 529 U.S. 362, 395-99 (2000); *Baxter v. Thomas*, 45 F. 3d 1501 (11th Cir. 1995).

2. Trial counsel failed to develop and present significant mental health mitigation[32]

Trial counsel's failure to obtain an adequate mental health examination and present mental health testimony is inextricably linked to his failure to investigate. When mental health is at issue, counsel has a duty to conduct a proper investigation into the client's mental health background, *see, e.g.*, *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. *See Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Mauldin v. Wainwright*, 723 F. 2d 799 (11th Cir. 1984).

Counsel did retain the services of Dr. Sidney Merin, who evaluated Mr. Cooper.[33] Merin's evaluation, however, was inadequate. The only information

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32 This claim is also pled in terms of *Ake v. Oklahoma*, 470 U.S. 68 (1985) (claim IV), in that Mr. Cooper was denied a competent mental health exam. Either Mr. Cooper was denied a competent mental health exam or trial counsel was ineffective for failing to secure a competent mental health exam. In any event, the trial court erred in denying this claim.

[33] At the evidentiary hearing, collateral counsel moved to disqualify Dr. Merin. (ROA. 1638-51) Dr. Merin originally was retained by Richard Cooper's trial counsel to serve as a confidential expert adviser. (ROA. 1638) Dr. Merin did testify at Richard Cooper's sentencing (he did not testify at the

provided to Merin was Richard Cooper's self-report, a letter from trial counsel describing the homicide as an execution-style killing and statements made by Richard Cooper. (ROA. 1683) Due to the lack of background materials necessary for a thorough mental health exam, Merin's report fell woefully short of uncovering or exploring mental health mitigation. Indeed, with the information he possessed regarding Richard Cooper, it would have been impossible for him to render a comprehensive mental health exam.

At the evidentiary hearing, collateral counsel presented the testimony of a mental health expert, Dr. Brad Fisher, who was provided with the background information necessary to do a competent evaluation of Richard Cooper. Dr. Fisher first evaluated Richard Cooper in 1989. At that time, he contacted various family members and reviewed substantial background information, including Richard Cooper's birth, hospital, school, jail and medical records, and several affidavits

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penalty phase). Subsequent to his work on Mr. Cooper's case, Dr. Merin was retained by the State as a testifying expert witness in J. D. Walton's penalty phase proceedings. *Id.* In connection with Mr. Cooper's postconviction proceedings, Dr. Merin consulted with collateral counsel in 1995. (ROA. 1643) He then testified as a State witness in Mr. Cooper's post conviction proceedings. Dr. Merin clearly had a conflict of interest in these proceedings and the motion to disqualify should have been granted. *See Koch Refining Co. v. Boudreaux*, 85 F. 3d 1178, 1181 (5th Cir. 1996). It is obvious that Dr. Merin received confidential information in his consultation with Mr. Hanlon and Ms. Greenberg, despite Dr. Merin's initial attempt in his testimony to obfuscate his clear professional and ethical obligation to these lawyers - and to Mr. Cooper. (ROA. 1701-1705)

from those who know Richard Cooper. Dr. Fisher also reviewed the deposition and sentencing testimony of Merin. He conducted another evaluation of Richard Cooper in 1999 and sat in on portions of the evidentiary hearing and reviewed the testimony of the witnesses at the evidentiary hearing.

Dr. Fisher established significant mental health mitigating factors. He testified that Richard is the product of a physically abusive developmental background; he has a dependent personality disorder; he would adjust well to incarceration; and he suffers from brain damage. With adequate background information, Dr. Fisher was able to paint an extremely sympathetic picture of Richard Cooper that would not have been ignored by the jury.

The lack of background materials should have alerted trial counsel that Merin's report was inadequate, or that they needed to supply him with additional information. The information necessary for a thorough and competent mental health examination existed; trial counsel simply failed to discover it.[34] Merin should have been provided with this information and, most importantly, the information should have been before the jury when it decided whether Mr. Cooper should live or die.

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[34] Indeed, there can be no strategic decision attached to trial counsel's failure to provide Dr. Merin the background information necessary for a competent and thorough mental health evaluation, because trial counsel was not even aware that such information existed.

The above identified acts or omissions of penalty phase counsel were deficient and outside the range of professionally competent assistance. *See Baxter*, 45 F. 3d 1501. Deficient performance under *Strickland v. Washington*, and this Court's precedent has been established. Additionally, Merin's mental health examination was deficient. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

B. Mr. Cooper Was Prejudiced By Trial Counsel's Deficient Performance

Despite trial counsel's ineffective attempt to mitigate Mr. Cooper's sentence, the jury voted 9-3, 7-5 and 7-5 in favor of the death penalty. Mr. Cooper only needed the vote of three additional jurors to save his life.

Trial counsel's deficient performance prejudiced Mr. Cooper under *Strickland v. Washington*, which requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. 668, 694 (1984). Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. *Michael*, 530 So. 2d at 930. Prejudice is established when trial counsel's deficient performance deprives the defendant of a "reliable penalty phase proceeding." *Deaton*, 635 So. 2d at 9.

The overwhelming mitigation developed and presented by collateral counsel

could not and would not have been ignored had it been presented to Mr. Cooper's sentencers. Indeed, compare the fact that the trial court found *no* mitigating factors. If counsel had presented the mitigation evidence that was readily available to him, the jury would have heard expert and lay testimony establishing several powerful mitigating factors.

Prejudice is established under such deficient performance. *See Rose*, 675 So. 2d at 573; (prejudiced established by presentation of "substantial mitigating evidence" in post conviction); *Hildwin*, 654 So. 2d at 107 (same); *Phillips*, 608 So. 2d at 783 (prejudice established by "strong mental mitigation" that was "essentially unrebutted" in post conviction); *Lara*, 581 So. 2d at 1289 (prejudice established by evidence of statutory mitigating factors and abusive childhood); *Bassett*, 541 So. 2d at 597 ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").

Had trial counsel conducted an investigation of the available mitigation information, made reasonable decisions about the presentation of mitigation, advanced Mr. Cooper's right to an appropriate penalty phase mental health evaluation, there is a reasonable probability that the outcome of the proceedings would have been different. *Baxter*, 45 F. 3d at 1501; *Loyd v. Whitley*, 977 F. 2d 149 (5th Cir. 1992); *Cunningham v. Zant*, 928 F. 2d 1006 (11th Cir. 1991);

Middleton v. Dugger, 849 F. 2d 491 (11th Cir. 1988); *Stephens v. Kemp*, 846 F. 2d 642 (11th Cir. 1988); *Magill v. Dugger*, 824 F. 2d 879, 889-90 (11th Cir. 1987); *Elledge v. Dugger*, 823 F. 2d 1439, 1444-45 (11th Cir. 1987); *Blake v. Kemp*, 758 F. 2d 523, 531 (11th Cir. 1985).

Additionally, a close reading of *Strickland* provides an additional tool that provides a clear measure to determine prejudice. *Strickland* explained: " the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." 466 U.S. at 694 (citing *United States v. Agurs*, 427 U.S. 97, 104, 112-13 (1976)).

Assume the State had the responsibility to provide mitigation evidence to the defense. Posit that all the information the State disclosed was the mitigation actually offered by trial counsel at Mr. Cooper's penalty phase. It seems clear that there would be a *Brady* violation if the prosecution had in its possession all the mitigation evidence actually obtained by collateral counsel but did not divulge it. Applying a familiar standard, predictably this Court would have determined the mitigation evidence sufficiently material to require disclosure. Since the prejudice standard has its roots in the same test, Mr. Cooper's additional mitigation evidence would have been sufficiently material to create a reasonable probability that, absent the ineffectiveness of counsel in presenting inadequate mitigation, the outcome

would have been different respecting the imposition of the death penalty. Common sense dictates that Mr. Cooper's additional mitigation evidence was important and there is a reasonable probability it would have changed the jury's decision.

In *Penry v. Lynaugh*, Justice O'Connor re-affirmed "the principle that punishment should be directly related to the personal culpability of the criminal defendant," in capital cases. 492 U.S. 302, 304 (1989). And she stated: "Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" *Id.* at 327. Trial counsel's ineffectiveness prevented the jury from making this "reasoned moral response" to his prejudice.

V. SUMMARY DENIAL OF MERITORIOUS CLAIMS

The lower court erroneously denied Mr. Cooper an evidentiary hearing on claims III, V(b), (c), (d), (f) and (g), VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX. Mr. Cooper was entitled to an evidentiary hearing unless "the motion and files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; *Lemon v. State*, 498 So. 2d 923 (Fla. 1986). The files and records in this case do not conclusively rebut Mr. Cooper's allegations.

Several of Mr. Cooper's claims alleged ineffective assistance of counsel. Specifically:

Claim III alleged that Richard Cooper was incompetent to stand trial and counsel was ineffective for failing to seek a competency hearing.

Claim V(b) alleged trial counsel was ineffective for failing to object to numerous *Caldwell* errors.

Claim V(c) alleged trial counsel was ineffective for failing to object to victim impact evidence.

Claim V(d) alleged trial counsel was ineffective for failing to object to the trial judge's instructions that a majority vote of the jury was required to recommend a life sentence.

Claim V(f) alleged the trial court's refusal to grant a continuance so that defense counsel could obtain mitigating evidence rendered trial counsel ineffective.

C Claim V(g) alleged the trial court failed to inquire into the possibility that one of Richard Cooper's trial counsel had a conflict of interest. Trial counsel was rendered ineffective because of the undetected conflict.

The trial court summarily denied claim III, finding it was time barred because it was not raised in Mr. Cooper's initial 3.850. The court further found that Mr. Cooper did not allege that the claim met the requirements for exceptions to the time

bar. When Mr. Cooper filed his initial 3.850 he requested special leave to amend. Specifically, Mr. Cooper's counsel stated:

> The Special Request for Leave to Amend and To Supplement the Appendix is made on the basis that counsel herein volunteered to represent Mr. Cooper on a pro bono basis and are located in New York. Witnesses are in Ohio, Arizona and Florida. The limitation of funds and the logistical difficulties of fully investigating this matter and preparing an appendix from a remote location justify the leave requested.

(ROA. 2) Counsel also requested "the opportunity to amend [the] motion with any factual and/or legal allegations and/or claims which may come to light during the course of counsel's continuing investigation and the opportunity to adequately investigate and present claims asserted in [the] Rule 3.850 proceedings." (ROA. 76) After further investigation, Mr. Cooper filed an amended 3.850 motion, which contained Claim III. (ROA. 156-60) The Amended 3.850 Motion specifically restated collateral counsel's request to amend and incorporated all the claims in the initial motion. (ROA. 129-130) Moreover, at the start of Claim III, counsel incorporated all allegations and factual matters in the motion. (ROA. 156)

The initial motion did assert an adequate basis for the requested leave to amend and those allegations were specifically incorporated into Mr. Cooper's Amended 3.850 Motion. Indeed, the request for leave to amend was based on the fact that there were unknown facts that collateral counsel could not ascertain

through due diligence. Mr. Cooper should have been allowed to fully develop Claim III, which alleged that Mr. Cooper's borderline mental retardation, neurological impairments, dependent personality, pretrial depression resulting in suicide attempts, self mutilation, and the administration of psychotropic mediations rendered him incompetent for trial and capital sentencing and that counsel was ineffective for failing to seek a competency hearing. The claim was further supported by an affidavit from Mr. Cooper's trial counsel that Richard did not fully comprehend the significance of the proceedings and that counsel was unaware the jail was administering psychotropic mediation to his client. (ROA. 712-17) The lower court should have considered this claim. Indeed, the amended motion was accepted by the lower court and it should not thereafter be able to deny a meritorious claim in Mr. Cooper's amended motion based upon a time bar.

The court also summarily denied the remaining allegations contained in claim V, finding they were either without merit or procedurally barred. The Sixth Amendment requires that a criminal defendant be afforded effective representation. *See Strickland*, 466 U.S. at 668. Claims alleging ineffective assistance of trial counsel are properly raised in a Rule 3.850 motion for post conviction relief. *See Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).[35]

[35] Likewise, ineffective assistance of counsel claims based upon trial counsel's failure to object do not frustrate the preservation of error rule because a defendant claiming ineffective assistance must satisfy

Richard Cooper's counsel failed to effectively represent Mr. Cooper at every stage of his trial. The claims in Mr. Cooper's 3.850 motion are not refuted by the record and they are not procedurally barred. They are ineffective assistance of counsel claims cognizable under Rule 3.850. The lower court erred in its summary denial of these claims.

In claim VII, Mr. Cooper alleges that the trial court failed to weigh the aggravating and mitigating factors before it imposed the death sentence. One of the allegations contained in Claim VII is that the State prepared the trial court's written findings in support of Mr. Cooper's death sentence. Indeed, the trial court's findings are almost identical to its findings supporting J. D. Walton's death sentence. The lower court, however, found that the claim was procedurally barred because it should have been raised on direct appeal. Appellate counsel had no way to determine whether the trial court's written findings were in fact prepared by the State and this claim could not have been brought on direct appeal. Claim VII raises serious issues regarding the trial court's improper delegation to the State the responsibility for drafting the sentencing order and the trial court's resulting failure to weigh the aggravating and mitigating circumstances. *See Patterson v. State,* 513

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the standards articulated in *Strickland* and are properly raised under Rule 3.850. *See Hardman v. State,* 584 So. 2d 649 (Fla. 1st DCA 1991); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

So. 2d 1257 (Fla. 1987). The claim is not procedurally barred and Mr. Cooper should have been allowed to prove the State prepared the written findings that the trial court submitted in support of his death sentence.

In claim X, Mr. Cooper alleges he was denied his right to a jury trial on the elements of capital murder. The lower court ruled that this claim was procedurally barred because it should have been raised on direct appeal. This claim was properly raised in Mr. Cooper's 3.850 motion. The United States Supreme Court is currently considering whether death penalty statutes, such as Florida's, deprive defendants of their constitutional right to a jury trial on the elements of capital murder. *Arizona v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (2002). Indeed, major changes in constitutional law are given retroactive effect so as to be cognizable in a 3.850 motion. *Witt v. State*, 387 So. 2d 922, 925-26 (Fla. 1980).

In claim XVIII, Mr. Cooper alleges that the imposition of the death penalty is cruel and unusual punishment due to his intellectual and neurological impairments. The lower court found this claim was procedurally barred because it should have been raised on direct appeal. However, Mr. Cooper does not allege in this claim that the death penalty is *per se* unconstitutional. To the contrary, Mr. Cooper alleges that there are certain factors that make the death penalty unconstitutional as

applied to him. *See Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (finding death sentence imposed on 15-year-old constituted cruel or unusual punishment). This is not a claim that could have been raised in direct appeal. This is a claim that is cognizable in a 3.850 motion and the lower court should have granted an evidentiary hearing. *See Jones v. Butterworth*, 691 So. 2d 481, 482 (Fla. 1997) (granting evidentiary hearing in post conviction proceedings in order to determine whether electrocution in its present condition is cruel or unusual punishment).

In claim XIX, Mr. Cooper alleges that newly discovered evidence establishes that he was wrongly convicted and sentenced to death. Mr. Cooper alleged that the newly discovered evidence established that he was not responsible for firing the last and fatal shots that resulted in the death of Steven Fridella. Had the jury known that Terry Van Royal actually inflicted the final shots, they would not have sentenced Richard Cooper to death.

An evidentiary hearing is presumed necessary absent a conclusive showing that a claim is without merit. "The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). To the contrary, the Florida Supreme Court has instructed judges to err on the side of caution in granting evidentiary hearings, especially on claims alleging ineffective

assistance of counsel, *Brady* violations or newly discovered evidence.[36] The lower court prevented Mr. Cooper from fully developing this claim. Mr. Cooper should have received a full and fair evidentiary hearing on this issue.

Mr. Cooper did not receive a fair trial or sentencing. The flaws that occurred throughout his trial and sentencing were many. The court was required to examine the cumulative effect of these deprivations. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). As demonstrated above, Mr. Cooper proved at the evidentiary hearing that he was entitled to relief on a number of issues. Individually these violations warrant relief, however, their cumulative effect is even more compelling – especially in light of the numerous claims the lower court refused to consider.

Indeed, throughout the penalty phase and during sentencing, the trial judge's and prosecutor's actions deprived Mr. Cooper of the individualized sentencing required by the Eighth and Fourteenth Amendments. *See Zant v. Stephens*, 462 U.S. at 879-80; *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Specifically, Mr. Cooper raised several claims relating

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[36] *Floyd v. State*, 27 Fla. L. Weekly S75 (Fla. Jan. 17, 2002); *see also Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J., concurring) (advocating mandatory evidentiary hearing for all initial 3.850 motions asserting ineffective assistance of counsel, Brady violations and other newly discovered evidence claims).

to his failure to receive an individualized sentencing. Those claims included: the trial court's instruction that the jury's verdict had to be by a majority vote (claim XII); the prosecutor improperly instructing the jury they could not consider sympathy towards Mr. Cooper in reaching their decision (claim XI); the trial court's allowing testimony regarding Mr. Cooper's lack of remorse to infect the penalty phase (claim XIII); and the trial court permitting the prosecution to diminish the role of the jury (claim XV).

Additionally, Mr. Cooper raised several claims attacking the constitutionality of Florida's sentencing scheme in death penalty cases. Specifically, Mr. Cooper challenged the admission of victim impact evidence (claim VIII); the jury instructions, which shifted the burden to Mr. Cooper to prove that a death sentence was inappropriate (claim IX); that the jury did not receive sufficient guidance regarding the meaning of the "heinous, atrocious and cruel" aggravating factor (claim XIV), or the "cold, calculating and premeditated" aggravating factor (claim XVI); and the improper consideration of the contemporaneous murder convictions as an aggravating factor (claim XVII).

The lower court should have considered these issues in connection with the claims already discussed in this brief.

CONCLUSION

Foul play permeated every stage of the proceedings in this case - resulting in a death sentence from a judge and jury who were given no reason to support a life sentence. Richard Cooper deserves to live. This Court should remand for a new trial on both the guilt and penalty phases. Alternatively, it should remand with instructions to re-sentence Mr. Cooper to life in prison. At the very least, Mr. Cooper should be allowed to develop all his meritorious 3.850 claims at a full and fair evidentiary hearing. If a new trial or hearing is ordered, then the remand should direct the State to comply with the public records laws.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 20th day of March, 2002, a true and correct copy of the foregoing was furnished by U.S. Mail to **C. MARIE KING, BOB LEWIS**, and **JIM HELLICKSON**, Assistant State Attorneys, Office of the State Attorney, 14250 49th Street North, Clearwater, Florida 33762-2800; **CAROL M. DITTMAR**, Assistant Attorney General, Office of the Attorney General, Suite 700, Westwood Building, 2002 North Lois Avenue, Tampa, Florida 33607-2366.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Appellant Richard Cooper, certifies that this Initial Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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