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

REPLY BRIEF

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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 County Clerk, but were filed by the Clerk after Mr. Cooper's Initial Brief are cited as: Supplemental Record on Appeal are denominated "(SROA. 123)," Second Supplemental Record on Appeal "(SSROA.123)," and Third Supplemental Record on Appeal "(TSROA.123)." A list of the proper citations for record items cited in the Initial Brief is appended to this reply as "Appendix A."

Citations to transcripts include the correct spelling for names transcribed phonetically by the court reporter.

I. THINGS REALLY ARE AS BAD AS MR. COOPER ASSERTED IN HIS INITIAL BRIEF

The State seeks to lessen the impact of the wrong done to Mr. Cooper by asserting that the facts contained in his brief are not supported by the record. As will be demonstrated more fully in the context of the arguments below, every factual assertion in that brief is supported by the record. A few of the record issues raised, however, warrant specific discussion.

First, record evidence supporting assertions about Mr. Cooper's pretrial mental state is contained in the medical logs of the Pinellas County jail that were appended to Mr. Cooper's amended 3.850 motion and are a part of the record. (ROA. 613-25) Those records are discussed in detail on page 30 below, as is the fact that Mr. Cooper's competence claim was improperly summarily denied. Thus Mr. Cooper was prevented from presenting testimony on his mental health.

Second, with regard to Skalnik's testimony in ten cases prior to Mr. Cooper's, the State Attorney's own letters list the ten cases cited in the Initial Brief under the heading "Paul Skalnik as a witness." (SROA. 276-80, 356-60) Mr. Cooper cannot prove what role Skalnik played as to each case because the vast majority of the records were not provided to his counsel in response

to the public records request. The eight sealed boxes of Skalnik-related material are, however, available for the Court's review.

Third, Mr. Cooper's defense attorney unequivocally stated that he did not interview Skalnik in jail because he felt ethically compromised. The full text of his testimony is presented in Section II, A, 2 a below.

Finally, the State is correct that Mr. Cooper improperly cross-cited to items in the record on appeal for co-defendant Van Royal. Mr. Cooper has remedied that mistake by filing a motion to supplement the record pursuant to *Johnson v. State*, 660 So.2d 648 (Fla. 1995).

II. KOCH HAD A "GRAVE ETHICAL COMPROMISE"

The facts establish that Mr. Koch's actual conflict adversely affected his performance and deprived Mr. Cooper of his right to effective assistance of counsel under the Sixth Amendment and Florida's Constitution. The facts and law applicable to the determination of an actual conflict are addressed below. Contrary to the State's assertion on the adverse effect prong, Mr. Cooper "need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had **some** adverse effect on counsel's performance." *McConico v. Alabama*, 919 F.2d 1543, 1546 (11th Cir. 1990) (internal citations omitted) (emphasis supplied). In addition

to the discussion of adverse effect at pages 63-66 of the Initial Brief, subsections 2 b, c, and d below show that the conflict had an adverse effect on Koch's performance as counsel for Mr. Cooper.

A. The Facts Supporting The Conflict Claim

1. Facts Not Subject To Interpretation

Several undisputed facts underlie the conflict claim: Skalnik worked as a private investigator/process server for Koch. (SROA. 3) Koch filed a Petition for Reconsideration of Sentence for Skalnik in October, 1982. (SSROA. 2757) Skalnik was again arrested and incarcerated in November, 1982. (Dir. 480) Koch was appointed to represent Mr. Cooper on March 10, 1983. (Dir. 40, 42) On June 14, 1983 Skalnik provided detectives with a statement concerning "confessions" he obtained from Mr. Cooper when they were housed in jail together. (Dir. 505) Defense counsel Crider deposed Skalnik on November 18, 1983. (SROA. 1) At the November 18, 1983 deposition Skalnik admitted that he had been snitching for two and a half years, had snitched against 28 defendants and had actually testified in 3 or 4 cases. (SROA. 25, 26) On January 10, 1984, the court conducted a hearing on Cooper's motion to suppress Skalnik's statements on the grounds that they were obtained in violation of *Henry/Massiah*. (Dir. 476-77) Koch conducted the examination of Skalnik at the suppression hearing. (Dir. 480)

2. Facts Supported By The Record

Koch knew that "[t]he information that Mr. Skalnik had about Richard was extremely damaging." (ROA. 1026)

a. Koch knew he had a "grave" conflict of interest.

Koch explicitly acknowledged his conflict at the 3.850 hearing in the context of being questioned about his efforts to investigate Skalnik.

> Q. Do you know if you **personally having previously represented Mr. Skalnik**, if you went privately and had a chat with Mr. Skalnik?
>
> A. I did not.
>
> Q. Was there a reason for that?
>
> A. Yes. **Because of an ethical compromise** I would have felt by doing that.
>
> Q. Now, I believe the records reflect that you brought some, correct me if I'm wrong, I think you brought something of that sort to the Court's attention at some point in the trial proceedings?
>
> A. **That I represented Mr. Skalnik?**
>
> Q. Yes.
>
> A. You know, I hope I did.[1] I have no specific recollection of that. I've got to tell you that **given the gravity of that ethical compromise**, I can't imagine not having brought that to the Court's attention.
>
> Q. Okay. Having – again, the record would reflect what it reflects at that point. But you're saying **you felt that you could not go speak with Mr. Skalnik because it would**

[1] There is no such disclosure to the trial court in this record.

have been unethical to do so. Is that true? I believe you just testified to that.

A. **I felt a compromise by it, yes, sir.**

(ROA. 1026-27)

The State tries to negate Koch's assertion that he had a grave ethical compromise by quoting Koch's answer to a follow up hypothetical question. Counsel asked Koch whether, if he had not previously represented Skalnik, he "would…have had any **reluctance** to and speak to him knowing that he was a potential witness?" (ROA. 1027-28) Koch answered that he would have been reluctant and that he would have felt "awkward" because Skalnik was on the State's witness list and in custody.[2] (ROA. 1028) Contrary to the State's brief, he did not testify that he would not have interviewed Skalnik for that reason. Nor did he back off his assertion of an ethical compromise.

b. The prosecution knew that Koch had a conflict that adversely affected Koch's representation

At the 3.850 hearing Crow testified about a conversation he had with Koch shortly prior to trial about how they were going to "handle" the fact that Koch had previously represented Skalnik. When Crow was asked if he was aware of Koch's prior representation of Skalnik he answered:

[2] Koch's "reluctance" to speak with a State witness is itself a curious matter. Neither the law nor ethics rules prohibited Koch from interviewing a State witness.

A. Yes. I think that it came out in Skalnik's deposition, pretrial deposition taken by Mr. Crider…And I believe it also came up in my conversation with Mr. Koch after the motion hearing because **we were discussing what to do and how to handle it** and -

(ROA. 1826) (Crow was interrupted by the State's lawyer.)

The only logical conclusion to draw from Crow's testimony is that he and Koch recognized the inevitable conflict that would arise when Koch cross examined his former client. So rather than having Koch advocate unfettered, they discussed a way for Koch to "avoid" the conflict.

c. Koch intentionally limited his examination of Skalnik to the time after his relationship with Skalnik.

Although Koch knew that Skalnik began snitching at least two and a half years earlier, Koch initiated his interrogation of Skalnik by asking him "on how many instances and in how many different cases have you provided information to law enforcement since your incarceration in November of 1982?" (Dir. 482) Despite numerous objections seeking a time predicate throughout the hearing, Koch concluded the questioning as he began, "Be fair to say Mr. Skalnik, that since your incarceration you have routinely provided all information that you obtained?" (Dir. 493)

Although he could not recall why, Mr. Koch explicitly acknowledged the limitation of his examination at the 3.850 hearing:

Q. Looking back on it, was your cross examination limited in any way?

A. Yes, sir.

Q. How so?

A. I read through this transcript when you all first contacted me back in 1989 a couple of times since then. And **the questions that I asked Mr. Skalnik were predicated upon since your incarceration in some month in 1982, what have you done to assist the State**. And I – to this date do not recall why I had placed that limiting time frame to the question.

(ROA. 1029)

The combination of Koch and Crow's 3.850 testimony leads to the inescapable conclusion that Koch intentionally limited his questioning of Skalnik in Mr. Cooper's trial because of his prior representation of Skalnik

d. Koch declined the opportunity to correct the false impression created by his questions.

Koch's narrow questioning, along with prosecutor Crow's objections and Skalnik evasive answers combined to leave the court with the false impression that Skalnik had begun his career as a snitch with his November, 1982 incarceration and with Mr. Cooper. Prosecutor Crow admitted as much when he testified at the 3.850 hearing:

> And I was aware and I believe Mr. Koch was aware that, in fact, in a prior incarceration Mr. Skalnik had testified against other people in other cases and to ensure that Mr. Koch knew that when it wasn't brought out at the hearing, **I became concerned that maybe the judge was unaware of it**. I had a conversation with Mr. Koch to make sure that he was aware of that."

(ROA. 1825) (emphasis supplied)

In fact, at the conclusion of the hearing on the Motion to Suppress concluded, Crow, in an extraordinary move, "specifically asked [Mr. Koch] why he had not brought out that Skalnik had testified during prior incarcerations, advised Mr. Koch of Skalnik 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, if [Mr. Koch] desired to do

so." (ROA. 783-784) Koch declined to re-open the hearing and Crow took no further action on the matter.

B. This Court Must Establish A Legal Standard For Finding Actual Conflict In Successive Representation Cases

The Sixth Amendment and the Florida Constitution guarantee Mr. Cooper the right to the assistance of counsel free from conflict. This Court has never explicitly addressed the circumstances under which successive representation gives rise to an actual conflict of interest. It should do so now. This Court should adopt a bright line rule finding an actual conflict in all circumstances in which the attorney has personally previously represented a key prosecution witness (as here). Alternatively, the Court should accept as an adequate showing of actual conflict "any other proof of inconsistent interest," *Smith v. White*, 815 F. 2d 1401, 1406 (11th Cir. 1987), which establishes that "counsel's allegiance to the accused was compromised by competing obligations owed to other clients." *Perillo v. Johnson*, 205 F.3d 775, 798 (5th Cir. 2000) (citation omitted).

Koch's prior representation of Skalnik created an actual conflict that adversely affected his performance on Mr. Cooper's behalf. Where, as here, defense counsel has previously represented a key prosecution witness, there is a serious risk that "counsel's allegiance to the accused [will be] compromised by competing obligations owed to [his prior] clien[t]." *Ibid*. There is no question that this risk materialized in this case. At the 3.850

hearing Koch acknowledged the existence of "an ethical compromise" stemming from his successive representation of Skalnik and Mr. Cooper. (ROA. 1026-27) The prosecutor recognized the conflict and knew that Koch had to alter his examination of Skalnik to avoid the conflict. (ROA. 1826) Thus the record makes it clear that this ethical compromise, which Koch characterized as grave (ROA. 1027), limited Koch's advocacy and actions for Mr. Cooper.

C. This Court Should Adopt A Bright Line Rule On Successive Representation of a Key Witness And A Defendant

Koch's assessment of his ethical dilemma is entirely consistent with the rulings of the Florida courts of appeal. At least two courts have found that an actual conflict of interest arises when a defense attorney previously represented a key prosecution witness. In *Lee v. State*, 690 So.2d 664 (Fla. 1st DCA 1997), the court examined the successive representation of a jail house snitch and a capital defendant. Ten years prior to Mr. Lee's trial, his attorney represented Kyles, Lee's cell mate/informant. At the time he informed on Mr. Lee, Kyles was represented by other assistant public defenders from the same office as Mr. Lee's attorney.

Unlike Mr. Cooper's case, Mr. Lee's defense attorney raised the conflict issue with the trial court, informed the court that he had no memory of his prior representation, but asserted that he had no conflict. *Id.* at 665.

He also told the court that he and the prosecutor were working on a stipulation to introduce evidence of prior convictions so he wouldn't have to do that on cross examination. *Id*. Although the appellate court was ultimately asked to rule on the manner in which the trial court handled the issue of waiver, it also had to determine whether there was an actual conflict.

Despite the ten year gap in counsel's representation of the witness and Mr. Lee, the court held "[d]efense counsel had an actual conflict of interest **resulting from his own prior representation of a key witness against the defendant** and the Public Defender's recent representation of that witness." *Id*. at 669 (emphasis supplied). Here the Court is faced with a mere four month gap between Koch's representation of Skalnik and Cooper. Moreover, unlike Mr. Lee's attorney, Koch admits there was a grave ethical compromise and that it affected his performance. Finally, the *Lee* case shows that counsel's agreement on how to deal with the witness' past convictions was not sufficient to preclude a finding of conflict.

More recently, the Second District Court of Appeals applied the *Lee* reasoning in its decision in *Thomas v. State*, 785 So.2d 626 (Fla. 2nd DCA 2001). Mr. Thomas's defense attorney had also previously represented his cellmate, who became a key prosecution witness. As in *Lee*, the defense attorney brought the matter to the court's attention. But unlike *Lee* the matter

was never brought to the defendant's attention because the *Thomas* "trial court found that there was no conflict because the past representation had no connection to the present case." *Id.* at 627. The Second District Court of Appeals disagreed, held that there was an actual conflict of interest, and remanded for a new trial. *Id*. at 628-29.

1. *Lee* And *Thomas* Are Not Materially Distinct

The State seeks to distinguish *Lee* and *Thomas* on the basis that the appellate courts were faced with determining whether the trial court properly handled the successive representation conflict when it was presented to them prior to trial. While that is true, the holdings of the courts of appeal concerning the existence of an actual conflict in those cases were in no way dependent on this fact. That the trial court in this case was not advised of Koch's conflict of interest in no way detracts from the fact that there was indeed an actual conflict. Moreover, distinguishing *Lee* and *Thomas* on this basis would serve only to further penalize Mr. Cooper for the fact that his own attorney, who was aware of a "grav[e] . . . ethical compromise," failed to inform the court of that actual conflict.

2. This Court's Decisions In *Gorby & Bouie* Do Not Apply

The State next contends that this Court's decisions in *Gorby v. State*, 630 So.2d 544 (Fla. 1993), and *Bouie v. State*, 559 So.2d 1113 (Fla. 1990), reject the argument that successive representation of a witness and defendant creates an actual conflict. In fact, this Court has never explicitly addressed the circumstances under which successive representation gives rise to an actual conflict of interest. Indeed, both *Lee* and *Thomas* were decided *subsequent* to *Gorby* and *Bouie*. Neither court of appeal even mentioned *Gorby* or *Bouie*, much less found them dispositive. Moreover, *Gorby* and *Bouie* involve very different scenarios than *Lee*, *Thomas*, and this case.

First, neither *Gorby* nor *Bouie* involved actual successive representation by the same attorney. There was no evidence that the attorneys in question had personal knowledge concerning the former client of their former partner or co-workers. Nor as in the case of Koch, was there any evidence of a prior business relationship between the attorney and the witness that might generate a personal duty of loyalty to that former client. Indeed, in *Gorby*, it was counsel's *former* partner who had represented the prosecution witness. Because any conflict of interest imputes only to an attorney's "*current* partners and employees," *see Cox v. American Cast*

Iron Pipe Co., 847 F.2d 725, 729 (11th Cir. 1988) (emphasis added), an actual conflict was not possible.

Second, in both the *Gorby* and *Bouie* trials the defense attorneys zealously cross-examined their associates' former clients, causing the courts to conclude that there had been no adverse effect on the current clients. These adverse effect findings were sufficient to end the Sixth Amendment inquiry. Thus, the *Gorby* and *Bouie* courts' comments on actual conflict were therefore dicta at most.

3. The Bright Line Rule

Thus, the Florida courts have consistently held—on essentially identical facts—that an actual conflict of interest arises when defense counsel has previously represented a key prosecution witness. This bright line rule is an appropriate way to deal with the concern that an attorney in such a position "may not be able to effectively cross-examine the witness for fear of divulging privileged information," *Church v. Sullivan*, 942 F.2d 1501, 1511 (10th Cir. 1991), and therefore will be a less-than-zealous advocate for his current client. This is precisely what happened here.

Without a bright line test courts will continue to have to examine the facts in each case to ascertain the existence of an actual conflict. But that retrospective examination will inevitably be hindered by the fact that the very

nature of the issue precludes full factual disclosure. The attorney who received confidential information from his client is precluded from disclosing the information necessary for the Court to decide whether there is a conflict. This Court should therefore relieve the lower courts of this impossible burden by placing its imprimatur on the *Lee/Thomas* rule and applying it here to hold that Koch's successive representation of Skalnik and Mr. Cooper gave rise to an actual conflict of interest.

D. In Absence Of A Bright Line Test, The Court Should Determine Whether The Attorney Had Divided Loyalties.

In the event this Court is unwilling to adopt a bright line rule, then the test for determining whether successive representation created an actual conflict should focus on whether the attorney had divided loyalties. Such a test should permit the consideration of all relevant facts in answering that question. Indeed, the "'guiding principle in this important area of Sixth Amendment jurisprudence' . . . is whether counsel's allegiance to the accused was compromised by competing obligations owed to other clients." *Perillo*, 205 F.3d at 798 (quoting *United States v. Alvarez*, 580 F.2d 1251, 1255, 1258 (5th Cir. 1978)).

All courts that have considered the successive representation issue agree that attorneys are compromised by competing obligations and thus have an actual conflict 1) where the prior and current cases are substantially

related, or 2) where the attorney learned confidential information from the former client. *See, e.g.*, *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000); V*eney v. United States*, 738 A.2d 1185, 1193 (DC 1999); *Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994); *Commonwealth v. Munson*, 615 A.2d 343, 347-48 (Pa. Super. Ct. 1992); and *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en banc) (adding the requirement that confidential information obtained in the former representation must be relevant to the later case).

Most courts, however, recognize that those two circumstances do not account for all factual scenarios out of which a conflict may arise from successive representation. They therefore extend the inquiry to determine whether the attorney "'otherwise divides his loyalties.'" *Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994) (quoting *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988)); *Veney v. United States*, 738 A.2d 1185, 1193 (DC 1999) (articulating same three-prong test); *Commonwealth v. Munson*, 615 A.2d 343, 347-48 (Pa. Super. Ct. 1992) (same); *see also Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000) (establishing a number of factors that could give rise to actual conflict of interest in successive representation).

Mr. Cooper urges this Court to recognize that not all actual conflicts will fit neatly into the first two categories. He asks the Court to adopt the

third prong of the test so that Florida courts can remedy situations in which the attorney provided "less-than-zealous representation of [a] present client" because of "divided loyalties." *Maiden*, 35 F.3d at 480. Divided loyalty may be harder to identify than cases in the other categories, but, they are no less a violation of the Sixth Amendment or any less deserving of a remedy.

1. The Test Should Seek Proof Of Inconsistent Interests

The Court should accept as an adequate showing of actual conflict/divided loyalty "any other proof of inconsistent interest," *Smith v. White*, 815 F. 2d at 1406, which shows that "counsel's allegiance to the accused was compromised by competing obligations owed to other clients." *Perillo*, 205 F. 3d at 798 (quoting *United States v. Alvarez*, 580 F. 2d 1251, 1258 (5th Cir. 1978)). In such a case, the petitioner should be required to prove such inconsistent interest by "point[ing] to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Porter v. Singletary*, 14 F. 3d 554, 560 (11th Cir. 1994). A petitioner who establishes such proof – even absent a substantial relationship or disclosure of confidential information – should be deemed to have met the "actual conflict" prong of *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

2. The Facts Show That Koch Had Inconsistent Interests

Koch's own assertion that he had a grave ethical compromise is the best evidence that he had to "divide his loyalties" between Skalnik and Mr. Cooper. *Ibid.* (ROA. 1026-27) Koch admitted to inconsistent interests when he testified that he felt precluded from interviewing Skalnik because of the prior representation. *Id.* This same ethical compromise is what undoubtedly prompted Koch to affirmatively mislead the trial court at suppression hearing as to the extent of Skalnik's activities as a police snitch. Further, Koch's minimal (3 page) cross examination at trial of the key witness is evidence of the inconsistent interest.[3] Koch did not even attempt to impeach Skalnik to the full extent of the law by inquiring about his prior crimes of dishonesty or false statement as permitted by Fla. Stat. 90.610(1). The prosecution even noted the scanty cross of Skalnik in its closing "they didn't cross-examine [Skalnik] in any great degree." (Dir. 1573)

Neither Koch's inability to recall the reason that he limited his questions, nor his failure to articulate the exact nature of his ethical compromise detract from the existence of the conflict. Undoubtedly there are a host of facts that could explain the exact nature of the ethical compromise and the reason for his time limited questions. But Koch could

[3] Koch's scant cross examination of Skalnik is discussed in detail on pages 10 and 11 of the Initial Brief.

not disclose that information because of his continuing duty of loyalty to Skalnik. For reasons that are known only to Koch, at the time he represented Cooper, his loyalties were divided between Skalnik and Cooper. Unfortunately for Mr. Cooper, Koch elevated Skalnik's interests over his.

E. This Court Should Reject *Freund's* "Actual Conflict" Test.

The State urges this Court to adopt the Eleventh Circuit's narrow view of actual conflicts in successive representation cases as articulated in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en banc). In *Freund*, the court held that an actual conflict arises in a successive representation case only if counsel's earlier representation of an adverse witness was substantially and particularly related to counsel's later representation, or if counsel actually learned particular confidential information during the prior representation of the witness that was relevant to the petitioner's later case. *Freund* eliminates the independent third prong followed by other courts and twists it to say that even where both of the above are true, "other proof of inconsistent interests" may be required to demonstrate an actual conflict. *Id.* at 859.

1. Freund Improperly Departed From Precedent

The Eleventh Circuit's approach in *Freund*—termed "narrow" and "restricting" by the Fifth Circuit, *see Perillo*, 205 F.3d at 799—was subject to a devastating dissent authored by Judge Tjoflat and joined by Judges Anderson, Birch, and Dubina. As Judge Tjoflat made abundantly clear, while the *Freund* majority purported to reaffirm earlier Eleventh Circuit precedent, it in fact departed from that precedent, which had "sanctioned additional methods—other than substantial relatedness or disclosure of confidential information—of establishing an actual conflict in the successive representation context." *Freund*, 165 F.3d 839, 872 (Tjoflat, J., dissenting). The majority's approach improperly disregards the nuanced and fact-intensive nature of the actual conflict inquiry and thus is simply not adequate to identify all possible contexts in which an actual conflict may arise with successive representation. *Id*. at 872-73.

2. Freund Is So Factually Distinct That It Is Inapplicable.

Despite the State's assertion of factual similarities between *Freund* and the instant case, the factual dissimilarities are far more striking. First, it appears from the circumstances of Freund's friendship with co-defendant Trent, and Trent's closely intertwined relationship with the lawyers, that Freund knew of the extensive prior business and personal relationship his

attorneys had with Trent. In contrast, Mr. Cooper had no prior knowledge of the Koch/Skalnik relationship before Koch was appointed to represent him. Koch recalled telling Mr. Cooper about his prior representation of Skalnik, but never testified that he also explained the prior business relationship to Mr. Cooper. Other than Koch's recollection, there is no evidence in the trial record that shows that Mr. Cooper knew of the conflict prior to his trial. More importantly, Koch admits that he did not tell Mr. Cooper that he would be limited in how he would investigate or examine Skalnik. (ROA. 1035)

Nor is there any evidence that Mr. Cooper's trial judge knew about Koch's successive representation. In contrast, the court in *Freund* was apprised of the successive representation and even conducted a hearing on the relationship. *Freund,* 165 F.3d at 848-49. Freund's retained defense attorneys also informed the court that they were seeking a Florida Bar ethics opinion concerning their proposed conduct. *Id*. Freund's counsel, presumably at his behest, brought the issue to light and fought to maintain the ability to represent him. Going into trial, Freund knew full well about his attorneys' relationship with their former client and Freund could have hired different counsel. Mr. Cooper did not have that option, because the trial

court did not know of the successive representation, it made no inquiry of Mr. Cooper and no offer for the appointment of conflict free counsel.

Finally, and perhaps most significantly, Freund's attorney never had to cross-examine Trent, his former client, because, unlike Skalnik, Trent was never called to testify. *Id.* at 842. Thus, Freund's attorney never faced the issue of how to use or disregard information obtained from the prior representation. In contrast, Koch was forced to make that decision and balance his clients' (mutually exclusive) interests. He chose to protect his relationship with Skalnik by limiting his questions rather than protecting Cooper and extensively examining Skalnik.

3. These Facts Meet the *Freund* Test

Ky Koch filed a pleading for his client Skalnik concerning Skalnik's "prior involvement with the law." (SSROA. 2757) He then was faced with cross examining Skalnik in the Cooper case about Skalnik's criminal history and service as a law enforcement snitch. Thus the representation was both substantially related, and likely to have involved client confidences. It should therefore satisfy both prongs of the *Freund* test.

Regardless of the test that the court applies to examine the Koch/Skalnik conflict, federal constitutional law compels a finding that Mr.

Cooper was denied effective assistance of counsel under the Sixth Amendment. This Court should therefore reverse and remand for a new trial.

III. IT IS TIME TO EXPOSE THE SKALNIK RECORDS TO THE LIGHT OF DAY.

A. The Standard of Review is De Novo, Not Abuse of Discretion.

Mr. Cooper is asking this court to determine that, as a matter of law, the State failed to comply with the particularity requirement of the statute. This is a pure question of law; therefore, the standard of review is de novo. *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). The State argues that the standard of review on the Chapter 119 issue is whether the trial court abused its discretion. Ans. Br. at 47, 53 (citing *Mills v. State*, 786 So. 2d 547, 552 (Fla. 2001) and *Bryan v. Butterworth*, 692 So. 2d 878 (Fla. 1997)). These cases are inapplicable because they involve issues of fact, rather than issues of law. Mr. Cooper is not asking this court to review facts found by the trial court. Nor is he asking this court to second-guess the trial court's findings after the in camera review. See Ans. Br. at 53. Instead, Mr. Cooper is asking this court to rule that the in camera review was insufficient as a matter of law because the State failed to comply with the particularity requirement of the

statute, precluding Mr. Cooper's participation in any meaningful adversary process. [4]

[4] Mr. Cooper asks the Court to take judicial notice of the record in the Mandamus Petition he filed in this Court, case no. 89,390

B. It Is Not Fair or Reasonable to Require Courts to Examine Voluminous Documents For Public Record Exemptions Without Participation by The Party Seeking Disclosure or Particular Disclosure of Exemptions Sought.

The State urges this court to accept the view that the trial court can validate the State's exemption claims without participation of the party seeking disclosure. Ans. Br. at 51. This argument was rejected in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), a case involving the federal Freedom of Information Act. In *Vaughn*, the court recognized that the "lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Id.* at 824. The court found that unequal access to knowledge could not be entirely remedied by an in camera inspection, which is "necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Id.* at 825. Assigning this task to the trial court is futile, especially where voluminous documents are involved:

> In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a Government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

Id.

In response to Mr. Cooper's request, the State made sweeping allegations of exemptions, leaving to the trial court the daunting task of determining which documents or portions of documents were covered by which exemptions. "When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id*. The court simply cannot determine what exemptions apply to what parts of any particular document.

C. The State Failed to Meet the Particularity Requirement.

The Florida Legislature attempted to remedy the difficulties encountered by courts reviewing public records by adding the particularity requirement to the statute. As a result, 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. (2001). In response to Mr. Cooper's request, the State merely listed statutory exemptions, barely complying with the first requirement of the statute. The State has never complied with the second requirement of the statute because the State has never stated with particularity the reasons for concluding that the records are exempt.

In fact, the State did not even identify specific records—the State identified entire files and listed exemptions without specifying which documents were covered by which exemptions. ***For example, in the June 23, 1995 letter, the State listed the case of*** *State v. Franklin Gale*, CRC81-02332CFANO and included exemptions such as: § 119.07(3)(e) (undercover personnel of any criminal justice agency); § 119.07(3)(k) (confession of a person arrested); § 119.07(3)(w) (investigatory records of the Chief Inspector General in the Governor's Office); § 119.072 (intelligence or information from a non-Florida criminal justice agency) (SBOA 358) (parentheticals supplied).

The State did not specifically object to each of the documents (or portions of documents) subject to each exemption. Certainly the State does not contend that each exemption applies to each document in each file.

D. The Court Should Adopt the Procedural Requirements Set Forth in *Vaughn* to Ensure that the State Meets the Particularity Requirement in the Statute.

The State asserts a duty to protect confidential information from disclosure. Ans. Br. at 52. However, the State also has a duty to comply with Chapter 119. These competing interests can be balanced by a more detailed description of the documents withheld without revealing the substance of the documents. Florida courts have achieved this balance through the use of privilege logs. See the discussion of Florida Rule of Civil

Procedure 1.280(b)(5) and *TIG Ins. Corp. v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001) at pages 50-51 of the Initial Brief.

Similarly, the particularity requirement of § 119.07(2)(a) is designed to enable a party seeking disclosure of a public record to assess the applicability of the asserted exemption. The information provided by the State in response to Mr. Cooper's request is utterly useless in this regard.

The State should be required to provide specific information, along the lines of that required by the court in *Vaughn*. Mr. Cooper asks this Court to adopt the *Vaughn* factors. The Second DCA rejected *Vaughn* in *Lorei*,[5] **but the court was interpreting the 1982 version of the statute, before the 1984 amendment inserted the particularity requirement. Although** *Lorei* was decided in 1985, the court was interpreting the 1982 pre-amendment version of the statute. Adopting the reasoning of *Vaughn* will ensure that those who seek public records in Florida will have a meaningful opportunity for review. The result will be in the best interest of public policy.Mr. Cooper is not asking this court to change the law, as the State suggests. Ans. Br. at 51. Instead, Mr. Cooper is asking this court to interpret the law as it has existed since 1984. Mr. Cooper requests this court

[5] Contrary to the State's assertion at page 50 of its Answer Brief, Cooper did not contend in his Initial Brief that the statutory amendment was in response to the *Lorei* decision. Rather, Cooper merely claimed that the amendment seemed to be what the *Lorei* court was inviting in its opinion.

to order the State to provide the following information as to each document withheld: (1) the type of document; (2) the date; (3) the author; (4) to whom document is addressed (5) the general subject matter; (6) the specific exemption (including citation to the applicable subsection of the statute); and (7) a specific explanation of why the State contends that the specific exemption claimed applies to the document. Mr. Cooper would clearly be entitled to such relief if this were a civil case. Certainly he should be entitled to nothing less here, where his life is at stake.

IV. THE TRIAL COURT IMPROPERLY SUMMARILY DENIED COOPER'S MERITORIOUS CLAIMS

Under Rule 3.850, an evidentiary hearing is presumed necessary absent a conclusive showing that a claim is without merit. Thus, a court must grant an evidentiary hearing on all claims 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. A few of the claims addressed in the Initial Brief merit additional reply and are discussed below.

A. Claim III Was Improperly Denied as Time Barred

In its Answer Brief, the State contends that Claim III, which alleged that Richard Cooper was incompetent to stand trial and that counsel was ineffective for failing to seek a competency hearing, was properly summarily denied as time barred. Contrary to the State's argument, Mr. Cooper's

original and amended post conviction motion both presented a legally sufficient basis for presenting that claim after the original time limitation. Rule 3.850(b)(1) permits an extension of time where "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."

1. Mr. Cooper's Pleadings Asserted Inability to Ascertain Facts Despite Due Diligence

When he timely filed Mr. Cooper's initial post conviction motion, counsel anticipated that there might be facts or claims that he was unable to ascertain in the allotted time, despite his due diligence. Accordingly, the original post conviction motion 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)

Less than three months later, 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) Additionally, at the start of Claim III, counsel incorporated all allegations and factual matters in the motion. (ROA. 156) Although Mr. Cooper's pleadings did not specifically track the language in Rule 3.850, ***they clearly asserted his counsel's inability to discover the facts underlying the claim despite his due diligence.*** The State's characterization of the special request for leave to amend as a "blanket statement seeking to amend a pleading at any time" is simply wrong. The request was very specific: collateral counsel was operating out of New York and had limited funds, witnesses were scattered throughout the country and counsel simply had not had enough time to fully investigate and develop all claims. This is hardly a "blanket" request to amend. *Cf. McConn v. State*, 708 So. 2d 308 (Fla. 2d DCA 1998), overruled in part, *Harris v. State*, 27 Fla. L. Weekly D954 (Fla. 2d DCA 2002) (request to amend "in the best interests of justice" insufficient). Collateral counsel specifically stated why an amendment was necessary and

filed the Amended 3.850 Motion less than three months after the initial motion. This is not a situation that constitutes an abuse of procedure or warrants a time bar. *Id*.

2. Insufficient Evidence Cannot be Harmless Error Where the Trial Court Refused to Hold an Evidentiary Hearing.

Claim III 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 drugs rendered him incompetent for trial and capital sentencing and that counsel was ineffective for failing to seek a competency hearing.

Because the court summarily denied the claim, Mr. Cooper was not allowed to fully develop the claim and present other evidence that would support the claim. Mr. Cooper did, however, present substantial documentation to support the allegations in his Amended 3.850 Motion. Specifically, record evidence demonstrates that Richard Cooper mutilated himself, set fire to his cell, and was provided psychotropic medications – all while awaiting trial. Jail medical records show that approximately four months prior to trial Mr. Cooper was provided the anti-anxiety drug Librium[6]

[6] Mr. Cooper was provided with 25 milligrams of Librium twice a day from September 8 to September 14, 1983. (ROA. 617)

and the anti-psychotic drug Mellaril.[7]The jail's counseling logs show "[Cooper] burned himself in several places; claims one playing chicken with Robinson; [unreadable] others he claimed were accidental. Cooper avoids reality whenever possible." (ROA. 623) Finally, jail medical logs show: "Complaining of sleep problems, prescribed Librium" (ROA. 628); "inmate set fire to cell, inmate fighting, kicking and shouting obscenities at nurses and officers" (ROA. 626, 628); and "Not a B-Wing candidate for psych reasons" (ROA. 625).

The State contends that given the testimony at the evidentiary hearing rebutting this claim, any error in summarily denying the claim is harmless. It is nonsensical to argue harmless error where the defendant is precluded from introducing testimony or evidence to support his claim at an evidentiary hearing. Mr. Cooper cannot be punished for not presenting more evidence to support the claim when the summary denial precluded him from fully demonstrating that he was entitled to relief.

B. The State Admits that Claim VII was Not Barred

Claim VII raised serious allegations regarding the trial court's improper delegation to the State Attorney of the responsibility for drafting the sentencing order and the trial court's resulting failure to weigh the aggravating

[7] Mr. Cooper was provided with varying doses of Mellaril from September 1983 almost continuously through February 1984. (ROA. 612-16)

and mitigating circumstances. The lower court, however, found it was procedurally barred because it should have been raised on direct appeal. In the State's Response to Mr. Cooper's Habeas Petition, it asserts:

> The record on appeal did not reflect that the sentencing order had been drafted by the State Attorney's Office, so there was no basis for such an appellate argument. This necessarily required the development of facts at an evidentiary hearing, and even if jurisdiction had been relinquished, the question might not be resolved. At any rate, Cooper made no attempt to develop this claim factually in his post conviction proceeding, and no basis for relief has been offered in this petition.

Response to Petition for Writ of Habeas Corpus, 14 (citations omitted).

Mr. Cooper agrees that the claim required the development of facts at an evidentiary hearing. The reason, however, that facts were not presented during the post conviction proceedings is because the lower court found the claim was procedurally barred.

V. MR. COOPER'S *RING* CLAIM IS NOT BARRED.

In Claim X, Mr. Cooper alleges that he was denied his right to a jury trial on the elements of capital murder. On two counts, five members of Mr. Cooper's jury, although finding him guilty of first degree murder, never found him guilty of first degree capital murder. On the third count, three members of the jury again never found Mr. Cooper guilty of capital murder. Instead, it was the trial court that made the requisite findings that Mr. Cooper committed capital murder and subjected him to a death sentence.

After Mr. Cooper filed his initial brief, the United States Supreme Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent that . . . [Walton] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 2002 WL 1357257, *10 (U.S. June 24, 2002). Simply put, *Ring* subjected capital sentencing to the Sixth and Fourteenth Amendment rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Ring*, 2002 WL 1357257 at *3 (quoting *Apprendi*, 530 U.S. at 483).

The very essence of Florida's capital sentencing scheme, under which

Mr. Cooper was sentenced, was the relegation of the jury to a subordinate, advisory, non-fact-finding role in its determination as to the appropriate sentence, combined with reliance on written findings of fact by the trial judge to establish the factual bases on which a death sentence was authorized and appropriate. *See, e.g., Porter v. State*, 723 So. 2d 191, 195-96 (Fla. 1998). *Ring's* recognition that the "right to trial by jury guaranteed by the Sixth Amendment . . . encompasse[s] the fact finding . . . necessary to put . . . [a capital defendant] to death" upsets the fundamental tenets upon which Florida's capital sentencing scheme was constructed. *Ring*, 2002 WL 1357257 at *10. Thus, the rule enunciated in *Ring* signals the death knell of the Florida sentencing procedure used to impose Mr. Cooper's death sentence. Indeed, Mr. Cooper was sentenced to death without a "jury determination of any fact on which the legislature condition[ed] an increase in [his] maximum punishment" from imprisonment to death. *Id.* at *3.

The State argues that Claim X is procedurally barred because it should have been raised at trial and direct appeal and there are no new facts or law which legitimize this claim. However, 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). Indeed, this Court is currently

deciding the effect of *Ring* on Florida's capital sentencing scheme. *Bottoson v. Moore*, 2002 WL 1472231 (Fla. July 8, 2002).

VI. THE FACT BASED CLAIMS (*GIGLIO*, *HENRY*, *BRADY*)

A. The Facts Support the *Giglio* Claim

The State seeks to escape from the deception perpetuated on the court by characterizing Skalnik's pre-trial testimony as "not a lie, but an ambiguous answer to a qualified question." (Ans. Brief. p. 39) That characterization might be true of a single question and answer, but when the totality of Skalnik's testimony is reviewed, is it inaccurate. The prosecutor knew at the end of the hearing that the judge likely misunderstood the testimony about when Skalnik began snitching. *See infra* p 7, 8. Moreover, it appears from the post-trial hearing that the judge relied on that false information when reaching his decision not to suppress Skalnik's testimony. (Dir. 377-78) Notably, the State did not challenge this assertion in its Brief.

Instead the State asserts that "death sentences easily would have been imposed even if Skalnik never testified." (Ans. Brief p. 41) This assertion sets up a false test. In order to prevail on his *Giglio* claim, Mr. Cooper need only show that "there is a reasonable probability that the false evidence "**may have affected** the judgment of the jury. *Ventura v. State*, 794 So.2d 553,

563 (Fla. 2001) (emphasis supplied). Mr. Cooper has made the requisite showing.

B. Ruling on the *Massiah/Henry* and *Brady* Claims Should Be Deferred Pending Receipt of the Public Records

It is highly likely that the sealed records concerning each of Skalnik's prior cases will establish the extent of Skalnik's snitching activities. Such documents would substantiate Mr. Cooper's *Henry/Massiah* claim, and would constitute impeachment evidence that should have been disclosed under *Brady*. Thus, the 3.850 trial court's decision that Skalnik was not an agent of the state, and that the State withheld *Brady* material was not predicated on complete information. The matter should be re-opened for hearing after the production of the public records.

CONCLUSION

For claims only partially addressed or not addressed in this Reply Mr. Cooper stands on the arguments presented in his Initial Brief and does not waive any argument he was not able to address herein. It is time for this Court to put a stop to the unfairness that has permeated this case from the day that a star snitch was housed with Richard Cooper in jail through to the present.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 26th day of August, 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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INDEX TO APPENDIX

APPENDIX A

GUIDE TO PROPER CITATION FOR RECORD ITEMS FILED AFTER THE INITIAL BRIEF

Page of Initial Brief	Citation as denominated in Appellant's Initial Brief	Citation to Record as Filed
18	Supp. 6/15/95 Motion to Continue, Tab 2	SROA. 205
18	Supp. 6/15/95 Motion to Continue, Tab 7	SROA. 218
19	Supp. 2/22/96 Notice of Filing	SROA. 354
20	Supp. 2/22/96 Notice of Filing	SROA. 354
20	Supp. 9/3/96 Order on Def. Motion to Compel Discovery of Ch. 119 Documents	SROA. 735
20	Supp. 9/3/96 Order Denying Motion to Compel, pg. 3	SROA. 737
21	Supp. 9/17/96 Def. Notice of Compliance, pg. 1-2	SROA. 740
21	Supp. 10/24/96 Def. Motion to Compel Pltff. to Provide Information	SROA. 747
21	Supp. 11/14/96 Order Denying Def. Motion to Compel	SROA. 758
Footnote 8	Supp. 9/19/96 Amended Order on Def. Motion to Compel Discovery of Ch. 119 Documents, pg. 1-2	SROA. 742
22	Supp. 2/24/97 Order Denying Petition for Writ of Mandamus	SROA. 903
41	Supp. 2/12/96 Supplemental Memorandum in Support of Defendant's Motion to Compel, Exh. A	SROA. 346
41	Supp. 6/15/95 Motion to Continue, Tab 2	SROA. 205
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42	Supp. 6/15/95 Def. Motion to Continue, Tab 27	SROA. 282
42	Supp. 6/15/95: Defendant's Motion to Compel Disclosure of Documents Pursuant to §119.01, Et Seq., Fla. Stat., pg. 10-11	SROA. 298
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44	Supp. 9/19/96, Amended Order on Defendant's Motion to Compel Discovery of Documents Pursuant to Chapter 119.01, et seq., Fla. Stat.	SROA. 742
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