IN THE SUPREME COURT OF FLORIDA

GREGORY ALLEN KOKAL,

Appellant,

v. CASE NO. SCO1-882

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record on this successive capital 3.850 appeal consists of three volumes, plus two supplemental volume. The three main volumes of record on the instant appeal will by cited to as "R. The supplemental volumes will be cited to as "Supp R."

In addition, the State will reference the original trial record, which the State will cite to as "TR," and the record on appeal from the previous denial of postconviction relief (case no. 90,622), which the State will cite to as "PCR" or "Supp PCR."[1]

All citations to the record will include reference to the appropriate volume number.

STATEMENT OF THE CASE

This case is intertwined with that of Charles Michael Kight. See Kight v. State, 784 So.2d 396 (Fla. 2001).[2] In these two cases, each of two death-sentenced defendants (Kokal and Kight) has attempted to use the other's non-death sentenced co-

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[1] The record on appeal in case no. 90,622 consists of five volumes and 15 supplemental volumes.

Kokal also filed an interlocutory appeal in 1994, which was dismissed, and a petition for writ of mandamus in 1996, which was denied. The State's brief will contain no citations to either of these records, or to the public records appeal which this Court decided by written opinion in 1990.

[2] Kokal, in fact, has supplemented the record on appeal in the case with significant portions of the Kight postconviction record.

defendant as a "newly discovered" witness that his own co-defendant had confessed to being the actual killer.[3]

In October of 1893, Gregory Alan Kokal and co-defendant William O'Kelly were indicted for the first degree murder of Jeffrey Russell (TR 3). O'Kelly pled guilty to second degree murder and on November 13, 1984, was sentenced to 14 years in the penitentiary, with credit for the 404 days he had been jailed prior to the imposition of sentence (2R 311, 316-21). Kokal was convicted by a jury of first degree murder and sentenced to death. This Court affirmed Kokal's conviction and death sentence. Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Charles Michael Kight was indicted on January 6, 1983, for the first degree murder of a cab driver (1Supp R 2). A co-defendant, Gary Hutto, pled guilty to second-degree murder pursuant to a plea agreement. 784 So.2d at 398, fn. 1. On June 4, 1984, Kight was convicted by a jury and, on August 7, 1984, was sentenced to death (1Supp R 2). His conviction and sentence were affirmed on direct appeal. Kight v. State, 512 So.2d 922 (Fla. 1987).

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[3] Both of these co-defendants had testified at the trials of their respective defendants, although not as state's witnesses. Kokal's co-defendant William O'Kelly was called as a defense witness (8TR 690-713), while Kight's co-defendant Gary Hutto was called as a court's witness at the behest of Kight's trial counsel. 784 So.2d at 398, fn. 1.

On September 26, 1988, Kokal filed a motion for state postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (1R 69). Following litigation over public records, see State v. Kokal, 562 So.2d 324 (Fla. 1990), an amended 3.850 motion was filed on May 18, 1992 (1R 69).

On September 20, 1996, the petitioner's original postconviction counsel, the Office of the Capital Collateral Representative (CCR), moved to withdraw on the ground that a conflict of interest had developed (the nature of which was not disclosed) (8Supp PCR 555-56). On October 28, 1996, Judge Hugh Carithers granted CCR's motion to withdraw and appointed Jacksonville attorney Jefferson W. Morrow to represent Kokal (8Supp PCR 564-65). Following a two-day evidentiary hearing conducted in February of 1997, the circuit court denied relief, by order dated April 11, 1997 (2PCR 296-307). Kokal appealed, and on July 16, 1998, this Court affirmed. Kokal v. Dugger, 718 So.2d 138 (Fla. 1998).

Meanwhile, Kight had unsuccessfully litigated postconviction claims in both state and federal court. Kight v. Dugger, 574 So.2d 1066 (Fla. 1990)(affirming denial of 3.850 relief and denying state habeas petition); Kight v. Singletary, 618 So.2d 1368 (Fla. 1993) (denying second state habeas petition); Kight v. Singletary, 50 F.3d 1539 (11th Cir. 1995) (affirming denial of

federal habeas petition). Finally, on September 9, 1997, while Kokal's case was pending on appeal from the denial of his first 3.850 motion, Kight filed in the circuit court a successive 3.850 motion in which he alleged, inter alia, that he had recently obtained newly discovered evidence from William O'Kelly, alleged to be a former cellmate of Gary Hutto, who would testify that Hutto had confessed to having killed cab driver Lawrence Butler (the victim in Kight's case) (1Supp R 1-78, particularly at pp. 5-11). On January 21, 1999, the case proceeded to an evidentiary hearing at which O'Kelly testified (although not so favorably as Kight had alleged he would) (2Supp R 220-360, particularly at pp. 224-263). The circuit court denied relief and, on May 4, 2001, this Court affirmed. Kight v. State, supra, 784 So. 2d 396.

On February 2, 1999 - a few days after the conclusion of the Kight circuit court evidentiary hearing - Kokal filed in the United States District Court for the Middle District of Florida a Motion for Appointment of Counsel Pursuant to USC § 3001 et seq and 21 USC § 848 et seq for Representation in Capital Federal Habeas Corpus Proceedings. In this motion, attorneys Leslie Delk and Martin J. McClain, formerly employed by the Capital Collateral Representative (CCR), sought to be appointed to represent Kokal in his federal habeas corpus and, among other

things, explicitly disclaimed the existence of any conflict of interest in their representation of Kokal despite their former employment by CCR (1R 86-89). Based upon information presented to him by McClain, Federal District Judge Nimmons determined that it was CCR's representation of a defendant named "Kite" [sic] and CCR's reliance on Kokal's co-defendant William O'Kelly as a witness to incriminating statements allegedly made by Kight's co-defendant Gary Hutto which had precipitated CCR's withdrawal in 1996 from further representation of Kokal (1R 77-79). Because McClain denied that either he or Delk had any involvement with the Kight case or with O'Kelley, and because neither attorney was now employed by CCR or any of its descendent regional Capital Collateral Counsel (CCC) offices, Judge Nimmons determined that their representation of Kokal presented no conflict of interest, and appointed them to represent Kokal in his federal habeas corpus proceedings, by order dated March 8, 1999 (1R 75-84).

On August 16, 1999 (the date on which his federal habeas corpus petition was due to be filed), Kokal filed in state circuit court a successive Rule 3.850 motion alleging, inter alia, newly-discovered evidence of innocence. He moved in federal court to hold the proceedings in abeyance pending the resolution of his new state claim, and moved in circuit court

for the appointment of counsel (1R 62-66).[4] On October 12, 1999, CCC-North was appointed to represent Kokal in his state proceedings, and that agency has represented Kokal in state court continuously since that time (1R 90-91).

On April 3, 2000, CCC-North filed an amended 3.850 motion on Kokal's behalf (2R 152-224). A Huff hearing was scheduled to be heard three days later, on April 6, 2000 (1R 149). Minutes before the hearing began, CCC-North served the court and the parties with a motion to disqualify Judge Carithers on the ground that he had presided over the Kight postconviction evidentiary hearing at which William O'Kelly had testified about statements allegedly made to him by Gary Hutto (2R 225-36). CCC-North alleged that, because Judge Carithers had heard and credited O'Kelly's testimony, he could not impartially evaluate the credibility of Gary Hutto in this case (2R 226-27).[5]

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[4] In his state motion for appointment of counsel, Kokal acknowledged that, although CCR had failed to identify the alleged conflict when it originally withdrew from Kokal's case, the conflict "has subsequently been identified as arising from that office's representation of Charles Kight" (1R 63).

[5] In light the various claims of conflict that have been made, leveled or denied over the years as to the interrelationship between the Kokal and Kight cases, it is interesting to note that although Bret Strand, who was one of the CCC-South attorneys representing Kight on his latest postconviction motion (2Supp R 220), now is employed by CCC-North, who represents Kokal, CCC-North claims no conflict of interest.

At the outset of the Huff hearing, after counsel for the State and the Court noted for the record that they had received the motion to disqualify only 30 minutes earlier, CCC-North attorney Andrew Thomas apologized "for the timing of the motion," but contended that he had only learned of the grounds for disqualification over the weekend (3R 424). Defense counsel urged the court to decide the issue of disqualification before conducting a Huff hearing (3R 431). Following extensive discussion of the issue of disqualification, during which Judge Carithers indicated that the motion might be well taken if he were to conclude that the newly-discovered-evidence claim warranted an evidentiary hearing, Judge Carithers instructed the parties to submit written briefs on the disqualification issue and, as well, on whether or not an evidentiary hearing was warranted on the newly-discovered evidence claim (3R 453, 455).

The parties submitted memoranda on these issues (2R 243-52, 254-60). Judge Carithers thereafter denied the motion to recuse by order dated June 30, 2000 (2R 262). He rescheduled the Huff hearing for September 12, 2000 (2R 263-64), and it was conducted on that date (3R 459 et seq).[6] On October 2, 2000, Judge

[6] Kokal asserts in his brief (p. 4) that this Huff hearing involved only Claims II-IV. In the State's view, all four claims were at issue in this hearing. Counsel for Kokal adopted by reference his arguments as to Claim I presented at the April 6 hearing and made additional argument on that issue (3R 467-

Carithers issued a written order requiring an evidentiary hearing on Claim I (the newly-discovered-evidence claim) and summarily denying the other three claims (2R 265-66).

An evidentiary hearing was conducted on October 31, 2000 (4R 507-76). Following the submission of post-hearing written closing arguments, Judge Carithers denied relief by written order dated February 12, 2001 (3R 371-78). Judge Carithers first concluded that Kokal's detailed confession to his trial attorney, which had been disclosed in testimony presented at the previous evidentiary hearing on Kokal's claim of ineffective assistance of trial counsel, would be admissible if this case were retried. That being the case, an acquittal on retrial in light of the trial evidence and all new evidence was "virtually inconceivable" (3R 377). In addition, Judge Carithers concluded that Hutto's new testimony was "highly impeachable." It was "hard to understand" why Hutto would have waited to come forward with this information long after his sentencing rather than at a time when it could have helped him with his own sentencing; it appeared that Hutto's true motivation was to retaliate for O'Kelly having testified in the Kight case that Hutto had confessed to him (3R 377). Moreover, Hutto's testimony "makes

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77). The State also presented argument as to Claim I (3R 478-81).

no real sense in light of the physical evidence adduced at trial." That evidence, including fingerprints and bloodstains, contradicts any defense theory that Kokal was not at the murder scene and thus, even disregarding Kokal's confession to trial counsel, "the newly discovered evidence is not of such a nature that it would probably produce an acquittal on retrial" (3R 377-78).

Kokal filed a motion for rehearing, which Judge Carithers denied on March 2, 2001 (3R 387-88).

STATEMENT OF THE FACTS

The evidence and testimony relevant to Kokal's present claims include that presented at his original trial, at the 1997 evidentiary hearing on his claim that trial counsel was ineffective, and at the 2001 evidentiary hearing on his newly-discovered evidence claim. The State will summarize each:

A. The evidence presented at trial

1. The guilt phase. At 7:15 a.m. on the morning of September 30, 1983, Jeffrey Russell's body was discovered on the beach at the Hanna Park Recreational Facility (7TR 454-55). There was a pool of blood under the victim's head. A broken cue stick lay nearby (7TR 475, 515). There was no identification on the body (7TR 456), but police discovered Russell's wallet,

empty except for a Navy photo identification card, lying on the park exit road (7TR 472).

Russell had suffered multiple blunt impacts to the head, inflicted while he was still alive and trying to defend himself (7TR 517, 523). It was discovered during the autopsy that the victim had been shot in the head and that the gunshot wound was the cause of death (7TR 517). Police had not known this beforehand, and did not release this information (7TR 546-47). The bullet was recovered from the victim's clothing (7TR 520).

At 11:45 a.m. of the day Russell's body was discovered, Jacksonville police officer David Mahn arrested Kokal for stealing gas (8TR 746-47). Kokal was the driver and lone occupant of a 1975 Ford pickup truck with Arizona tags (7TR 524-26). Officer Mahn obtained from Kokal a current Florida driver's license in Kokal's name, a New York driver's license belonging to Jeffrey Russell and the Colorado driver's license of William O'Kelly (7TR 526-27). Under the seat of the truck, officer Mahn found a Reuger .357 revolver (7TR 528). Mahn placed these items in the police property room (7TR 530). Kokal was released on his own recognizance (8TR 740).

Five days later, Eugene Mosley called the police to report that he had information about someone having been shot in the

head at the beach (7TR 547-48). After talking to Mosley, police obtained an arrest warrant for murder and arrested Kokal in the upstairs bedroom closet of his residence (7TR 548, 576).

Mosley testified that he had been Kokal's friend at the time of the crime and that he had stopped by Kokal's house the evening of September 30, 1983 (7TR 550). Kokal told him that he had "*wasted* a guy ... over a dollar" and that he and his buddy were preparing to flee to Canada (7TR 551)(emphasis supplied). Kokal stated that he and William O'Kelly had picked up the victim on Mayport Road and driven to Hanna Park, where they got out of the truck and Kokal - with O'Kelly's assistance - beat the victim on the head with a cue stick (7TR 552). According to Kokal, the "guy wouldn't ... hardly go down." They just kept beating him, finally got him on the ground, and continued to kick him and beat him, while the victim pleaded for his life (7TR 552-53). Then Kokal "took a gun and held it to [the victim's] head and shot him" (7TR 552). Kokal stated that he had killed the victim because "dead men can't tell lies" (7TR 554). Kokal thought the bullet would go into the sand and that no one would be able to identify the gun, and that the sand would prevent any fingerprints from getting on the cue stick (7TR 553-54). Kokal admitted that the purpose of the attack had been to rob the victim (7TR 553).

A tire on the Ford pickup Kokal had been driving was matched to a tire track at the scene of the murder (7TR 607). Kokal's Nike shoes were matched to shoe prints found at the scene (7TR 614); one of his shoes had human blood on it of the same type as the victim's (7TR 636-37). Kokal's fingerprints were found on the .357 Magnum revolver recovered from the Ford pickup truck (7TR 619), and that gun was identified by ballistics examination as the murder weapon (7TR 648).

Two witnesses testified for the defense at the guilt phase of the trial: William O'Kelly and Kokal himself.

O'Kelly acknowledged during his testimony that he had written a letter to Kokal in November of 1983 in which he (O'Kelly) claimed to have been the triggerman (he claimed the shooting was an accident)(8TR 694-95). On cross-examination, O'Kelly claimed that he had written the letter in an effort to get both Kokal and himself "off the hook" (8TR 696). The truth, O'Kelly testified, was that they had picked up a sailor and that Kokal had robbed the sailor of his wallet, beaten him with a cue stick and shot him in the head with O'Kelly's .357 (8TR 703-05).

Kokal testified that he had met O'Kelly in the summer of 1983 and that they had been friends since (8TR 715-16). O'Kelly owned a .357 firearm and had let Kokal fire it on maybe a "dozen" occasions (8TR 717). Kokal testified that he had

awakened at 2:00 p.m. the day of the shooting and had spent the day drinking and smoking (8TR 719-20). Around midnight, he and O'Kelly left the house, headed for the beach. Kokal drove (8TR 720). They brought a bottle of rum and some marijuana (8TR 721). Sometime early in the morning, after drinking half the bottle of rum and smoking three joints, they picked up a hitchhiker (8TR 721-22). It was Kokal's idea to pick him up, because he often had to hitchhike himself (8TR 722). The hitchhiker wanted to smoke pot, too, so they went to Hanna Park just to "get high, to drink and to listen to music" (8TR 723). After parking on the beach, Kokal left the truck to relieve himself on the beach. When he returned, O'Kelly had his pistol "in the guy's face" (8TR 724). Neither Kokal nor O'Kelly had discussed robbing anyone that night or any other time (8TR 725). Kokal testified that by this time, he was "pretty drunk" and "quite stoned" (8TR 725). He did not leave when he saw the gun, or tell O'Kelly to stop, because he was scared; he had seen O'Kelly shoot at people before (8TR 725-27). O'Kelly told the victim to turn around, struck him in the back of the head with the gun, and reached into his back pocket and took his wallet (8TR 727-28). Then O'Kelly grabbed Kokal's cue stick out of the truck and hit the victim over the head with it (8TR 728-29). The cue stick broke. O'Kelly picked up one of the pieces, and

forced the victim to march to the beach and to lie down (8TR 729-31). Kokal walked with them, scared that if he left, O'Kelly would shoot him (8TR 730). He watched O'Kelly repeatedly strike the victim with the cue stick (8TR 731). After the stick broke again, Kokal stated to O'Kelly that he was "getting the hell out". He and O'Kelly walked back to the truck. After Kokal started the truck, however, O'Kelly ran back to the victim (8TR 732). Kokal "heard a blast and seen a flash." Then O'Kelly ran back to the truck. According to Kokal, "[O'Kelly] said he just *wasted* the fucker, to be more specific he said I *smoked* the fucker" (8TR 733) (emphasis supplied). Kokal could not explain why he had first used the word "wasted;" Kokal guessed that was "my" word (8TR 733). As they left, O'Kelly went through the victim's wallet. He found only some identification and a dollar. He tossed the wallet out the window (8TR 733-34).

Kokal claimed that he had not called the police to report this crime that he had witnessed because he was scared and because he was on probation (8TR 736). He did tell Mosley about the crime later, but he had not stated "I" killed the guy; instead, he had said "we" had killed the guy. Mosley was mistaken because he had been drinking (8TR 738). Kokal had said "we" killed the victim only because he was trying to make

himself “look big” (8TR 738). Although O’Kelly’s letter was not accurate to the extent that O’Kelly claimed that the shooting was an accident, O’Kelly had correctly identified himself as the shooter (8TR 744).

On cross-examination, Kokal admitted that he had been stopped by officer Mahn because he had driven away from a gas station without paying for the gas and that stealing gas was a violation of the terms and conditions of his probation (8TR 746-47). He insisted, however, that his probationary status was a reason he didn’t report the crime O’Kelly had committed (8TR 749). He denied telling Mosley that he had “wasted” a sailor; he insisted that he had used the word “killed” to Mosley (8TR 752). He denied having said most of the other things Mosley testified he had said (8TR 753-57).

2. The penalty phase. The State recalled the pathologist, who gave further testimony as to the wounds inflicted to the victim. Initially, the pathologist testified, the victim was conscious and face-to-face with his assailant, fending off the attack. At the very end of the attack, he was struck in the head hard enough to render him unconscious. He was probably unconscious (and incapable of defending himself) when he was shot. The beating itself, the pathologist testified, fractured the victim’s skull and could have caused the victim’s ultimate

death even if he had not subsequently been shot (9TR 863). The shooting itself was execution style, the muzzle of the gun being less than two centimeters from the victim's head when the gun was fired (9TR 867).

The defense called Kokal's mother. She testified that she and Kokal's father had divorced seven years earlier, when Kokal was thirteen or fourteen (9TR 875). Kokal's father had physically abused him (9TR 876). She described an instance when the father had struck Kokal with a tennis racket, severely gashing his head (9TR 877). Another time, the father had locked Kokal in his room for a week, chained to his bed, with nothing to eat except sweet potatoes (9TR 877). She testified that the abuses were frequent and severe (9TR 878). She finally left her husband in 1977 (9TR 878). She testified that she had sought counseling for her son (9TR 879), but that he kept getting into trouble; although Kokal had "love, compassion and ... a lot to offer (9TR 879), he "mostly would do what he wanted to," which was to drink (9TR 881). On cross-examination, she acknowledged that her son had attended counseling for several years and that since 1977 her son had not suffered any physical abuse (9TR 883).

B. The evidence presented at the 3.850 hearing in 1997

Kokal first presented the testimony of Dr. Barry Crown, a neuropsychologist (3PCR 316).[7] Dr. Crown examined Kokal in prison on June 20, 1996 (3PCR 316). He also reviewed the pretrial psychiatric evaluation of Dr. Virzi, conducted in 1984, as well as medical records from Memorial Hospital of Jacksonville (3PCR 316-17). In his opinion, Kokal has brain damage which, although not severe enough by itself to have significantly impaired Kokal at the time of the crime, in combination with the consumption of a large quantity of 151 proof rum on the evening of the murder, would have diminished Kokal's ability to conform his conduct to the requirements of the law, and would also have put him under extreme mental or emotional disturbance at the time of the crime (3PCR 317-19, 332). However, despite the importance of the "combination" of brain damage and alcohol to his opinion, Dr. Crown testified that it would not have been significant to his analysis if Kokal had lied to him about how much he had had to drink the night of the crime (3PCR 366).

Nor did Dr. Crown attribute any "significance whatever" to Kokal's clear recall of the events of the crime (3PCR 345, 347,

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[7] The transcript of this hearing is replicated in Supplemental Volumes 4-6 of the record on appeal in case no. 90,622, albeit with different page numbers. The State's citations here are to the initially-submitted volumes of the record on appeal in that case.

352-53). In Dr. Crown's opinion, one can have organic brain disorder and be under the influence of alcohol and drugs during the commission of a crime and still remember everything in detail (3PCR 347). Although Dr. Crown also agreed with Dr. Virzi's opinion that Kokal had understood the consequences of his actions, he nevertheless thought that Kokal had difficulty understanding long-term consequences (3PCR 352-53). Dr. Crown did not agree that Kokal's post-crime preparations to flee to Canada were significant to any evaluation of Kokal's difficulty understanding long-term consequences (3PCR 357).

Dr. Crown acknowledged that Kokal had successfully completed his G.E.D. and that he had successfully completed junior college courses (3PCR 360). These facts were not inconsistent with his opinion that Kokal was brain-damaged. Kokal could function normally; sometimes his switch just needed to be jiggled a bit (3PCR 360-61). The "casual observer" might not realize that Kokal had any problems (3PCR 361).

Dr. Crown was not aware that Kokal had feigned illness in order to receive preferential treatment in jail; but it did not matter because Dr. Crown viewed such matters as irrelevant to his diagnosis (3PCR 368-69).

Dr. Crown acknowledged that the neurological examination he administered in 1996 was a mental status exam which, by itself,

could not reveal when any brain damage occurred or what might have caused it (3PCR 324). He nevertheless was of the opinion that Kokal's brain damage had been caused by a 1983 automobile accident, because he was unaware of any kind of head injury Kokal might have suffered after that automobile accident (3PCR 325). However, he had not reviewed Kokal's prison records and had no knowledge of Kokal's history since 1983 (3PCR 325, 369, 341). Moroever, Dr. Crown did not find it significant that Kokal had taken a cross-country motorcycle trip soon after the 1983 automobile accident, and he attributed no significance to hospital records of the accident that (a) ruled out significant head injury, (b) indicated that Kokal's condition after the accident was due to alcohol, not head injury, and (c) reported that Kokal was doing well when discharged (3PCR 382-85). Finally, Dr. Crown did not deem it significant that prison evaluations found that Kokal was not suffering from any mental disorders and did not need counseling (3PCR 389).[8]

[8] In his brief, Kokal states as fact that, following the State's cross-examination of Dr. Crown, postconviction counsel conducted a short redirect with the sole "apparent goal" of establishing that "Kokal is not a vegetable." Initial Brief at 24. This argumentative (and disparaging) comment really does not belong in a statement of facts, but in response the State would suggest that the more apparent goal of the redirect was simply to remind the court that no one was contending that Kokal was severely brain damaged, but only that he had some mild brain damage which, in combination with alcohol abuse during the crime, could potentially be considered mitigating.

Dr. Virzi testified that he has been a psychiatrist since 1966 (3PCR 395). He examined Kokal in 1984 at the request of Dale Westling, Kokal's attorney at trial, for an "insanity type of evaluation" (3PCR 396). Dr. Virzi did not recall that Westling had given him background information; however, Dr. Virzi's file had been lost, and he could have had conversations with Westling about the case that he no longer recalls (3PCR 396, 411-12); in fact, it was "standard" practice, and Dr. Virzi's "assumption" that Westling gave him at least some information over the telephone (3PCR 422). Dr. Virzi testified that he had not conducted an independent background investigation, but he acknowledged that he had sufficient skills to obtain relevant background information from a patient like Kokal (3PCR 399-400, 466), that he was aware of Kokal's history of drug and alcohol use when he conducted his original evaluation in 1984 (3PCR 453), and that he had enough information even then to conclude that Kokal could have suffered diminished capacity due to alcohol abuse (3PCR 451-52). He acknowledged that Westling had not asked him to do an incomplete evaluation (3PCR 420), and that it would have been his normal practice in 1984, as a psychiatrist with (even at that time) over 15 years experience, to do a psychosocial evaluation and to consider any prior traumatic events or accidents that might

affect a person's capacity to commit the crime (3PCR 421-22). Dr. Virzi was not sure whether or not he had conducted the follow-up MMPI examination referred to in his written 1984 report (3PCR 456-61). He had testified in his deposition that his recollection was that he had administered an MMPI, but "right now" he did not think that was a correct recollection (3PCR 468). Although Dr. Virzi initally stated that Westling had not asked him to evaluate Kokal for mitigation, he later explicitly acknowledged that his examination of Kokal encompassed potential mitigation as well as sanity and competence (3PCR 399-400, 426-27). He also acknowledged that one's memory generally is more impaired the more one drinks (3PCR 437) and that if a defendant is able to give a detailed and accurate description of the events surrounding a crime, "then there would be no evidence of any diminished capacity" (3PCR 446); if Kokal could walk, talk, strike someone, drive a car and give precise details of an event, that would have a "tremendous effect" on Dr. Virzi's findings (3PCR 448). Dr. Virzi still agreed with everything he had found in his original report (3PCR 469). When he examined Kokal in 1984, he saw no

evidence of organic brain disorder (3PCR 473); Kokal was functioning normally (3PCR 475).[9]

Kokal's father testified briefly. He could not recall whether or not he had told trial counsel about Kokal's car accident a few months before the murder (4PCR 527). He did recall that he had told Westling that he did not want to be involved at all in the trial (4PCR 527-28).

Kokal's trial attorney Dale Westling testified that he has been a member of the bar since 1975 (4PCR 595). He was an assistant state attorney until 1978 (4PCR 532), prosecuting, as he recalls, some 76 cases (4PCR 595). In 1984, his practice was probably 85 to 90 percent criminal law (4PCR 596). He had handled first-degree murder and death-penalty cases as a prosecutor and, as a private practitioner, had handled four or five first-degree murder cases in which he had been successful

[9] On page 25 of his brief, Kokal states as fact that "Dr. Virzi's testimony on cross-examination establishes that Mr. Kokal was denied a competent mental health evaluation at the time of the trial through a combination of ineffective assistance of counsel and a violation of Ake v. Oklahoma, 470 U.S. 68 (1985)." This statement, like many others in Kokal's Statement of Facts, is argument, not fact, and does not belong in a statement of facts. The State disagrees that Virzi's testimony establishes any such thing, and would note that this Court has already explicitly determined that Kokal was not denied effective assistance of counsel at trial. Kokal v. Dugger, supra, 718 So.2d at 141.

in avoiding a death-penalty phase (4PCR 532-33). He was retained, not court appointed, to represent Kokal (4PCR 598).

At the outset of his representation of Kokal, Westling collected all the police reports and read them (4PCR 599). He investigated Kokal's medical, criminal and social background (4PCR 545), visited Kokal "numerous times" and also talked to him by telephone almost every day (4PCR 599). Westling took many depositions (which disappeared after Westling turned his file over to CCR) (4PCR 600), and reviewed and indexed all the depositions in preparation for trial (4PCR 600-01). Westling discussed this evidence with Kokal (4PCR 617). Although Kokal initially claimed that O'Kelly had beaten the victim with the cue stick, when confronted with "all the evidence that [the State] had," Kokal confessed, admitting that he had beaten and shot the victim and that his co-defendant was not involved (4PCR 616). Kokal gave a detailed recounting of the crime and of his role in it (4PCR 615-17). Kokal knew "every step that occurred that evening with great specificity (4PCR 619), and his description of the crime was perfectly consistent with the physical evidence (4PCR 626). Westling testified that he had asked Kokal why he had done it. Kokal answered: "Dead men tell no lies. That's why I did it." Then he said, "and you know what, the mother fucker only had a dollar." Westling stated

that Kokal showed no emotion and no remorse when making these statements (4PCR 623). It was, Westling testified, "chilling at the time" (4PCR 618).

Westling testified that, overall, his strategy at the guilt phase of the trial was to stress the alcohol as much as he could along with the fact that O'Kelly had been allowed to plead guilty to second-degree murder, and to urge a theory that although the crime had occurred much as the State contended that it had, O'Kelly had been the triggerman (4PCR 614). Put another way, "our defense at trial was everything the government witnesses were going to say was true except you had to take the word O'Kelly and exchange it for Kokal and take the word Kokal and exchange it for O'Kelly" (4PCR 534). Kokal not only agreed with this approach, he insisted on testifying personally that he had not murdered the victim (4PCR 621). Westling drafted a document which he asked Kokal to sign, stating:

> I, Gregory Kokal, acknowledge the fact that my attorney has advised me against testifying untruthfully in my trial. He has specifically told me that perjury is a felony and that it is a crime. Nevertheless I have instructed him to call me as a witness and to "ask what happened." He has asked me to sign this statement as evidence that I acknowledge his advice.

(4PCR 621-22). Westling testified that Kokal's trial testimony was in fact contrary to his confession to Westling and also contrary to what he had told Dr. Virzi (4PCR 622).[10]

Asked about a voluntary intoxication defense, Westling answered, "Well, besides the fact that I have never seen in 25 or 22 years that defense work, besides the fact that it was our defense that he didn't do it and you don't plead alternative theories in a criminal trial like we do in civil cases, the fact that he was so specific in his memory and so articulate in telling me exactly what occurred and why he did it showed to me that there was no way in the world he was intoxicated" (4PCR 623-24). Kokal never gave the "slightest indication" that he had been "in any way impaired" at the time of the crime (4PCR 619).

As for his decision to call O'Kelly as a defense witness, Westling explained that although O'Kelly was not a completely favorable witness, calling him as a defense witness allowed Westling to get O'Kelly's letter in evidence in which O'Kelly had admitted being the killer, which, of course, was precisely the defense theory of the case. Without O'Kelly's letter, there

[10] Dr. Virzi's pre-trial report (Defendant's exhibit 1 at this hearing) indicates that, while Kokal denied shooting the victim, Kokal admitted hitting him on the head with a pool stick in order to rob him.

was no evidence to corroborate Kokal's own testimony that O'Kelly was the real killer; therefore, the benefits of O'Kelly's testimony, Westling concluded, outweighed the risks (4PCR 635-38).

Westling testified that he began thinking about penalty-phase strategy from the moment he was retained to represent Kokal (4PCR 643). He asked Kokal at the outset if he had any physical or mental disabilities or handicaps and Kokal told him no (4PCR 556). He talked to both Kokal's mother (4PCR 545) and to his father (4PCR 531-32). The father refused to get involved (4PCR 532). However, Westling "spent a lot of time with Mrs. Kokal" (4PCR 548). He told her that she could testify to just about anything in mitigation (4PCR 546). However, despite spending a considerable amount of time with both Mrs. Kokal and with the defendant, and reminding both of them of the importance, for mitigation, of any background evidence that might explain why Kokal had turned out bad, neither of them told Westling about a near-drowning episode in 1977 (4PCR 579-80) or about an automobile accident occurring six months before the murder (4PCR 555-56).

Kokal was "very astute" (4PCR 545), "incredibly bright, responsive, always appropriate in his remarks and responsive in responses, interested in the case" (4PCR 580). He was mature

for his age, being in fact an accomplished criminal at age 20 (4PCR 581). Westling knew from Kokal's rap sheet that he had "an incredibly extensive criminal history" and concluded that it would not be a good idea to place that history before the jury (4PCR 581-84. Although Westling knew from talking to Kokal that he had committed the crime and that he had not been intoxicated at the time of the crime, he obtained a confidential expert mental-health evaluation "just on the off chance that a person that causes murder hopefully cannot be what we call normal" (4PCR 562). Westling gave Dr. Virzi background information (4PCR 564), including information that Kokal "had been drinking all night [and] using marijuana" (4PCR 565). Westling got "no psychiatric help" from Dr. Virzi. After receiving Dr. Virzi's written report, Westling telephoned Dr. Virzi. He asked, is "this all you have to offer, is there anything else, and he said no" (4PCR 562-63). Dr. Virzi told him that Kokal "knew exactly what he was doing" (4PCR 563). Westling persisted, asking Dr. Virzi if he had "anything that can help me;" did he think Kokal had been "real drunk that night" (4PCR 653). Dr. Virzi again answered no, that he had found no evidence of that. Dr. Virzi even "got a little snotty" about the question, pointing out that he had stated in his report that Kokal "had a clear idea of what happened" during the murder (4PCR 653). Moreover, if Westling

had called Dr. Virzi as a witness, his report would then have been discoverable by the state (4PCR 567). Even if Dr. Virzi had changed his mind and tried to testify about diminished capacity at the penalty phase, there was still the written report to the contrary - that Kokal had a very clear understanding of what had occurred the evening of the murder and had no delusions (4PCR 561, 653), which the state could have used against Kokal.[11] Furthermore, Dr. Virzi's report "would have given the state three or four aggravating circumstances in and of itself" (4PCR 548, 561). Any benefit from Dr. Virzi's testimony would have been outweighed by what the State could have done with the report and in its cross-examination of Dr. Virzi (4PCR 567). In Westling's opinion, Dr. Virzi would have been a "devastating witness" against the defense (4PCR 561).[12]

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[11] In his report (defense exhibit 1 at this hearing), Dr. Virzi stated that Kokal "was oriented to time, person and place," that his "[i]ntelligence was not impaired," that his "[r]ecent and remote memory were clear," that he "understands the consequences of his behavior," and that he "had a clear idea of what had happened prior to the above incident and during the above incident."

[12] Again, Kokal has presented argument in his Statement of Facts, stating (Initial Brief at 26) that Westling made "blatant misrepresentations" which could readily have been proved false. For one example, Kokal states that a witness existed who could have "completely" rebutted Westling's testimony that significant portions of his file disappeared after it was turned over to CCR. He further states (as fact) that Westling was "antagonistic" towards his former client and overly "close[]" to his former employer (the State Attorney's office, for whom

The final witness to testify at the 1997 hearing was Kokal's mother. She could not recall telling Westling about Kokal's near-drowning experience at the Slippery Dip in 1977 (4PCR 689), and she "really" did not think she had told him about her son's automobile accident in 1983 (4PCR 690). She acknowledged that her son had taken a long motorcycle trip after the 1983 car accident, and that he had been in trouble with the law before 1983 (4PCR 693-94).

C. THE EVIDENCE PRESENTED AT THE 2001 HEARING

Two witnesses testified at this hearing:

Jeffrey Walsh testified that in the summer of 1999 he had been retained as an investigator for Kokal by Leslie Delk, who at that time represented him in federal court (4R 520-22). Delk informed Walsh that Hutto had been housed with William O'Kelly

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Westling last worked some 20 years ago), and that Westling's testimony that Kokal had confessed to him is highly "suspect."

All this is argument. As such, it does not belong in a Statement of Facts. Furthermore, it is argument that is unsupported, even inferentially, by the record. As the State will develop more fully in its argument, if Kokal's present counsel had wished to establish that Westling lied at the 1997 hearing, they could have presented evidence of such at the 2001 hearing on his claim of newly-discovered evidence. After all, they were specifically invited by the State to present some basis for disregarding Westling's testimony that Kokal had confessed to him. They chose instead not even to attempt to present such evidence. Having made that choice, they have no business making these kind of unsupported slanderous allegations now.

(4R 526). At her direction, Walsh contacted Gary Hutto at Columbia Correctional Institution in Lake City to ask him about any communications O'Kelly might have made to Hutto (4R 521-22, 526). Hutto provided him information and executed an affidavit (4R 522). Walsh was aware before he spoke to Hutto that O'Kelly given testimony implicating Hutto; however, Walsh denied having discussed that testimony with Hutto (4R 529-30).

Gary Hutto also denied having been informed by Walsh of O'Kelly's testimony in the Kight case; Hutto testified that he only learned that O'Kelly had given testimony in the Kight case sometime in November of 1999 - several months after he talked to Walsh and executed his affidavit (4R 548-49). In fact, Hutto denied even knowing who Walsh was or who he worked for when he told him about O'Kelly's alleged incriminatory statements to Hutto (4R 555). Hutto testified that, during the course of his stay in jail following his arrest, he was in the same court chute with O'Kelly "sometimes for periods of all day" (4R 535). Then, in May of 1984, he and O'Kelly were in the same 12-17 man cell (4R 536). Hutto testified that it was "unusual" to "sit around and talk about your cases because there is snitches in courtrooms or snitches in your cells, et cetera, et cetera" (4R 550). So, Hutto "did not tell [O'Kelly] anything" except perhaps that the victim in his case was a cab driver (4R 547).

O'Kelly made several incriminating statements to him, however.

According to Hutto, O'Kelly admitted beating a sailor with a pool cue and shooting him with a .357 (4R 540-42). O'Kelly said Kokal was a "pussy mother fucker" who was "too scared" and "too drunk" to do anything, and "stayed up by the truck" (4R 540).[13] O'Kelly claimed that robbing the victim was his idea and indicated that Kokal was not aware of any plan to rob or kill and did not consent to it; "it was just the opposite, that he didn't know nothing about it" because he was "too messed up, you know, on drugs and alcohol to really be - tangled up with him in the first place" (4R 543-44).

These conversations occurred, Hutto testified, after Hutto had pled guilty, but before he was sentenced (4R 550-51). Hutto admitted that testifying against another defendant can help one get a better deal from the state - but only before sentencing. "After you get sentenced, ain't no reason for it. There ain't no benefit." (4R 550). In fact, before his sentencing Hutto had disclosed to the State the names of witnesses that might have information against his co-defendant, Charles Kight (4R

[13] At one point in his testimony, Hutto asserted initially that O'Kelly had told him Kokal "*made me* take this guy." (Emphasis supplied). After a pause, Hutto finished that sentence by saying Kokal "wouldn't have nothing to do with anything," and kept saying "let's go, let's go" (4R 540).

553). But he did not come forward with any information about O'Kelly because no one asked him about it (4R 552).[14] In addition, he thought O'Kelly's statements were "bullshit;" that he was trying to make himself look bigger and badder than he was (4R 551-52).

Hutto testified that he ran into O'Kelly again after they were sentenced, and O'Kelly bragged to him about "what a sweet deal" he had gotten based on information he "had garnered from myself and my co-defendant. . . . Kight" (4R 537-38).

[14] On direct examination, Hutto claimed that, had anyone interviewed him at the time of Kokal's trial, he would have said the same things and testified as he did in this hearing (4R 545). However, on cross-examination he claimed if anyone had asked him about O'Kelly's statements, he "probably still wouldn't have said nothing" (4R 552).

SUMMARY OF ARGUMENT

There are three issues on appeal:

1. Kokal's motion to disqualify Judge Carithers on the ground that he had presided over the Kight hearing, which Kokal filed minutes before a scheduled Huff hearing, and more than five months after Kokal was expressly put on notice that Judge Carithers had presided over the Kight hearing, was untimely. Moreover, it was meritless, especially considering that it was not an initial motion to disqualify and Judge Carithers was a successor judge. At bottom, Kokal's only argument is that Judge Carithers cannot preside over separate hearings involving the same two dueling co-defendants. But judges cannot be disqualified from a case just because it involves someone they know about from another case. Judges see defendants, witnesses, and attorneys more than once, and sometimes again and again. That fact alone does not disqualify them, and nothing requires that each case have an entirely new cast of characters.

2. In reviewing a postconviction defendant's claim that he has uncovered new evidence that he is innocent, it is perfectly proper to take into consideration prior testimony that the defendant confessed in great detail to his trial attorney. The attorney-client privilege, once waived, cannot be reasserted after communications have been publicly disclosed. Furthermore,

regardless of the admissibility of such communications at any retrial, it would be inequitable for a defendant to demand that we disregard a prior confession when evaluating his claim of newly discovered evidence of innocence. Kokal did not attempt to discredit his confession to his trial attorney, and Judge Carithers correctly determined that Kokal has no right to ask us to ignore it.

Furthermore, the Judge Carithers was justified in concluding from all the circumstances that Hutto had come forward more than 15 years after trial only in retaliation for O'Kelly's testimony against him at the Kight hearing, that Hutto's testimony was "highly impeachable" for a variety of reasons, and that, even without any consideration of Kokal's confession to his trial attorney, Kokal's new evidence failed to create any reasonable doubt about who shot and killed the victim in this case.

3. Kokal's claim of ineffective assistance of postconviction counsel at the prior proceedings was properly denied summarily. Such a claim does not state a valid basis for relief.

ARGUMENT

ISSUE I

JUDGE CARITHERS CORRECTLY DENIED KOKAL'S UNTIMELY AND COMPLETELY MERITLESS MOTION TO RECUSE

As set out in the Statement of Facts, Kokal filed a motion to recuse Judge Carithers a few minutes before a scheduled April 3, 2000 Huff hearing on a 3.850 motion containing a claim of newly discovered evidence from Gary Hutto that, although subsequently amended, had been pending in circuit court since August 16, 1999 - almost eight months. The alleged ground for the recusal was that Judge Carithers had presided over the January 1999 Kight evidentiary hearing at which William O'Kelly had testified about statements that Gary Hutto allegedly made to him. It is the State's position that Judge Carithers properly denied the motion to disqualify because it was both untimely and legally insufficient.

The motion was untimely. Motions to recuse a judge are untimely unless filed within a reasonable time not to exceed 10 days of the discovery of the facts constituting the grounds for recusal. Fla. R. Jud. Admin. 2.160(e). In this case, the asserted ground of recusal - that Judge Carithers had presided over the January 1999 Kight evidentiary hearing - has existed the entire time that Kokal's newly-discovered evidence claim has

been pending in circuit court. In fact, Kokal claimed to have learned of Hutto as the result of O'Kelly's testimony at the Kight hearing, stating in Claim I of his motion that: "In early 1999, a hearing was held in a case ***Kight v. State*** which had as a witness, Mr. Bill O'Kelly, the co-defendant in Mr. Kokal's case and the man Mr. Kokal always claimed was actually the one who murdered the victim" (1R 4)(emphasis in original). Kokal has not explained why he would have known about this hearing but would not have known or bothered to find out that the same judge presided over it. But even if he were not on notice then, the State's October 18, 1999 written response to the motion made specific reference to that fact that Judge Carithers had presided over the Kight hearing, stating, at page 4:

> [Kokal] contends that he has now learned that [his] codefendant William O'Kelly confessed to Gary Hutto while both of them were jailed together before trial. Kokal claims to have become aware of Hutto as the result of O'Kelly's testimony in a hearing before this Court earlier this year in the case of Kight v. State, which, coincidentally, *was heard before this very Court.*

(1R 108) (emphasis supplied). Thus, Kokal was on specific notice from October 18, 1999 at the very latest that Judge Carithers had presided over the Kight hearing. Yet, he did not file his motion to recuse Judge Carithers until April 6, 2000 - more than 5 ½ months later. Kokal can present no reasonable

excuse for having waited so long to file a motion recuse Judge Carithers, and his motion must be deemed untimely.

Kokal argues, however, that Judge Carithers' "finding that the motion may have been 'untimely' is not supported by the record or Judge Carithers' remarks at the April 6th hearing." Initial Brief at 43. However, Kokal does not dispute that his postconviction counsel was in possession of the State's response; he merely offers the excuse that his counsel was just too busy to read it - for over five months. If this is a valid excuse for ignoring the time limits for filing a motion to recuse, those time limits might as well be abolished.[15] As for the statements Judge Carithers made at the aborted Huff hearing minutes after Kokal filed his motion, upon which Kokal so heavily relies, the fact remains that, regardless of what Judge Carithers' initial off-the-cuff reaction might have been, after being reminded by the State that it had disclosed to Kokal the grounds for his disqualification motion some five months previously, Judge Carithers called for written briefs on this

[15] The rule contains no express requirement that counsel exercise diligence in learning of the grounds for recusal, but surely defense counsel cannot be allowed to claim ignorance of the grounds for recusal when he is in actual possession of a document containing that very information for over five months. Cf. Garcia v. I.N.S., 222 F.3d 1208 (9th Cir. 2000) (proof that written notice was served on attorney of record is sufficient to rebut claim that party received inadequate notice).

issue and, after considering these briefs, Judge Carithers issued a written order stating, inter alia, that the facts constituting the grounds for the motion were in possession of Defendant's counsel since at least October, 1999 [and] [t]he recusal motion was not filed until April, 2000" (2R 261). This factual determination is supported by the record and must be given deference. Giving those facts the deference they deserve, it must be concluded that the motion to recuse was not timely filed.[16]

The motion is meritless. Kokal again attempts to rely upon Judge Carithers' comments at the aborted Huff hearing suggesting that he would "probably" conclude that the motion to recuse was well-founded if he were to decide that an evidentiary hearing were necessary. Of course, Judge Carithers made those comments less than 30 minutes after he and the State were served with copies of the motion, and neither he nor the State had had the time to research case law nor examine the state of the record. In fact, although Kokal failed to acknowledge it in his motion,

[16] The State is unaware of any Florida case explicitly stating the standard of review of the question whether a motion to recuse was timely filed. The State would suggest that once it is determined that counsel was put on explicit notice of the ground of recusal by the written response of the State, but fails to file a motion to recuse for over five months after receiving the State's written response, the defense cannot excuse the delay by defense counsel's failure to read the State's response; the motion is untimely as a matter of law.

this was not his first motion to recuse. There had been previous motions to recuse (at least one of which was granted), and Judge Carithers was at least the fourth judge assigned to this case.[17] This is important, because different standards apply to successive motions to disqualify than to initial such motions. Fla. R. Jud. Admin. 2.160(f) and (g); Card v. State, 26 Fla. L. Weekly S670 (Fla. Oct. 11, 2001). In an initial motion, the judge must accept as true the facts alleged in the motion, so long as they are sufficiently definite and particular and not conclusory or based upon opinion or rumor. Barwick v. State, 660 So.2d 685 (Fla. 1995)("A legally sufficient motion for disqualification cannot be based upon rumors or gossip"); J&J Industries v. Carpet Showcase of Tampa Bay, Inc, 723 So.2d 281, 282 (Fla. 2nd DCA 1998) (conclusory allegations are insufficient to establish a legally sufficient basis for disqualification). A successor judge, on the other hand, may "pass on the truth of the facts alleged in support of the motion and need only be disqualified if "he or she is in fact not fair or impartial." Card, supra (quoting section (f) of the rule).

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[17] On May 8, 1992, Kokal successfully moved to disqualify Judge Wiggins from presiding over Kokal's first postconviction proceedings. See page 99-100, record on appeal, Case No. 93-111794. Thereafter, Kokal unsuccessfully moved to disqualify Judge Foster. Ibid. Judge Bowden later was assigned to this case, and he recused himself.

What Kokal is in essence trying to do is say that once Judge Carithers indicated preliminarily that he thought the motion might be well taken if an evidentiary hearing were necessary, he was then governed by the general rule that, having determined the grounds of the motion were legally sufficient, a judge must immediately take himself off the case - no matter that Judge Carithers' comments were a preliminary response to a motion that had been served on the court and the parties only minutes earlier, no matter that his comments were not only preliminary but conditional, no matter that the motion was legally insufficient despite what the judge may initially have thought, no matter that the motion failed to acknowledge that this was a successive motion to recuse, and no matter that because the judge was in fact a successor judge he was entitled to go beyond the initial question of the bare legal sufficiency of the allegations.

After being informed that this was a successive motion to recuse, Judge Carithers reviewed the matter pursuant to the proper standard and (1) determined that he was, and would remain, "an impartial arbitrator" in these proceedings, and (2) found "not true" the allegations that he could not be impartial

because of the testimony of William O'Kelly (2R 262). This ruling was not error.[18]

Kokal's allegations would in fact be legally insufficient even if this were an initial motion to recuse. All Kokal alleges as to bias is that, in the Kight case, Judge Carithers had made some determination of the credibility of William O'Kelly, and of the degree of Hutto's guilt. This simply is not a legally sufficient ground for recusal. E.g., Jackson v. State, 599 So.2d 103, 107 (Fla. 1992) (fact that judge has previously made adverse rulings not adequate ground for recusal; fact that judge has previously heard the evidence not a legally sufficient basis for recusal; allegation that judge has formed a fixed opinion of the defendant's guilt insufficient to mandate disqualification). The State would note that if Kokal's allegation are a valid basis for recusal, the judge who presided over a defendant's trial and sentenced him to death could never

[18] In Sume v. State, 773 So.2d 600, 602 (Fla. 1st DCA 2000), it is suggested that denials of motions to disqualify are reviewed de novo. However, that court was addressing an initial motion to recuse, in which the facts are assumed to be true and the only question is whether those facts present a legally sufficient basis for recusal. That is not the case here. Moreover, this Court has reviewed the denial of a motion to disqualify under the abuse of discretion standard. Arbalaez v. State, 775 So.2d 1909 (Fla. 2000). Especially given the nature of the trial court's decision in resolving a successive motion to disqualify, the State would suggest that the abuse of discretion standard should apply.

preside over any of that same defendant's postconviction proceedings, and that certainly is not the law.

Kokal's motion to recuse is both untimely and, especially considering that it is a successive motion, meritless. Judge Carithers correctly denied the motion to disqualify him.

ISSUE II

JUDGE CARITHERS CORRECTLY DENIED RELIEF ON KOKAL'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF INNOCENCE

Kokal argues that Judge Carithers' order denying relief is erroneous for three reasons: (1) in evaluating Kokal's alleged newly discovered evidence of innocence, Judge Carithers took into consideration that Kokal had confessed in great detail to his own attorney; (2) Judge Carithers found that Hutto was not a very credible witness; and (3) Judge Carithers failed to consider whether or not Kokal's newly discovered evidence probably would result in a different sentence. The State will address these arguments in order.

(1) **The fact that Kokal has confessed in great detail to his own attorney may be considered in determining whether or not he has proffered a plausible claim of actual innocence.** At the outset, it is important to consider the nature of a postconviction claim of actual innocence and why we allow defendants to raise such a claim on postconviction. A

postconviction defendant making a claim of actual innocence does not claim that some constitutional error infected his trial, or that the evidenced presented was constitutionally insufficient to convict him. What such a defendant contends is that despite the constitutional validity of his trial, evidence discovered afterward indicates that justice was "thwarted" because he is in fact innocent. Indeed, this Court established the present standard for evaluating claims of newly-discovered evidence of innocence because it concluded that the former standard presented the risk of "thwarting justice in a given case." Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

This Court's previous decisions in this case establish that Kokal was convicted and sentenced based on legally sufficient evidence in a proceeding that was free from constitutional error. Nevertheless, Kokal, insists that the State be required to prove his guilt all over again in a new trial without regard to any likelihood that justice was thwarted by the conviction of an innocent person. Despite his insistence on a "cumulative" review of all the evidence presented at trial and since, Kokal insists that we just ignore his detailed confession to his own attorney. In effect, Kokal demands that we consider evidence discovered after trial only if it is favorable to him, but not otherwise, and especially if it further inculpates him or if it

proves just how right the jury was to convict him in the first place. This is no proper way to evaluate whether or not an error-free trial must be set aside.

As noted in the Statement of Facts, and as Kokal acknowledges, in his previous 3.850 motion Kokal raised an issue of ineffectiveness of trial counsel Dale Westling. Kokal further acknowledges that filing such a motion effectively waives his attorney client privilege, although he contends that such a waiver is a "limited" waiver. Finally, Kokal acknowledges, as he must, that Westling testified at the IAC hearing that Kokal had confessed to committing the murder of which he was thereafter found guilty. Westling testified that Kokal not only confessed, but did so with great specificity, that his description of the crime was perfectly consistent with the physical evidence, and that the confession was "chilling" in its lack of any remorse.

The presentation of Westling's testimony at the prior hearing was of course perfectly appropriate. In the seminal case of ineffective assistance of counsel, the United States Supreme Court counseled us that:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular,

> what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, *inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.* [Cits.]

Strickland v. Washington, 466 U.S. 668, 691 (1984). For these reasons, once a defendant claims that his trial counsel is ineffective, he waives the attorney client privilege as to any matters relevant to that issue, and conversations between him and his trial attorney may be disclosed by that attorney. Reed v. State, 640 So.2d 1094 (Fla 1994); LeCroy v. State, 641 So.2d 854 (Fla. 1994).

Kokal argues, however, that we must now disregard his confession to his trial counsel because he would otherwise be compelled to forfeit one right (the right to attack his trial counsel) in order to pursue another right (the right to a new trial based on new evidence).

Of course, the fact that a defendant has the right to pursue a claim does not mean that he has the right to obtain relief

even where such relief would be contrary to justice or truth. Further, defense theories are often inconsistent, and a defendant must choose one or the other, but not both (alibi versus justification, just for one example). Although attacks on trial counsel have become such a matter of course that they are raised automatically, even where it is obvious that trial counsel did everything he or she reasonably could have done under the circumstances, no one compelled Kokal to attack his trial counsel. Once he chose to do so, he waived the attorney client privilege as to communications between him and his attorney. That some of those communications may now be used to contradict his present claim of innocence cannot be deemed an injustice. *Cf* U.S. v. Dunnigan, 507 U.S. 87 (1993) (permissible to enhance defendant's sentence for the willful presentation of false testimony at her trial despite claim that it would chill a defendant's exercise of her constitutional right to testify in her own defense); Ohio Adult Parol Authority v. Woodard, 523 U.S. 272 (1998) (rejecting claim that interview procedure of clemency proceedings presented defendant with a "Hobson's choice" between asserting his Fifth Amendment rights and participating in clemency, even though clemency proceedings are not confidential and what defendant says or does not say may be used against him in postconviction proceedings; Ohio permissibly

does not allow a defendant to say one thing in clemency and another in habeas).

It must be remembered that the attorney-client privilege is just that - a *privilege* - and not a constitutional right. Federal Grand Jury Proceedings, In re Cohen, 975 F.2d 1488 (11th Cir. 1992) (defendant's argument under Simmons v. United States, 390 U.S. 377 (1968), that a grand jury could not question defendants' attorneys about testimony they gave at a motion to suppress hearing because defendants would be forced to give up one constitutional right to assert another, rejected for two reasons: first, that attorney client privilege is a common law privilege, not a constitutional right; and, second, although never overruled, Simmons has been narrowed and its reasoning questioned; Simmons has never been extended to situations involving the exclusion of prior testimony when competing right, whether constitutional or statutory, are at issue); Bradt v. Smith, 634 F.2d 796, 800 (5th Cir. 1981) (attorney-client privilege is an evidentiary privilege secured by state law, and not by the Constitution).[19]

[19] It is true that forced disclosure of attorney-client communications *at trial* potentially can interfere with trial counsel's representation of the defendant, and, thus, have constitutional implications. E.g., Myles v. State, 602 So.2d 1278, 1280 (Fla. 1992). However, no one forced Kokal to disclose his communications to his attorney at his trial, and Kokal cannot complain that such communications were divulged

Nor can Kokal properly argue that his waiver of the privilege is limited to the hearing on ineffective assistance of counsel. Court have uniformly held that, once an attorney-client communication is disclosed publicly, the privilege no longer attaches and cannot be reasserted later. See, United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987), and cases cites therein. In Suarez, the defendant had waived his attorney client privilege to allow his attorney to testify at a pre-trial hearing to determine whether the defendant should be allowed to withdraw his plea. Following the hearing, Suarez was allowed to withdraw his plea, and his attorney at that hearing was called as a government witness at the subsequent trial to testify to the defendant's statements to him, as revealed at the earlier hearing. The appellate court, inter alia, rejected Suarez's claim that his waiver of privilege was a limited waiver, made "only for the purposes of the change of plea proceeding," and his attorney's testimony should have been excluded from trial. The Court stated:

> We begian by noting that privilege is not a favored evidentiary concept since it obscures the truth, and should be construed as narrowly as is consistent with its purpose. [Cits.] The purpose of the attorney-client privilege is to promote freedom of consultation between client and lawyer by eliminating the fear of

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several years later, after Kokal made an issue of his trial counsel's effectiveness.

> subsequent compelled legal disclosure of confidential communications. [Cits.] However, at the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege. [Cits.] For that reason, it has long been held that once waived, the attorney-client privilege cannot be reasserted. [Cits.] Once Feldman testified at the hearing to withdraw the guilty plea, the attorney-client privilege could not bar his testimony on the same subject at trial. Feldman's testimony at trial was well within the scope of his testimony at the plea withdrawal, which was already in the public domain pursuant to the waiver of the privilege.

Id. At 1160.[20]

Thus, Judge Carithers correctly ruled that if Kokal's case were to be retried, testimony from his trial counsel about his confession would be admissible (3R 376).

Moreover, even if there might be some circumstances in which the State might fairly be precluded from presenting at retrial information learned from an evidentiary hearing on the

[20] Kokal attempts to distinguish Suarez on the ground that the Suarez court supposedly made it clear that the testimony of Suarez's former attorney was related to the issue at his trial, whereas Westling's testimony was related to an IAC issue that would not be at issue at any retrial. Suarez, however, does not say what Kokal claims it says. Suarez noted only that the testimony given by the attorney at trial was no broader than that given at the hearing on the plea withdrawal; in other words, everything he testified to at trial had already been divulged and was therefore not privileged. Nothing in Suarez holds that the formerly privileged matters can only be used for the same purpose. In fact, the court *rejected* Suarez's claim that his former attorney's testimony could only be used on the sole issue of whether or not he should be allowed to withdraw his plea and for no other purpose.

effectiveness of trial counsel, the issue here is simply whether or not a defendant may pursue a claim of newly discovered evidence of innocence without having to address testimony presented in an earlier hearing establishing that he confessed in great detail to his trial attorney. The State would note that this Court has held that a trial court must analyze newly-discovered evidence not only in conjunction with the trial evidence, but also in conjunction with evidence presented at prior evidentiary hearings. Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998). Ignoring testimony presented at the prior evidentiary hearing would seem inconsistent with this demand. Further, the Jones standard was formulated in the first instance to protect someone who could establish his probable innocence despite having been convicted in a trial that was free from constitutional error. Kokal was convicted in a trial that was free from constitutional error, but nevertheless wants a new trial based on a claim of innocence he knows - and has admitted - is false. Cf Kneale v. Williams, 30 So.2d 284, 287 (1947) ("It appears well settled that ... no privilege attaches ... with respect to transactions constitution the making of a false claim or the perpetration of a fraud.").

The State's position is that if Kokal means to obtain a new trial by claiming he is innocent, he cannot expect this Court

just to ignore his own previous admissions to the contrary. Kokal has presented no evidence that Westling lied or was mistaken about this confession, and has not attempted to explain why Kokal would have confessed to his own attorney if he was innocent or how he could have done so in detail if he had not participated in the murder.[21] Absent such evidence, it is clear that what Kokal wants to do is not obtain justice for an innocent, but a windfall for the guilty, by hiding behind a privilege he previously has waived. This Court should not countenance such an effort.

(2) **The record supports Judge Carithers' determination that Kokal is not entitled to a new trial, even without consideration of Kokal's confession to his trial attorney, as Hutto's testimony is "highly impeachable."** Kokal takes issue with Judge Carithers' conclusion that, despite Hutto's disavowals, Hutto

[21] Kokal claims that he has done so by attacking the effectiveness of his postconviction counsel Jeff Morrow. But, as the State will address in argument on the next issue, he has no right to raise a claim of ineffectiveness of postconviction counsel. Moreover, that is not the way for Kokal to demonstrate that his confession to his trial attorney is unreliable. The issue here is not whether Morrow was ineffective; it is whether or not either Westling lied to the court, or Kokal lied to Westling. If Kokal's claim is that Westling lied about the confession, he should have presented evidence to that effect. Or, if his claim is that Kokal lied to Westling about having committed the murder, then he should have presented evidence to that effect. He did neither. Judge Carithers properly credited Westling's testimony that Kokal had confessed to him, as the record clearly supports that determination.

really came forward with evidence against O'Kelly in retaliation for O'Kelly having done the same thing to him. Kokal argues that, in reaching this conclusion, Judge Carithers ignored Hutto's testimony as well as that of defense investigator Walsh, and also ignored a letter Hutto wrote.

It should be noted that Walsh testified only that he did not tell Hutto about O'Kelly's testimony in the Kight case. Assuming that Walsh testified truthfully (and the State does not concede that he did), he did not testify (and of course could not have testified) that Hutto did not know about O'Kelly's testimony.

Hutto did testify that he was ignorant of O'Kelly's testimony until after he spilled the beans on O'Kelly, but Judge Carithers was entitled to be skeptical of this testimony. Regardless of Hutto's denials, it is a fact that he came forward with his evidence against O'kelly for the first time - some fifteen years after Kokal's trial - **only after** O'Kelly had given testimony incriminating Hutto at the Kight postconviction hearing. Despite his denials, it is difficult to believe that Hutto's testimony in this case is not merely his way of paying O'Kelly back. As Hutto himself testified, there "ain't no benefit" in being a snitch after one is sentenced. By Hutto's own testimony, however, O'Kelly confessed to him **before** Hutto

was sentenced, but Hutto failed to furnish this incriminating information to the State despite having been perfectly willing to provide, and providing, the State with the names of witnesses who could incriminate Kight. One has to wonder why, if O'Kelly had made incriminating statements to Hutto, Hutto would not have revealed these statements before he was sentenced, and not fifteen years later when O'Kelly (according to Hutto) had perjured himself in the Kight case about Hutto's involvement in that murder. Hutto certainly gave no convincing explanation for not having spoken up at the time of trial, claiming on the one hand that he did not say anything because no one asked, and, on the other, that he would not have said anything at the time even if someone had asked. See Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998) (appropriate in evaluating credibility of alleged newly discovered witnesses to consider "both the length of the delay and the reason the witness failed to come forward sooner).

But there are other reasons to discredit Hutto's testimony. Hutto also testified that O'Kelly had bragged about getting a "sweet deal" by using information he had obtained from Hutto and Kight. This seems contradictory to Hutto's testimony that he told O'Kelly nothing. Further, there is absolutely no indication in the Kight record that O'Kelly gave information to the State in the Kight/Hutto case, and, indeed, if he had done

so, his affidavit many years later could not possibly have been considered newly-discovered evidence. Kight v. State, supra 784 So.2d at 400 (noting that Judge Carithers had found that O'Kelly's testimony constituted newly discovered evidence).

Furthermore, even if we assume that Hutto is now - very belatedly - telling us the truth that O'Kelly actually made these statements, there is no reason - by Hutto's own testimony - to believe that O'Kelly was telling the truth to Hutto, as Hutto himself believed that O'Kelly's statement was "bullshit." Nor does O'Kelly's statement - as reported by Hutto - square with the trial evidence. If, as Hutto reports O'Kelly said, Kokal was "too scared" to participate and stayed "up by the truck," one has to wonder how Kokal got blood on his shoe of the same type as the victim's, why Kokal's fingerprint would have been on the murder weapon, why Kokal would have been in possession of the victim's driver's license after the murder, why he would have been driving the truck used in the robbery/murder several days later, or how Kokal could have described the crime in great detail to Eugene Mosley (or to his own attorney).

It should be noted that Hutto's description of Kokal's activity during the commission of this murder (i.e., that he did not participate in the robbery or the murder and stayed in the

truck) is contrary to Kokal's own trial testimony that he had walked down to the beach with O'Kelly and the victim. It is also contradictory to Kokal's statement to Dr. Virzi, in which he admitted not only that "they all walked down to the beach," but also that he had hit the victim himself, with a cue stick, in order to rob him.

Besides not being very credible, Hutto's testimony is mere hearsay. O'Kelly himself was not called as a witness in these postconviction proceedings, and so we can only speculate what he might have to say about Hutto's testimony. Kokal has not identified how Hutto's testimony might be substantively admissible, but assuming that he would rely on the declaration against penal interest exception to the hearsay rule (Section 90.804(c)), Kokal would have to demonstrate that O'Kelly is unavailable as a witness. Kokal, however, has made not the slightest effort to demonstrate that O'Kelly is unavailable now, and O'Kelly certainly was not unavailable at trial as he testified, albeit as a defense witness. As the party moving for the admission of the out-of-court statements, Kokal bore the burden to prove that O'Kelly is unavailable. Lawrence v. State, 691 So.2d 1068, 1073 (Fla 1997). Absent any demonstration that O'Kelly is unavailable as a witness, Hutto's testimony would not be admissible substantively as a statement against penal

interest, but, at best, only as inconsistent statements to impeach O'Kelly's testimony. Jones v. State, 678 So.2d. 309 (Fla. 1996); Jones v. State, supra, 709 So.2d at 524.[22] Newly discovered evidence which merely constitutes impeachment evidence does not generally entitle a defendant to a new trial. Williamson v. Dugger, 651 So.2d 84, 89 (Fla. 1994) (relief properly denied when newly-discovered evidence constituted, at best, impeachment evidence); Buenoano v. State, 708 So.2d 941, 951 (Fla. 1998) (relief properly denied where newly-discovered evidence was merely impeaching). Furthermore, O'Kelley was a *defense* witness. Kokal can point to no case in which a defendant has been granted a new trial or sentence on the basis of newly discovered evidence which, at best, only impeaches a *defense* witness.

Because Hutto's testimony is not credible for a variety of reasons, and because it would be admissible, at best, only to impeach a *defense* witness, Judge Carithers was fully justified in concluding that Hutto's testimony would not probably result in an acquittal on retrial, with or without consideration of Kokal's detailed confession to his own attorney.

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[22] Moreover, no inconsistent **testimony** has been presented from **O'Kelly**, which might be admissible as non-hearsay substantive evidence under section 90.801(2)(A) Florida Statutes (1999). 709 So.2d at 524, fn. 10.

(3) **Judge Carithers' findings are sufficient to explain why Kokal is not entitled to a new sentencing proceeding.** Kokal argues that Judge Carithers "failed to consider Mr. Hutto's testimony as it applied to Mr. Kokal's sentence." Initial Brief at 64. However, Judge Carithers denied Kokal's "Motion to Vacate Judgment and *Sentence*" (3R 371). Thus, Judge Carithers ruled on Kokal's claim as to sentence, and Kokal cannot contend otherwise. (If Judge Carithers had not ruled on this claim, Kokal would have nothing to appeal from.)

Furthermore, Kokal filed a motion for rehearing from Judge Carithers' order denying relief, but made no contention whatever that Judge Carithers had failed to consider the potential impact of Hutto's testimony on Kokal's *sentence* (3R 379-86). Because Kokal did not raise this issue in the circuit court when he had the clear opportunity to do so, it is not preserved for appeal. Morrison v. State, 27 Fla. L. Weekly S53 (Fla. March 21, 2002) ("In order to preserve the issue for appellate review, a party must have made the same argument to the trial court that it raises on appeal.").

Moreover, Judge Carithers explicitly rejected Kokal's newly-discovered evidence claim on the ground that it was contrary to Kokal's confession to his attorney and on the ground that the newly-discoved evidence was "highly impeachable." These reasons

are more than adequate to demonstrate that Hutto's testimony would not, and could not, probably result in a life sentence if this case were sent back for resentencing. That Kokal confessed in great detail to his own attorney is sufficient by itself to preclude giving Kokal another sentencing proceeding at which he might attempt to relitigate the question of who the triggerman was. Moreover, the jury's finding at the sentencing phase of the trial that Kokal was the actual killer was based on evidence presented at the guilt phase of the trial, including his confession to Moseley, his possession of the victim's driver's license after the murder, his fingerprint on the murder weapon, and the blood on his shoe. If Hutto's testimony is not deemed sufficiently credible to rebut this proof, it is *a fortiori* insufficient to warrant a new sentencing. As to guilt or sentence, the fact that Hutto only came forward with testimony against O'Kelly some fifteen years after trial, and only after O'Kelly testified against him, suggests that his testimony is not truth, but payback, and Hutto has presented no credible explanation to the contrary. Not only would Hutto's testimony in any resentencing be suspect on this basis alone, but, as Judge Carithers noted in his order, Hutto's testimony about Kokal's participation in this crime is inconsistent with the physical evidence. These factors counsel against any conclusion

that a jury would probably conclude that Kokal was not the triggerman and, based on Hutto's testimony, would recommend a life sentence. That Judge Carithers did not explicitly address resentencing *per se* does not preclude proper analysis by this Court of the ultimate legal question of whether or not Kokal is entitled to a new sentencing.[23] It is clear that he is not, and Judge Carithers' denial of relief should be affirmed.

ISSUE III

JUDGE CARITHERS CORRECTLY REJECTED KOKAL'S CLAIM OF INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL

Judge Carithers properly denied Kokal's claim that his previous postconviction counsel rendered constitutionally ineffective assistance during his initial postconviction proceedings in circuit court. It is well settled that such a "claim does not state a valid basis for relief." King v. State,

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[23] In Jones v. State, supra, 709 So.2d at 526, n. 12, this Court stated: "As noted in Justice Shaw's dissent, Judge Johnson's order does not analyze Smith's testimony under Brady nor fully address Smith's testimony as newly discovered evidence. However, accepting Smith's testimony as true, the record is adequately developed for us to analyze Jones' claims pertaining to Smith's testimony." Here, too, the record is adequately developed for this Court to analyze Kokal's claim pertaining to sentence with the distinction that there is no reason to accept Hutto's testimony as true because, in contrast to Jones, in which the trial judge did not evaluate Smith's credibility (it was deemed inadmissible and came in only by way of proffer), Judge Carithers has clearly explained why Hutto's testimony is not credible and is of little or no substantive value.

27 Fla. L. Weekly S65a (Fla. January 16, 2002). As noted in King, both Florida and federal courts, including the United States Supreme Court, have held that, because there is no constitutional right to counsel in postconviction proceedings, there is no constitutional right to effective collateral counsel. Ibid, citing Lambrix v. State, 698 So.2d 247, 248 (Fla. 1997); Murray v. Giarratano, 492 U.S. 1 (1989); and Pennsylvania v. Finley, 481 U.S. 551 (1987).

Moreover, one of Kokal's primary complaints about postconviction counsel is that he allegedly failed "to confront and disprove Mr. Westling's testimony that Mr. Kokal confessed to him." Initial Brief at 83. This seems like a strange complaint to level at prior counsel, since present counsel have likewise failed "to confront and disprove" Westling's testimony that Kokal had confessed to him. Although Kokal claims that "[h]ad Mr. Morrow effectively represented Mr. Kokal he could have proved that Mr. Kokal did not confess to Mr. Westling and have severely undermined Mr. Westling's credibility," Initial Brief at 84, it must be noted that present counsel have not even attempted to prove that Kokal did not confess to Westling. Nor were present counsel precluded from doing so. Although Judge Carithers summarily denied Kokal's claim that Jeff Morrow was ineffective, he did not preclude the presentation of evidence

about the validity of the confession. Nor did the State indicate in any way that it would object to any evidence offered to somehow cast doubt on the validity of the confession. On the contrary, the State's position all along was that, if Kokal wanted us to disregard his confession to Westling, he had to give us a reason not to believe it. In short, the State invited Kokal to prove that Westling lied about the confession, but Kokal simply chose not to attempt such proof (probably because such proof does not exist).

In the end, Kokal wants to undo the prior postconviction proceedings for the same reason he wants to undo the trial - the outcome was unfavorable to him. But his personal dissatisfaction with the result of prior proceedings is not a sufficient basis for redoing what has been done before. No legal basis exists for having an evidentiary hearing on a claim that previous postconviction counsel was ineffective, and Judge Carithers properly denied the claim.

CONCLUSION

Judge Carithers properly determined that Kokal has failed to present admissible, newly-discovered evidence of sufficient credibility to warrant overturning the presumptively accurate and fair proceedings resulting in his conviction and death sentence. For all the foregoing reasons, the judgement of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Linda McDermott, Assistant Capital Collateral Counsel, Northern Region, P.O. Drawer 5498, Tallahassee, FL 32314-5498, this 2nd day of May, 2002.

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CURTIS M. FRENCH

Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

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

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CURTIS M. FRENCH
Senior Assistant Attorney General