IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-882

LOWER TRIBUNAL No. 83-8975 CF

GREGORY ALAN KOKAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Kokal's second motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied three of Mr. Kokal's claims without an evidentiary hearing and held an evidentiary hearing on Mr. Kokal's claim of newly discovered evidence.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

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

"T." -- transcript of proceedings from trial;

"PC-R." -- record on appeal regarding public records' issues;

"PC-R2." -- record on appeal from initial denial of postconviction relief;

"PC-R2. Supp. Vol." -- supplemental record on appeal from initial postconviction relief;

"PC-R3." -- record on appeal from the second denial of postconviction relief.

"PC-R3. Supp." -- supplemental record on appeal from second denial of postconviction relief.

REQUEST FOR ORAL ARGUMENT

Mr. Kokal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument

in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Kokal, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The standard of review regarding Mr. Kokal's newly discovered evidence claim was explained by this Court in Blanco v. State: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court.'" 702 So. 2d 1250, 1252 (Fla. 1997). As to the summary denial of Mr. Kokal's ineffective assistance of postconviction counsel claim and Mr. Kokal's judicial disqualification claim, a de novo standard applies because these issues present a legal question and a mixed question of law and facts, respectively.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On October 20, 1983, Mr. Kokal was indicted and charged, along with co-defendant William O'Kelly, Jr., with the premeditated first-degree murder of Jeffrey Russell in Jacksonville, Florida. (R. 3).

Subsequently, Mr. Kokal was tried by a jury in the circuit court of the Fourth Judicial Circuit, in and for Duval County, Florida. Trial began on October 1, 1984 and on October 4, 1984, the jury found Mr. Kokal guilty of first-degree murder. (R. 228).

The penalty phase was held on October 12, 1984, and on that same day the jury returned a recommendation of death. (R. 236).

On November 14, 1984, the trial judge sentenced Mr. Kokal to death. (R. 224-258). This Court affirmed Mr. Kokal's conviction and sentence. Kokal v. State, 492 So. 2d 1317 (Fla. 1986).

Under Florida law, Fla. R. Crim. P. 3.850, Mr. Kokal's motion for postconviction relief was due on October 20, 1988, however, former Governor Martinez signed a death warrant on Mr. Kokal forcing Mr. Kokal to file his postconviction pleadings before the two-year time limit provided for by then existing Rule 3.851.

Mr. Kokal's Rule 3.850 and state habeas pleadings were timely filed and Mr. Kokal requested the circuit court to stay his execution. Mr. Kokal also moved to compel public records disclosure from the Office of State Attorney for the Fourth Judicial Circuit.

In October, 1988, the circuit court stayed the execution date and granted Mr. Kokal's motion to compel.

Thereafter, the State appealed the circuit court's order to compel disclosure of public records to the First District Court of Appeals. The First District Court of Appeals transferred jurisdiction to this Court which affirmed the circuit court's order in its opinion of April 19, 1990. State v. Kokal, 562 So. 2d 324 (Fla. 1990).

Mr. Kokal filed an Amended Rule 3.850 on May 18, 1992. (PC-R2., 1-219)

In 1996, the Office of the Capital Collateral Representative (CCR), which had represented Mr. Kokal since 1988, became involved in a conflict situation that impacted Mr. Kokal's defense. Counsel assigned to Mr. Kokal therefore withdrew from Mr. Kokal's representation and private counsel, Jefferson W. Morrow, was appointed to represent Mr. Kokal in his postconviction appeals.

On February 11-12, 1997, a limited evidentiary hearing was held regarding trial counsel's ineffectiveness. (PC-R2.309-720). The circuit court denied all relief on April 14, 1997. (PC-R2. 296-307).

Mr. Kokal appealed the denial to this Court. This Court affirmed the circuit court's order. Kokal v. State, 718 So. 2d 138 (Fla. 1998).

In March, 1999, Mr. Kokal was appointed counsel by the federal district court to prepare his petition for writ of habeas corpus. The federal district court also granted funds for investigative assistance. It was through the grant of funds for investigative assistance that the newly discovered evidence at issue became known.

On or about August 12, 1999, Mr. Kokal filed a pro se Rule 3.850 motion alleging newly discovered evidence of innocence. (PC-R3. 1-57). In his pleading and by separate motion, Mr. Kokal requested that the trial court appoint counsel to represent him. (PC-R3. 4, 62-66).

On September 28, 1999, the circuit court appointed the Office of the Capital Collateral Regional Counsel for the Middle Region (CCC-MR) to represent Mr. Kokal. (PC-R3. 90-91). Thereafter, CCC-MR filed a motion requesting that the court transfer the case to the Northern Region, due to the fact that the Middle Region was experiencing difficulties in staffing and was transferring cases to Registry counsel. (PC-R3. 96-101). The court granted the motion and appointed the Office of the Capital Collateral Counsel for the Northern Region (CCC-NR).

On October 1, 1999, the court ordered the State to respond to Mr. Kokal's pro se Rule 3.850 motion. (PC-R3. 94-95). The State responded on October 18, 1999. (PC-R3. 105-116).

On April 3, 2000, CCC-NR filed an amended Rule 3.850 motion. (PC-R3. 152-224).

An incomplete Huff[1] hearing was held on April 6, 2000. (PC-R3. 420-458). On the day of the Huff hearing, Mr. Kokal filed a Motion to Disqualify Judge and Supporting Memorandum of Law, based on the fact that Judge Carithers presided over the postconviction proceedings in Kight v. State, Duval County Case. No. 83-2598CFB. (PC-R3. 225-236). At the April 6th hearing, Judge Carithers stated that he would disqualify himself if he determined that an evidentiary hearing was necessary. (PC-R3. 425, 430, 431, 432, 433-434). Thus, Judge Carithers believed that he could rule on the necessity of having a hearing on the newly discovered evidence claim prior to determining whether he should disqualify himself. Judge Carithers directed the parties to proceed with their argument as to the newly discovered evidence claim and indicated that he would bifurcate the Huff hearing as to the other claims in Mr. Kokal's amended Rule 3.850 motion. (PC-R3. 434).

Following the April 6th hearing, the parties submitted memorandum on the disqualification issue and the standard for granting an evidentiary hearing. (PC-R3. 243-252; 254-260).

On June 30, 2000, the circuit court denied Mr. Kokal's motion to disqualify. (PC-R3. 261-262).

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[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

On September 12, 2000, the circuit court held a Huff hearing on claims two, three and four of Mr. Kokal's amended Rule 3.850 motion. (PC-R3. 459-506).

On October 3, 2000, the circuit court granted Mr. Kokal an evidentiary hearing on his newly discovered evidence claim and denied his other claims. (PC-R3. 265-267). The hearing was held on October 31, 2000 (PC-R3. 507-576), and written closing arguments were submitted in February, 2001. (PC-R3. 336-365; 366-370).

The circuit court denied relief on Mr. Kokal's newly discovered evidence claim on February 12, 2001. (PC-R3. 371-378).

Mr. Kokal filed a Motion for Rehearing that was denied on March 2, 2001. (PC-R3. 387-388).

Mr. Kokal timely filed a notice of appeal. (PC-R3. 389-390).

STATEMENT OF THE FACTS

THE TRIAL

On October 20, 1983, Mr. Kokal was indicted and charged, along with co-defendant William O'Kelly, Jr., with the premeditated first-degree murder of Jeffrey Russell in Jacksonville, Florida. (R. 3). Mr. O'Kelly was represented by the Public Defender's Office, while Mr. Kokal was represented by private counsel, Dale Westling.

On February 18, 1984, after having filed no pre-trial motions on Mr. Kokal's behalf, Mr. Westling filed a motion to adopt the motions filed on behalf of Mr. O'Kelly. (R. 118). In fact, Mr. Westling filed the motions with Mr. O'Kelly's name crossed out of the

caption, but failed to change his name in the text of the motions. (See R. 14-17, 18-19, 20-40, 41, 42-44, 45-47, 48-51, 52-80, 81-83, 84-86, 87-89, 90, 91-95, 96-97, 98-99, 100-103, 104-110).

On March 15, 1984, Mr. Westling filed a motion requesting that the trial court sever Mr. Kokal and Mr. O'Kelly's cases. (R. 187). The motion was granted. (R. 188).

On March 23, 1984, approximately six months prior to Mr. Kokal's capital trial, co-defendant O'Kelly executed a document entitled "Plea of Guilty - Negotiated Sentence" wherein he agreed to plead to the lesser included offense of Second Degree Murder upon the understanding that prosecutors would recommend a sentence "in accordance with the sentencing guidelines" (12 to 17 years). In exchange for the plea, the State of Florida required that Mr. O'Kelly "testify truthfully" against Mr. Kokal. This was defined as testifying "in agreement with those prior consistent statements" given to detectives and a prosecutor. Further, "any breach of [the] agreement" by Mr. O'Kelly would "result in the setting aside of the plea" and prosecution for the indicted capital offense.

On April 24, 1984, Mr. Westling filed a Motion for Production of Correspondence. (R. 193). Mr. Westling was seeking to retrieve a letter written by Mr. O'Kelly to Mr. Kokal in which Mr. O'Kelly asked Mr. Kokal: "What do you want me to say?" (Id.). The letter had been

confiscated from Mr. Kokal's jail cell by the Duval County Sheriff's Office. (Id.).

On April 30, 1984, Mr. Kokal filed a motion to suppress the items obtained from Mr. O'Kelly's truck. (R. 194-195). The motion was heard on May 9, 1984. At the hearing, Mr. Kokal testified that the truck was registered to Mr. O'Kelly (T. 23). Officer David Mahn testified that he retrieved a firearm from beneath the driver's seat in the truck. (T. 36). Further, conflicting testimony was elicited regarding the location of the identification and wallets that were seized: Officer Mahn testified that Mr. Kokal produced the victim's identification from his pocket (T. 36), while Dena McKelly, a witness to the arrest and search, testified that she believed the officer seized the identification from the truck. (T. 49, 52-55). The trial judge denied the motion. (T. 100).

On July 25, 1984, Mr. Westling requested that the court appoint an expert to perform a psychiatric exam of Mr. Kokal. (R. 205-206). In his motion, trial counsel indicated that Mr. Kokal has previously received psychological care. (Id.). Over a month and a half later, on September 17, 1984, the court appointed Dr. Joseph Virzi to conduct an evaluation with Mr. Kokal (R. 207); the order was entered approximately two weeks before Mr. Kokal's trial commenced.

The guilt-innocence phase of Mr. Kokal's trial occurred October 1-4, 1984. The State's case consisted of the following evidence: Tire track impressions near the scene of the crime were consistent with the tires on Mr. O'Kelly's truck (T. 607). Shoeprint impressions near the scene of the crime were consistent with Nike shoes owned by Mr. Kokal and Pro-Wing shoes owned by Mr. O'Kelly (T.614, 616), -- the examination of the impressions and the shoes was only limited to characteristics of the design, i.e. no class characteristics were observed. (T.614). A fingerprint identified as Mr. Kokal's was located on the cylinder of the firearm that belonged to Mr. O'Kelly, and on the end flap of the shell box. (T. 619-620). Mr. Kokal's fingerprints were not found on the victim's identification, the victim's wallet, the pool cue, or any other items introduced into evidence, other than a cigarette pack seized from Mr. O'Kelly's truck. (T. 626-627). A small bloodstain on the tongue of the left Nike shoe was typed and found to be type B, the same blood type as the victim.[2] (T. 637). No evidence was produced as to Mr. Kokal's blood type or whether or not Mr. O'Kelly's shoes exhibited any bloodstains. A firearms expert testified that the firearm seized

[2] In 2000, Mr. Kokal requested that he be allowed to conduct DNA testing on the left Nike shoe in order to determine if the blood found on the shoe was in fact the victim's. (PC-R3. 237-242). At the December 15, 2000, hearing, the State represented to the lower court that the blood sample obtained from the victim was destroyed and therefore there was no comparison available for testing. (PC-R3. 583).

from Mr. O'Kelly's truck fired the bullet retrieved from the victim's shoulder. (R. 648).

The State's physical evidence linking Mr. Kokal to the homicide was circumstantial and consistent with Mr. Kokal's testimony.

The State also presented the testimony of Eugene Mosley. Mr. Mosley testified that he spoke to Mr. Kokal on September 30, 1983, and on that evening, Mr. Kokal told him: "that they had -- he killed a guy." (T. 551). Mr. Mosley did not know many details of the crime, but testified that Mr. Kokal told him that after exiting the car at Hanna Park, he and Mr. O'Kelly beat the victim and Mr. Kokal shot the victim. (R. 552). Mr. Mosley also testified that Mr. Kokal stated: "dead men can't tell lies." (R. 554).

On cross-examination, Mr. Mosley admitted that Mr. Kokal was intoxicated during the conversation. (T. 558). Mr. Mosley also admitted that during his deposition he attributed many of the actions Mr. Kokal allegedly discussed with him to both Mr. O'Kelly and Mr. Kokal, i.e., using the words "we" and "they". (T. 561). Mr. Mosley's explanation for the change in his testimony was that he "wasn't sure of the questions you were asking me. I had never gone through it before and I didn't know how to answer it." (Id.). However, Mr. Kokal's trial attorney did not impeach Mr. Mosley with the inconsistencies between his statement and the physical evidence.

After the State rested its case, Mr. Kokal's trial attorney presented an opening statement in which he told the jury: "We do not quarrel with, as you will see, with any of the fingerprints, blood samples, pistol, firearm." (T. 681). Mr. Westling then proceeded to inform the jury about the testimony they would hear from Mr. Kokal. (T. 683-689).

Mr. Westling called Mr. O'Kelly to testify. The sole purpose of calling Mr. O'Kelly to testify appeared to be so that Mr. Westling could introduce a letter written by Mr. O'Kelly in November 1983 in which Mr. O'Kelly explained that he shot the victim, but the shooting was an accident. (R. 692). On cross examination, Mr. O'Kelly read the letter to the jury:

> On Thursday, September 29, 1983, I William Robert O'Kelly, Jr., and my partner, Gregory Alan Kokal, decided to go to the beach to see the ocean and to party. Greg being from Jacksonville said he knew a nice place where we could drive right up on the beach. The place is called Hanna Park. I was already pretty loaded from drinking and smoking some pot. When we got to the park the gates were already open, so we drove in.
>
> Greg was driving as I was drinking more than him, and I thought it would be better if Greg drove. We drove to where we could drive up on the beach, but instead, we parked the truck up on the black top because we didn't want to get it stuck in the sand.
>
> Greg shut the engine off and we got out to take a leak. Then, I told Greg let's shoot off soda water caps. We had about one gross of them that he got out in Arizona. When we got out I decided to take my .357 revolver out from

> underneath the seat and do some target practice.
>
> There was what I thought to be driftwood or an old sack about a hundred and fifty feet down towards the water. I shot five rounds the first time because I always keep the hammer on the empty chamber when it's not in use.
>
> Greg and I then went to the wood or sack and discovered that it wasn't what we thought it to be, but the body of a young man. As I was walking down to the wood I had the hammer of my gun cocked and aimed at the wood at about two feet away. I accidentally pulled the trigger and shot the body in the head.
>
> I don't know why I did this because I never intentionally would shoot anyone unless it was in self defense. Then, Greg asked me what the hell did you do that for? I replied I don't know, I guess I was holding the trigger too tight. Then, he reached down to see if he was still alive. By this time I was still sober so I tried to get his pulse but his arm was cold and his driver's license was laying in the sand next to him and I picked it up and put it in my pocket.
>
> There were pieces of what looked like the cue stick also laying in the sand that we both picked up. Then, I told Greg let's get the f**k out of here, so we threw down the cue stick pieces and ran up to the truck, got in and drove off. We decided to go and report it to the police, but then we thought it would look like we killed him and decided to just go home. I, William Robert O'Kelly, Jr., do solemnly swear as God is my witness that the above statement is true and to the best of my knowledge exactly as it happened in Hanna Park late night and early morning of September 29 and 30.

(T. 697-699). Mr. O'Kelly told the jury that the letter was intended to get him and Mr. Kokal "off the hook". (T. 699). Mr. O'Kelly then relayed to the jury his version of events, which completely

exonerated him and inculpated Mr. Kokal. (T. 702-706). Mr. O'Kelly's version of events also differed from the alleged statement that Mr. Kokal made to Mr. Mosley.

Mr. Westling called Mr. Kokal to testify. Mr. Kokal testified that Mr. O'Kelly was the triggerman. Mr. Kokal testified:

> Q: (By Mr. Westling) Let's go to that night, the night Mr. Russell was killed. On that day, during about what time you got up (sic) based upon your usual habits?
>
> A: About 2:00 o'clock.
>
> Q: What did you do with the rest of the afternoon?
>
> A: I drank and smoked.
>
> Q: Where did you do that?
>
> A: Out in the backyard, in the garage of the house.
>
> Q: Was Mr. O'Kelly doing that with you?
>
> A: Yes, sir.
>
> Q: What did you and Mr. O'Kelly do that evening, and let's begin with the early -- first off, did you stay at the house all night or did you leave?
>
> A: We left the house.
>
> Q: About what time did you leave the house?
>
> A: About 11:00 or 12:00 at night.
>
> Q: Where did you go when you left the house? What was the intent?

A: Well, Mr. O'Kelly wanted to see the beach, the Atlantic Ocean. He had never seen it and we intended to go to the beach.

Q: All right. And who was driving the truck?

A: Me.

Q: Now, why were you going to drive?

A: Because I knew the area, I knew where I was going.

Q: All right. Now, did you all have any liquor with you when you left your mom's residence?

A: Well, no, we stopped on the way to the beach and got a bottle.

Q: A bottle of what?

A: Of rum, Bicardi.

* * *

Q: That evening, two or three hours, whatever, after you left your mother's house, did you all ever pick anybody up?

A: Yes, sir.

* * *

Q: Did you take the hitchhiker to Mayport?

A: No, sir.

Q: Where did you all go?

A: We went down -- we were heading towards the Naval Base and we asked him if he smoked pot and the guy said yes, and so we asked him if he wanted to smoke some and he

said yes. So, we agreed that we'd go down to Hanna Park because it was a nice section of the beach and it was on the way. It was pretty isolated at night.

Q: Why did you want to go there?

A: To get high, to drink and listen to music.

* * *

Q: Now, you left off, you stopped the truck, what did you do after you parked the truck?

A: I got out to go to the bathroom.

Q: Okay. Let me ask you where were you sitting? Well, obviously the driver's side. Where was Mr. O'Kelly sitting?

A: He was sitting on the passenger's side of the truck.

Q: All right. And where was Mr. Russell sitting?

A: In the center of the truck.

Q: Now, you got out and you went to the bathroom. What happened next? What did you do next Mr. Kokal?

A: Well, I used the bathroom on the beach.

Q: Okay. When you got done using the bathroom, what did you do?

A: I walked around to the back of the truck.

Q: Did you go around the back or the front?

A: Around the back of the truck.

Q: All right. And what if anything unusual did you observe as you got around the back of the truck?

A: I observed Mr. O'Kelly holding his pistol in the guy's face.

Q: How far apart were they from each other?

A: A couple of feet, just right --

* * *

Q: How would you describe your condition as far as intoxication is concerned? Look back and try to remember.

A: Pretty drunk.

Q: Had you also used marijuana that evening?

A: Yes, quite stoned and drunk; I was feeling pretty good.

Q: All right. Now, when you saw that pistol in his face, when you saw Bill holding that pistol, did you run?

A: No, sir.

Q: Why didn't you turn around and run?

A: Because I was scared.

* * *

Q: All right. Now, what happened next, if anything, after you saw Mr. O'Kelly with the pistol in the face of this boy, this young boy that you all had picked up? What if anything did Mr. O'Kelly do next?

A: He told the guy to turn around.

Q: Did the guy turn around?

A: Yes.

Q: Then what happened?

A: Then he hit the guy in the back of the head with the gun?

* * *

Q: What did Mr. O'Kelly do after he hit the man in the back of the head with the revolver?

A: He told the guy to put his hands on the truck.

Q: Did the guy do that?

A: Yes.

Q: All right. Had you said anything? Now we're going to go step by step. Had you said anything up to this point to Mr. Russell from the time that you saw the pistol until the time that he was struck in the head?

A: No, sir.

Q: Had you said anything to Mr. O'Kelly?

A: No.

Q: Why didn't you ask him to stop?

A: I didn't, just didn't ask him. I was scared of him.

Q: Did the man put his arms on the truck?

A: Yes, he did.

Q: What if anything did Mr. O'Kelly do then?

A: He stuck his pistol in his pants.

Q: And then what?

A: And then he reached in the guy's back pocket and took his wallet.

Q: What did O'Kelly do with the wallet?

A: Put the wallet in the truck.

Q: Where did he put it in the truck, do you know?

A: On the dashboard.

Q: What did O'Kelly do then?

A: Grabbed a pool cue off of the dashboard.

* * *

A: He walked out behind the guy and then hit him over the head with a pool cue.

* * *

Q: How many times did he hit him in the back of the head at the truck?

A: The time he hit him with the gun and the time he hit him with the stick.

Q: What happened when he hit him in the head with the stick, in the back of the head at the truck?

A: It broke.

Q: How many pieces?

A: Two.

Q: What did O'Kelly do then?

A: He picked up the piece that was broke.

Q: And then what?

A: He told the guy to walk down towards the ocean.

* * *

Q: What happened when the three of you all got down close to the water?

A: Mr. O'Kelly, Bill, hit the guy over the head with the pool stick again.

* * *

A: After he had hit him, then the guy still didn't fall down, or whatever Mr. O'Kelly expected him to do and he told the guy to lay down on the beach.

Q: Then what happened?

A: Then he hit him again with the pool stick repeatedly and then it broke again.

* * *

Q: Now, after the pool cue was finally broken, what did you and Mr. O'Kelly do?

* * *

A: I told him I was getting the hell out of there.

Q: What did he say?

A: As I recall, he didn't say anything right then.

Q: What did you do?

A: I started walking towards the truck.

Q: What did he do?

A: He was walking behind me.

* * *

A: I got in the truck and started the truck up and told him I was leaving.

Q: What did he do?

A: He said that he was going back down to the beach.

* * *

Q: What happened when he got down to the beach, what did you either see or hear with you in the truck and him down by the water?

A: I heard a blast and seen a flash.

Q: Okay. Then what happened?

A: Then he ran back up to the truck.

Q: Did he say anything when he got to the truck?

A: He said he just wasted the f****r, to be more specific he said I smoked the f****r.

* * *

Q: Did you know he was going to shoot the man?

A: No.

Q: Did you know that the man was going to be robbed?

A: No, sir.

(T. 719-735).[3]

Thus, during the defense's case, Mr. O'Kelly implicated Mr. Kokal as the triggerman (T. 701-709), and Mr. Kokal implicated Mr. O'Kelly as the triggerman. (T. 724-734).

During closing argument, Mr. Kokal's trial attorney argued:

> ...It just boils down to whether you, based upon that life-long association with people, whether or not you believe [Kokal].
>
> What I would like to talk to you about for the next hour, or maybe not that long, some things I think indicate why you should believe [Kokal]...
> ...everything that came in corroborates what [Kokal] told you, every piece of evidence, every shoe, every pistol, every cue stick, everything supports what Mr. Kokal told you on the witness stand.

(T. 780-781). After Mr. Kokal's testimony, the defense rested. (T. 759).

The jury found Mr. Kokal guilty "as charged in the indictment". (R. 228).

On October 12, 1984, a brief penalty phase was conducted. The State presented the testimony of the medical examiner. (T. 861-870). Mr. Kokal presented the testimony of his mother (her direct

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[3] At the evidentiary hearing in 1997 Mr. Westling characterized Mr. Kokal's testimony as a narrative. The brief excerpt demonstrates that Mr. Kokal did not testify in a narrative, rather Mr. Westling elicited the testimony by using leading and direct questions as he took Mr. Kokal "step by step" through his testimony. See Claim III, supra.

examination comprises less that eight (8) pages of transcript). (T. 875-882).

Mrs. Kokal briefly described the physical abuse her husband inflicted upon Mr. Kokal when he was a child. (T. 876). Mrs. Kokal only described two (2) incidents of abuse: Gregory Kokal's father hit him in the head with a tennis racket several times, leaving marks, and Gregory Kokal's father chained him to a bed for a week, only allowed him to eat sweet potatoes and provided him a container in which to relieve himself. (T. 877). Mrs. Kokal testified that Mr. Kokal's father was frequently, severely abusive to his son. (T. 878). Mrs. Kokal indicated that her husband abused her, but trial counsel did not ask if her son witnessed this abuse. Mrs. Kokal also testified that her son abused alcohol, but provided no details about his addiction. (T. 881). Finally, Mrs. Kokal testified that Greg Kokal received some counseling. No further evidence was presented on Mr. Kokal's behalf.

The trial jury recommended a sentence of death be imposed upon Mr. Kokal and further found Mr. Kokal did actually kill Jeffrey Russell. (R. 236).

On November 13, 1984, the State of Florida fulfilled its promise to Mr. O'Kelly. He was adjudicated guilty of Second Degree Murder and sentenced to 14 years in prison, near the low end of the guidelines range, and received 404 days credit for time served.

The following day, Mr. Kokal was sentenced to death by electrocution. (T. 240-243).

In the trial court's written "Judgment and Sentence of Gregory Alan Kokal" (R. 244-258), the testimony of Mr. O'Kelly was relied upon in determining facts and evaluating aggravating and mitigating circumstances. The court specifically rejected the contention that Mr. O'Kelly was the triggerman and concluded the facts indicated Mr. Kokal's "full, perhaps, single participation in Russell's death". (R. 251-252). Further, the trial court relied upon Mr. O'Kelly's trial testimony in rejecting Mr. Kokal's claim that alcohol intoxication and use of narcotics substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (R. 253). In considering aggravating circumstances and concluding Mr. Kokal subjected the victim to a "death march", the trial court accepted and relied in full upon Mr. O'Kelly's trial testimony.

The court also specifically found that the jury's recommendation met the Enmund[4] requirement. (R. 249).

3.850 Proceedings: 1988 - 1998

In 1988, a premature death warrant was signed and Mr. Kokal's initial Rule 3.850 motion and state habeas pleading were filed under threat of execution. A stay was entered. Following public records

[4] Enmund v. Florida, 458 U.S. 782 (1982).

litigation protracted by a State appeal, see State v. Kokal, 562 So. 2d 324 (Fla. 1990), Mr. Kokal timely filed his initial Rule 3.850 motion and filed an amended motion on May 18, 1992. (PC-R2. 1-219). Approximately one-half of the motion was devoted to specifically pleading ineffective assistance of counsel claims. (PC-R. 25-132). Mr. Kokal also pleaded an Ake claim. (PC-R2. 133-142).

On June 28, 1996, a preliminary hearing to determine issues requiring evidentiary hearing was conducted. (PC-R2. Supp. Vol. I, 4-110). Mr. Kokal was represented by counsel from the Office of Capital Collateral Representative (hereinafter "CCR") at that time. During this hearing, counsel for Mr. Kokal represented to the court that Mr. Kokal's trial attorney was uncooperative and would not discuss the case with her. (PC-R2. Supp. Vol. I, 7). The lower court ordered that counsel for Mr. Kokal could depose Mr. Dale Westling, Kokal's trial counsel, by Order dated July 1, 1996. (PC-R2. Supp. Vol. VIII at 550-51). The lower court entered an Order Regarding Necessity of Evidentiary Hearing on July 30, 1996, (PC-R2. Supp. Vol. VIII at 552-554), granting evidentiary hearing on various claims, including ineffective assistance of counsel.

On September 23, 1996, CCR counsel for Mr. Kokal filed a Motion to Allow Counsel to Withdraw and for Appointment of Conflict-Free Counsel. (PC-R2. Supp. Vol. VIII at 555-556).

On October 8, 1996, the lower court entered an Order Granting Office of Capital Collateral Representative Leave to Withdraw; Appointing Substitute Counsel; and Canceling Hearing. (PC-R2. Supp. Vol. VIII, 564-565). Jefferson Morrow was appointed to represent Mr. Kokal. This court's order contained a cooperation provision between CCR and Mr. Morrow "towards the end of effecting timely, competent representation for [Kokal] in this matter". (Id. at 565). The November 4, 1996, evidentiary hearing was canceled.

On November 25, 1996, a status conference was held. At that time the lower court wanted to know how much time Mr. Morrow needed to prepare for evidentiary hearing. Despite not having the files, Mr. Morrow stated he knew "what the issue is, Judge, because I recall the case when Judge Harrison was on the bench." (PC-R2. Supp. Vol. II at 113). The motion contained in excess of 200 pages of allegations; the appendix comprised in excess of 1300 pages. The lower court suggested Mr. Morrow might want to depose Westling, as previously ordered. (Id.). Mr. Morrow first estimated the hearing would take no more than one day; he then thought it would take "less than six hours", although he hadn't "seen the actual material". (PC-R2. Supp. Vol. II at 114). The lower court stated it wouldn't rush Mr. Morrow, but suggested a January evidentiary hearing, i.e., less than two months from that time, with no files or actual knowledge of the case. (Id. at 115).

On December 10, 1996, the lower court scheduled an evidentiary hearing for two half days, February 11 & 12, 1996, i.e., less than 10 weeks from the time Mr. Morrow represented he knew the issue but had no files or actual knowledge of the postconviction claims. (PC-R2. Supp. Vol. VIII at 566).

On January 27, 1997, another status conference was held. At that time, Mr. Morrow agreed to waive certain claims, agreed other claims were insufficiently pled, and agreed other claims were procedurally barred. (PC-R2. Supp. Vol. III). Mr. Morrow did not depose Mr. Westling and had advised him of the hearing date. (PC-R2. Supp. Vol. III, at 122). The State and Mr. Morrow were having on-going discussions and waiver of claims and stipulations in that regard were being reached. Mr. Kokal was on death row and Mr. Morrow had seen him but twice. Nothing on the face of the record indicates Mr. Kokal knowingly, voluntarily and intelligently waived any postconviction claims. Mr. Kokal was not present when the waivers were entered.

On February 4, 1997, the lower court entered an Order Clarifying Order Regarding Necessity of Evidentiary Hearing, (PC-R2. Supp. Vol. VIII at 568), restricting the scope of the evidentiary hearing based upon Mr. Morrow's stipulations and waivers on January 27, 1997. The practical result of Mr. Morrow's waivers and stipulations was to reduce the hearing solely to matters regarding

ineffective assistance of counsel. The evidentiary hearing was conducted as scheduled.

At the evidentiary hearing, Dr. Barry Crown, a forensic neuropsychologist and expert in substance abuse, testified. He evaluated Mr. Kokal, considered extensive background materials, and based on the totality of circumstances maintained the opinions that Mr. Kokal suffered from an extreme emotional or mental disturbance and had diminished capacity to conform his conduct to the requirements of the law at the time of the homicide. (PC-R2. 315-319). Dr. Crown also concluded that Mr. Kokal was brain damaged. (PC-R2. 317). Despite this, Mr. Morrow failed to qualify Dr. Crown as an expert during the hearing (PC-R2. 315-319; 489-490). On direct examination, Mr. Morrow did not discuss Dr. Crown's neuropsychological testing of Mr. Kokal or the foundation of these critical opinions, had Dr. Crown testify simply to his ultimate opinions, and, in fact, the entire direct examination comprises but four and one-half (4-1/2) pages of transcript. In contrast, the State's cross-examination consumes over seventy (70) pages of transcript. Following such thorough cross, Mr. Morrow's re-direct examination was a little over a page and the apparent goal was to establish Mr. Kokal is not a vegetable. (PC-R2. 390-391).

Likewise, Dr. Virzi, an examining psychiatrist from the time of trial, was not qualified by Mr. Morrow. Again, he summarily related

his ultimate opinions regarding the presence of both statutory mental health mitigators at the time of the crime. (PC-R2. 395-406). Dr. Virzi based his opinion on the background materials provided to him in postconviction and because in postconviction he was asked to evaluate Mr. Kokal for statutory and non-statutory mental health mitigation. (PC-R2. 404-405).

Dr. Virzi's testimony on cross-examination establishes that Mr. Kokal was denied a competent mental health evaluation at the time of trial through a combination of ineffective assistance of counsel and a violation of Ake v. Oklahoma, 470 U.S. 68 (1985), as alleged in Claim IV of the Motion to Vacate. (PC-R2. 133-142). The lower court specifically granted a hearing on this claim. (PC-R2. Supp. Vol. VIII at 553).

Dr. Virzi testified that he was retained only to evaluate whether Mr. Kokal was competent to proceed at trial and whether Mr. Kokal was insane at the time of the crime. (PC-R2. 396, 400). Mr. Westling confirmed that he did not request that Dr. Virzi evaluate Mr. Kokal to determine the presence of any statutory or non-statutory mental health mitigating factors. (PC-R2. 562-563, 649). Dr. Virzi was also not asked to assess the effect of Mr. Kokal’s alcohol and drug use on the day and evening of the crime or to consider mitigation in this regard. (PC-R2. 400).

Dr. Virzi's evaluation of Mr. Kokal lasted only forty-five (45) minutes. (PC-R2. 397). Furthermore, Mr. Westling told Dr. Virzi that he needed the evaluation and his report within a week of the initial contact with his expert. (PC-R2. 398). No background information was provided, despite Dr. Virzi's request, (PC-R2. 399), and Dr. Virzi conducted no independent investigation. (PC-R2. 399). Dr. Virzi requested Mr. Westling to have neuropsychological testing conducted because he felt his evaluation was incomplete. (PC-R2. 401, 421).

Mr. Morrow's post-hearing memorandum was entitled "Defendant's Closing Argument Regarding Ineffective Defense Counsel Issues and Memorandum of Law". (PC-R2. 256-295). Not one word was devoted to the Ake claim and the fact that Dr. Virzi's testimony established that Mr. Kokal was denied a competent psychiatric evaluation in preparing for his capital trial and penalty phase.

The lower court's order denying relief did not discuss the Ake claim and was confined to ineffective assistance of counsel. (PC-R2. 296-307). Mr. Morrow did not file a Motion for Rehearing.

Most prejudicial to Mr. Kokal was Mr. Morrow's complete mishandling of the trial attorney, Dale Westling. Mr. Morrow allowed blatant misrepresentations to go unrebutted and failed to challenge bald assertions by counsel. The record implies that Mr. Morrow and Mr. Westling were friendly and that all parties, with the exception of Greg Kokal, were relieved to have CCR out of the picture.

Mr. Morrow characterized the claim of ineffective assistance of counsel as an "attack" on Mr. Westling and led Mr. Westling into rebutting the "attack". (PC-R2. 533). CCR became "they"; the attackers. Mr. Morrow infected his questioning with some version of "What was your strategy in...?" on at least five occasions (PC-R2. 534, 535, 579, 582, 591) and allowed Westling to give long, unresponsive, self-serving responses to questions.

Mr. Westling was free to say anything he wanted on the witness stand by taking the position that CCR had stolen all of his trial notes and memorandum. (PC-R2. 543, 555, 600). Morrow had an available witness to completely rebut this proposition, but failed to call her. Rather than go through the trial file with Mr. Westling and determine if anything was, in fact, missing, he simply agreed that neither he nor Mr. Westling had 2/3 of the trial file. (PC-R2. 593-594). Mr. Morrow utterly failed to call custodians of the original trial file to rebut the representation by trial counsel. Upon hearing of this claim, Mr. Westling's assertion could have been defeated by clear and convincing evidence.

Mr. Westling's antagonism toward his former client and closeness to his former employer, the State Attorney's Office, culminated in his most suspect testimony: that Mr. Kokal, like all criminal defendants, originally lied to him, but over time confessed he murdered Mr. Russell, so Mr. Westling knew Mr. Kokal lied during

trial, but it was okay because he didn't ask him specific questions and just let him tell "what happened". (PC-R2. 615-624; 682-683). Mr. Westling quite openly stated "as probably 98 percent of all criminal defendants in the beginning of the case he lied to me." (PC-R2. 682). When Mr. Westling asserted that Mr. Kokal lied on the witness stand, Mr. Morrow simply conceded this was true: "I understand that." (PC-R2. 682). In fact, Mr. Morrow accepted Mr. Westling at face value on this issue from the beginning. Within a few questions of his direct examination, without any mention of a confession, Mr. Morrow asked: "At the time in 1984 what was your understanding of the ethical code regarding a client confessing to you to the crime charged and requesting to testify anyway untruthfully?" (PC-R2. 536). Before Mr. Westling even mentioned an alleged confession and rather than challenge such an assertion (which is inconsistent with what Mr. Kokal told Dr. Virzi and with what Mr. Hutto says Mr. O'Kelly confessed to him), Mr. Morrow took for granted the truth of Mr. Westling's statements.

Mr. Morrow allowed Mr. Westling to testify about the alleged written memorandum detailing the confession that CCR destroyed (PC-R2. 615), without rebutting Mr. Westling ludicrous and untruthful statement.

Further, Mr. Morrow allowed Mr. Westling to mischaracterize both his presentation of Mr. Kokal's trial testimony and his closing

argument. Mr. Westling claimed he just asked Mr. Kokal "what happened?" during testimony and merely argued the State's case didn't support a conviction. (PC-R2. 541-542). The record indicates quite the opposite. In his reserved opening, Mr. Westling assured the jury it would hear "the rest of the story". (T. 681). Since he only presented Mr. Kokal and Mr. O'Kelly, this was the story he promised. He specifically argued that Mr. Kokal's forthcoming testimony was what actually occurred. (T. 681-688). He asserted Mr. Kokal had no participation in the crime. He asserted Mr. O'Kelly committed the crimes without Mr. Kokal's knowledge. He argued Mr. Kokal's state of mind: he was afraid of Mr. O'Kelly and violating probation. He explained Mr. Mosley away by drunkenness and "acting big". (T. 688-689). Mr. Morrow did not ask Mr. Westling any questions in this regard.

During Mr. Kokal's testimony (T. 714-745), Mr. Westling did not ask "what happened?"; he led Mr. Kokal into his testimony and his questions were extremely specific. This was not an attorney concerned with presenting "perjured" testimony and disavowing the truthfulness of his client's words. Mr. Morrow utterly failed to confront Mr. Westling with this during his postconviction testimony.

Despite trial counsel’s defensiveness and hostility toward Mr. Kokal, he admitted to his complete neglect and lack of preparation for Mr. Kokal’s capital penalty phase. Mr. Westling testified that

he prepared for the penalty phase after the guilt phase concluded and the jury convicted Mr. Kokal. (PC-R2. 369-370, 570). Trial counsel believed: "You have got to worry about guilt or innocence but I think that the penalty phase has to remain in your mind as a possibility." (PC-R2. 576). In preparing for the penalty phase, trial counsel met with Mr. Kokal mother and asked:

> I said, Mrs. Kokal, you need to tell me any reason you can think of about why your boy turned out to be so bad, and she said he didn't turn out bad. I said, well, Mrs. Kokal, 12 people have just determined by unanimous verdict that he beat a young man with a pool stick, walked him to the beach and shot him in the head with a large caliber revolver.

(PC-R2. 545-546). Without providing Mrs. Kokal with any guidance as to what information could be helpful, trial counsel also met with his client and similarly provided no assistance in informing Mr. Kokal about what information was important. Trial counsel went through the statutory mitigating circumstances with his client, did not explain them and relied on Mr. Kokal, who suggested that his age may be a mitigating factor. (PC-R2. 549). The only other witness trial counsel contacted was Mr. Kokal's father, Dr. August Kokal. (PC-R2. 560).

Trial counsel did not understand the purpose of the penalty phase -- he believed that his duty was to evoke sympathy. (PC-R2. 646).

Trial counsel failed to obtain any of his client's medical records, (PC-R2. 555), and blamed Dr. Virzi for not inquiring about Mr. Kokal's medical history or the existence of any medical records. (PC-R2. 559). However, trial counsel admitted that he would have presented evidence of brain damage, if he had any evidence to support it. (PC-R2. 579, 582).

In denying relief, the lower court ruled that Kokal had failed to adduce any evidence of prejudice regarding the deficient penalty phase.

Mr. Morrow must be deemed responsible for the lack of demonstrating prejudice considering he failed to call any of the numerous witnesses who executed sworn affidavits establishing mitigating factors and did not attempt to introduce the affidavits. Further, he did not call and present Dr. Robert A. Fox, who evaluated Mr. Kokal in 1988, reviewed all background materials and historical information and opined in a written report:

> Summary
>
> In regard to the statutory mitigating circumstances, due to his impaired mental state and extreme intoxication, Mr. Kokal's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired. I further find that he acted under the influence of extreme mental and emotional disturbances. Mr. Kokal's emotional immaturity as documented by his family, teachers, history and records was a substantial factor in his inability to

> employ rational thought processes at the time of the offense.

(PC-R2. Supp. Vol. IX at 593).

Dr. Fox also found Mr. Kokal's age, considered in combination with his history and brain damage, to be mitigating. (Id.). Additionally, he found non-statutory mitigation as follows: (a) disabling hyperactivity and attention deficit disorders as a child; (b) alcoholic and dysfunctional family; c) extreme physical and psychological abuse from parents; (d) addiction to alcohol and drugs; (e) physical and emotional trauma resulting from being incarcerated in an adult prison at the age of 16; and (f) emotional immaturity, anxiety and depression. (PC-R2. Supp. Vol. IX at 594). Without explanation, Mr. Morrow did not present Dr. Fox's testimony or his report during the evidentiary hearing. This is but one example of information available to Morrow but not utilized whatsoever during the evidentiary hearing.

Additionally, Mr. Morrow abandoned claims during the evidentiary hearing, (PC-R2. 610-611) and determined that claims "had no merit". (PC-R2. 613-614).

On April 14, 1997, the circuit court denied all requested relief. (PC-R2. 296-307). In denying the ineffective assistance claim regarding guilt/innocence, the circuit court found any alleged errors by Mr. Westling to be matters of strategy and further indicated the trial strategy of arguing Mr. O'Kelly killed the victim

was sound. In denying the ineffective assistance claim regarding penalty phase, the circuit court found deficient performance ("Indeed, it appears to this Court that the defense lawyer's over-all preparation for the penalty phase of the trial may have fallen below that expected of reasonably competent counsel. The lawyer did little more than think about the penalty phase until after the guilt phase was completed." (PC-R2. 304), but ruled Mr. Kokal had not presented any evidence of prejudice.

Mr. Kokal timely appealed and this Court affirmed denial of postconviction relief without conducting the proper analysis set forth in Stephens v. State, 748 So. 2d 1028 (Fla. 2000). Kokal v. Dugger, 718 So. 2d 138 (Fla. 1998).

3.850 Proceedings: 1998 - Present

In March, 1999, Mr. Kokal was appointed counsel to investigate and prosecute his petition for writ of habeas corpus in federal court. (PC-R3. 75-84). The district court allocated investigative funds for Mr. Kokal's federal lawyers. It was during this investigation that the newly discovered evidence regarding Mr. O'Kelly's inculpatory statements surfaced.

At the evidentiary hearing, held on October 31, 2000, Jeffrey Walsh, a private investigator, testified that during the summer of 1999, he was contacted by Leslie Delk, Mr. Kokal's federally appointed attorney. (PC-R3. 520-521). Ms. Delk requested Mr. Walsh

to collect records in Mr. Kokal's case and to contact an individual, named Gary Hutto. (PC-R3. 521, 526).

At Ms. Delk's direction, Mr. Walsh traveled to Columbia County Correctional Institution and met with Gary Hutto. (PC-R3. 522). Mr. Walsh asked Mr. Hutto "if he had information regarding the case for which Mr. Kokal was convicted and sentenced to death." (PC-R3. 522). Mr. Hutto provided Mr. Walsh with information regarding the Kokal/O'Kelly case that he obtained from William O'Kelly while incarcerated at the Duval County Jail and also at the Polk County Correctional Institution. Thereafter, on August 10, 1999, Mr. Walsh obtained a sworn affidavit from Mr. Hutto. (PC-R3. 55-57).

In his affidavit, Mr. Hutto stated that Mr. O'Kelly had told him that Mr. O'Kelly was responsible for the death of Jeffrey Russell. (Id.). Mr. O'Kelly also stated that Mr. Kokal had nothing to do with the murder. (Id.).

On August 12, 1999, Mr. Kokal filed a pro se Rule 3.850 motion (PC-R3. 1-57), based on Mr. Hutto's sworn affidavit and simultaneously filed a motion requesting the circuit court to appoint him counsel (PC-R3. 62-66).

In October, 1999, CCC-NR was appointed to represent Mr. Kokal. (PC-R3. 103-104).

On April 3, 2000, CCC-NR filed an amended Rule 3.850 on behalf of Mr. Kokal. (PC-R3, 152-224). A Huff Hearing was scheduled for April 6, 2000.

On the day of the Huff hearing, Mr. Kokal filed a Motion to Disqualify Judge and Supporting Memorandum of Law. (PC-R3. 225-236). The motion was premised on Judge Carithers' involvement in the Kight case. (Id.). In January, 1999, Judge Carithers presided over an evidentiary hearing in State v. Charles Michael Kight, Duval County Case No. 83-2598-CFB. Specifically, Mr. Kokal averred:

> 4. In essence Mr. O'Kelly has testified before Judge Carithers that he did not kill anyone, despite being indicted for the First Degree Murder of Jeffrey Russell along with Mr. Kokal. The newly discovered evidence at issue is a confession by O'Kelly to Gary Hutto, Mr. Kight's co-defendant. Thus, the presiding judge in the instant action will be asked to evaluate the credibility of Mr. Hutto and Mr. O'Kelly in ruling upon Mr. Kokal's claim that he is innocent of murder and the death penalty.
>
> 5. This Court has already concluded that an "over-all review of the record herein indicates that Mr. Hutto's culpability for the murder was at least equal to that of Mr. Kight's" and that "Kight's death sentence appears unconstitutionally disparate." (Kight Order at 5). This conclusion could only be based upon a credibility determination that O'Kelly testified truthfully when he stated that Hutto confessed to stabbing Kight's victim. The finding also implicitly finds Hutto an unbelievable witness insofar as Hutto claimed Kight acted alone in that homicide and Hutto provided the State with several "snitches" as part of a plea negotiation to

> avoid a death sentence, each of which implicated Kight at trial.

(PC-R3. 226-227).

At the April 6th hearing, postconviction counsel explained that he had only become aware of the disqualification issue in preparing for the Huff hearing. (PC-R3. 424). Specifically, postconviction counsel explained that only when he reviewed Judge Carithers' order in the Kight case and Mr. O'Kelly's testimony, the weekend before the Huff hearing, did he realize the disqualification issue. (Id.). After postconviction counsel explained the motion, Judge Carithers stated:

> Certainly no need to apologize, Mr. Thomas, I understand what your posture is lately arriving in this case. **And, I certainly had no criticism of you as to the timing of the motion**.
>
> I do have a gut reaction though that the motion stands or falls on the issue of whether or not I would be called upon to judge the credibility of one Gary Hutto, who is a codefendant in that other case, the Kight case, K-i-g-h-t, and is the individual who allegedly heard the so-called jailhouse admissions by one William O'Kelly who was a live witness in Kight's post-conviction matters.

(PC-R3. 424-425)(emphasis added). After crystalizing the issue, Judge Carithers concluded that he would be required to disqualify himself if he decided to grant an evidentiary hearing. (PC-R3. 430, 432, 434). Judge Carithers repeatedly stated that Mr. Kokal's motion

was legally sufficient and he was required to disqualify himself if he granted Mr. Kokal an evidentiary hearing:

> I have now made a finding in [the Kight] case that [Hutto] was guilty of first degree murder. In fact, there is no doubt in my mind. And, I think for that reason the -- probably the motion to disqualify is well taken, assuming that I would ever be called upon to question the credibility of Mr. Hutto to begin with.
>
> * * *
>
> I mean, I have been wondering about this issue for the last six or eight months. But, I really think it does turn on the issue of whether or not an evidentiary hearing on the newly discovered evidence is warranted.
>
> * * *
>
> . . . In other words, if I am never called upon to make a credibility determination as to Mr. Hutto, then the matters set forth in today's motion to disqualify me become insufficient as a matter of law to warrant disqualification. . . . I think we ought to go forward with the Huff hearing on that issue alone. **If I determine that evidence should be taken, I will tell you right now, I am going to disqualify myself as to that individual finding that I made, that Mr. Hutto was equally culpable with Mr. Kight in that other case.**

(PC-R3. 430, 432, 433-434)(emphasis added).

While Judge Carithers emphatically stated that he would recuse himself if he determined that Mr. Kokal was entitled to an evidentiary hearing (PC-R3. 431), he was uncertain as to whether he needed to disqualify himself if he did not grant Mr. Kokal's request for an evidentiary hearing on his newly discovered evidence and he

asked the parties to submit further briefing on that issue. (PC-R3. 454-455).

Ultimately, Judge Carithers found that Mr. Kokal was entitled to an evidentiary hearing on his newly discovered evidence, yet, after indicating that he would disqualify himself, Judge Carithers denied Mr. Kokal's motion to disqualify. (PC-R3. 261-262). Judge Carithers ruled that the Court "determined that it remains, and will continue to be, an impartial arbitrator as to Mr. Kokal's pending Rule 3.850 motion." (Id.).

After, granting Mr. Kokal an evidentiary hearing on his newly discovered evidence claim, only, the court scheduled an evidentiary hearing for October 31, 2000.

At the evidentiary hearing, Mr. Hutto testified about his contact with Mr. O'Kelly. Mr. Hutto recalled having contact with Mr. O'Kelly in 1983 and actually being housed with Mr. O'Kelly in the same cell in 1984. (PC-R3. 535-536). Mr. Hutto was also incarcerated with Mr. O'Kelly after they had both been sentenced at Polk Correctional Institution (Polk C.I.). (PC-R3. 536).

While incarcerated together at the Duval County Jail Mr. O'Kelly and Mr. Hutto discussed their cases with one another. (PC-R3. 537). Mr. Hutto testified that Mr. O'Kelly implicated himself as the sole instigator and participant in the Russell murder:

> Q: (by Mr. Thomas) Okay. And did he explain to you what happened the night that he

and Mr. Kokal were involved with the death of the sailor named Jeffrey Russell?

A: Yes.

Q: And what did he tell you?

A: He said that he had robbed the guy and that they had only got a dollar.
And that he had beat the guy in the head with a pool stick.
He said that so and so co-defendant of his, he called him names. I would prefer not to use that language.

Q: Well --

A: But he didn't do nothing and he was just a sorry piece of junk.

MR. THOMAS: With the court's indulgence, I would like to know exactly what you remember about what Mr. O'Kelly said about Greg Kokal.
If the court will allow it, Your Honor?

THE COURT: Sure.

Q: (By Mr. Thomas) Go ahead.

A: **Well, he said that p***y m****r f****r Greg, he was too drunk to do anything. He was too sorry. He was too scared. He didn't want to do anything. He stayed up by the truck. He made me take this guy and, you know -- he didn't want nothing to do with it. He wouldn't have nothing to do with anything. He kept saying let's go, let's go.**
And, you know, he said I took this guy down the beach and I beat him in the head, you know.
And he said he wouldn't shut up.
And he said I shot him, you know in the head with a .357.
And he said then, he said, the punk only had a dollar.

Q: Okay. Did he tell you whose idea it was to rob Mr. Russell?

A: Well, he said that it was his. Because he said that he thought that the guy had just got off -- he said he had just got off a boat. You know, he's a sailor at Mayport and he had just got paid and he had just got liberty, all he's got is this big wad. And he said he wanted it. And it turned out to be a dollar.

Q: Did Mr. O'Kelly tell you how it came to be that he and Mr. Kokal and Mr. Russell were together that night?

A: Yeah. They were out hitchhiking. The sailor dude was out hitchhiking. They were riding around getting drunk, you know, having a good time, smoking some good stuff and drinking, from what I understand, some real good liquor, and that they had some better dope.

* * *

Q: Do you know what the sequence of events was from the time that they arrived at the beach area or anything?

A: All I know is that he said that he beat him in the head with the pool stick, and that he just kept beating him, and then he said all of a sudden he hit him in the head with the gun, or -- he hit him in the head with the gun.

* * *

Q: Did he at any time indicate anything that would lead you to believe that Mr. Kokal was involved with or consenting to the beating and homicide of Mr. Russell?

A: No. I believe that it was just the opposite, that he didn't know nothing about it. He was too messed up, you know, on drugs and

> alcohol to really be -- tangled up with him in the first place.
>
> * * *
>
> Q: Did he ever express any regret in your presence that Mr. Russell had been killed?
>
> A: No. He said that -- I said, you know, I asked him why did you kill the dude over a dollar.
>
> He said well, you know how it goes. He said someone -- dead men tell no tales. He said he can't tell on me now. He said he can't snitch on me. Dead men tell no lies. You know, like from some horror movie or war movie or some s**t he was watching or that he had watched.

(PC-R3. 539-544).

Furthermore, when Mr. O'Kelly and Mr. Hutto were incarcerated at Polk C.I., Mr. O'Kelly told Mr. Hutto that he had received a "sweet deal" on his case and that he would only have to serve six (6) to eight (8) years in prison for the Russell murder. (PC-R3. 537). At the time of the conversation, Mr. O'Kelly was housed in protective custody due to the fact that he received a deal on his criminal charges. (PC-R3. 537).

Mr. Hutto also explained that he did not know Mr. Kokal. (PC-R3. 544). When Hutto originally spoke to Kokal's investigator and relayed the information contained in his sworn affidavit regarding O'Kelly's inculpatory statements he did not know that Mr. O'Kelly had testified for Mr. Kight in Mr. Kight's postconviction proceedings. (PC-R3. 548). Mr. Walsh confirmed that he did not tell Mr. Hutto

about Mr. O'Kelly involvement in the Kight postconviction proceedings. (PC-R3. 530). Because Mr. Hutto did not know that Mr. O'Kelly testified in Kight's proceedings, he also did not know that Mr. O'Kelly testified that Mr. Hutto made inculpatory statements regarding the murder of the taxi driver; i.e. that Mr. Hutto was involved in the homicide and was not asleep in the back of the car. (PC-R3. 548). It was not until the Assistant State Attorney, Laura Starrett, visited Hutto that he found out that O'Kelly had testified at Kight's postconviction hearing. (Id.).

SUMMARY OF ARGUMENT

1. The circuit court erred in failing to disqualify himself. Mr. Kokal's capital postconviction proceedings were prejudiced because the judge was not impartial.

2. The testimony of Gary D. Hutto is newly discovered evidence. Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979), standard modified in Jones v. State, 591 So. 2d 911 (Fla. 1991). The circuit court erred in denying Mr. Kokal relief. The substance of Mr. Hutto's testimony, when considered with all known record evidence and in light of prior claims, would probably have resulted in acquittal of the First Degree Murder charge, either outright or through conviction of a lesser included offense. Certainly, the new evidence would have probably resulted in a life sentence even assuming a conviction was obtainable.

3. The circuit court erred in summarily denying Mr. Kokal's claim that his postconviction counsel did not effectively represent him at his evidetniary hearing in 1997. Mr. Kokal's prior state postconviction proceeding was infected with unreliability due to him being denied constitutionally competent and effective representation. The circuit court intended that Mr. Kokal be competently represented. Counsel is a statutory right in Florida and said right must be safeguarded by appointment of competent counsel, and case law from this Court requires competent and effective representation in capital postconviction proceedings. Mr. Kokal has been denied due process of law and his postconviction attorney's incompetence denied him a full and fair hearing. Claims were waived and abandoned without Mr. Kokal's knowledge, participation, or consent. The claims presented were unsubstantiated through errors of commission and omission. Mr. Kokal has been severely prejudiced thereby and a new evidentiary hearing, considering properly pled prior claims and the newly discovered evidence, is required.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. KOKAL'S MOTION TO DISQUALIFY WHICH RESULTED IN AN IMPARTIAL JUDGE PRESIDING OVER MR. KOKAL'S POSTCONVICTION PROCEEDINGS.

On April 6, 2000, Mr. Kokal filed a motion to Disqualify Judge. (PC-R3. 225-236). That same day, argument was heard and Judge

Carithers repeatedly stated that he would recuse himself if he determined that Mr. Kokal was entitled to a hearing on his newly discovered evidence claim. (PC-R3. 430, 432, 434). However, on June 30, 2000, Judge Carithers entered a written order denying Mr. Kokal's motion. In the order, Judge Carithers found that "it is not true that [the Court] 'cannot be impartial' because of the potential testimony of William Robert O'Kelly, Jr., herein." (PC-R3. 262). Judge Carithers erred in denying Mr. Kokal's motion. Judge Carithers' involvement in the Kight proceedings caused him to be impartial.

The circuit court's finding that the motion may have been "untimely" is not supported by the record or Judge Carithers' remarks at the April 6th hearing. Mr. Kokal's postconviction counsel was appointed to represent Mr. Kokal on October 12, 1999. At that time, Mr. Kokal's attorney, Andrew Thomas, was lead counsel in ongoing warrant litigation for Anthony Braden Bryan. Mr. Thomas asked for several continuances due to the warrant litigation, which the circuit court granted. (PC-R3. 134-137, 144-147, 149). Mr. Thomas made clear to the court that he was unable to obtain and review Mr. Kokal's case and claims due to his schedule.

Mr. Thomas informed the circuit court in his written motion to disqualify that:

> In the process of reading all available transcripts, undersigned for the first time

> reviewed the proceedings conducted before Judge Carithers in State v. Charles Michael Kight, Case No. 83-2598-CFB, along with Judge Carithers' Order denying relief in the case, over the weekend of April 1-2, 2000. Subsequently, on April 4, 2000, undersigned was able to review the appellate briefs filed by the opposing parties in the Kight action.

(PC-R3. 226). Mr. Thomas did not know the specifics of the Kight case and the factual findings made by Judge Carithers until a few days before he filed the motion to disqualify. Even Judge Carithers initially agreed that the motion was timely:

> Certainly no need to apologize, Mr. Thomas, I understand what your posture is lately arriving in this case. **And, I certainly had no criticism of you as to the timing of the motion**.

(PC-R3. 424) (emphasis added). Mr. Kokal's motion was timely.

Judge Carithers denied Mr. Kokal's motion because he believed that he could be impartial in regards to Mr. Kokal's newly discovered evidence, i.e., that Mr. Hutto obtained a confession from Mr. O'Kelly. However, Judge Carithers ignored the fact that Mr. O'Kelly testified before him in January, 1999, that he did not kill anyone, despite being indicted for the First Degree Murder of Jeffrey Russell along with Mr. Kokal.

The newly discovered evidence at issue is a confession by Mr. O'Kelly to Mr. Hutto, Mr. Kight's co-defendant. Thus, Judge Carithers was asked to evaluate the credibility of Mr. Hutto and Mr.

O'Kelly in ruling upon Mr. Kokal's claim that he is innocent of murder and the death penalty.

Judge Carithers had already concluded that an "over-all review of the record herein indicates that Mr. Hutto's culpability for the murder was at least equal to that of Mr. Kight's" and that Kight's death sentence appears unconstitutionally diparate." (PC-R3. Supp. 218). Judge Carithers' conclusion was based upon a credibility determination that Mr. O'Kelly testified truthfully when he stated that Mr. Hutto confessed to stabbing Mr. Kight's victim. This conclusion also implicitly finds Mr. Hutto an unbelievable witness insofar as Mr. Hutto testified at Mr. Kight's trial that Mr. Kight acted alone in that homicide and Mr. Hutto provided the State with several "snitches" as part of a plea negotiation to avoid a death sentence, each of whom implicated Mr. Kight at trial.

During the Kight hearing, Judge Carithers and Mr. O'Kelly engaged in both formal and informal discussions regarding Mr. Kokal's conviction and sentence of death. During direct testimony, Mr. O'Kelly stated "The only thing I can say about any of it is, I know in my case I did not kill anybody. Therefore, I could not have committed murder." (PC-R3. Supp. 244). Further, Mr. O'Kelly testified he was truthful on the witness stand (that Mr. Hutto confessed to him) and untruthful when he recanted that statement in

discussions with the prosecutor and her investigator. (PC-R3. Supp. 233-239).

Additionally, Judge Carithers engaged in the following informal discussion with Mr. O'Kelly during the Kight evidentiary hearing:

> THE COURT: Does he know what's going on with Mr. Kokal's case?
>
> MS. Starrett: He's asked me and I believe I just indicated to him that it was in the appellate process. I didn't give him any more specific information. I believe this Court is the one handling that.
>
> MR. STRAND: Judge, you didn't ask me but I kind of know.
>
> THE COURT: I know you know. I was going to tell him unless somebody object (sic).
>
> MR. STRAND: No, no objection, Your Honor.
>
> THE COURT: He's been through this process. His relief was denied.
>
> THE WITNESS: Greg Kokal?
>
> THE COURT: Yes. Request for a new trial was denied by me and the Supreme Court of Florida has affirmed that decision. I assume he is probably now on his last appeal through the U.S. Supreme Court.
>
> THE WITNESS: **Then I want to congratulate you for that. You kept the right man. That's all I can say**. Can I go?

(PC-R3. Supp. 264)(emphasis added).

The result of this contact between Mr. O'Kelly and Judge Carithers was that Mr. O'Kelly - a convicted murderer and co-

defendant in Mr. Kokal's case, but also a witness deemed credible by Judge Carithers in the Kight proceeding - was twice able to reassert his innocence and Mr. Kokal's guilt to Judge Carithers.

Judge Carithers was required to determine if Gary Hutto was credible and his determination could not be separated from determining Mr. O'Kelly's credibility - and Judge Carithers had already determined this in the Kight action and allowed Mr. O'Kelly to twice lobby for his own version of the Russell homicide.

Mr. O'Kelly, despite having penned a letter admitting he was the triggerman in Russell's death prior to trial, testified during trial that the letter was a fabrication and Mr. Kokal was the triggerman. Mr. Hutto testified that Mr. O'Kelly admitted robbing and murdering Mr. Russell without Mr. Kokal's prior knowledge or active participation. The credibility determinations constitute the very core of Mr. Kokal's current claims.

Mr. Kokal is entitled to a neutral, detached, impartial determination in his action. The circuit court's involvement in the Kight proceedings and the evaluation of Mr. O'Kelly's credibility and irrelevant claims of innocence in the homicide for which Mr. Kokal received the sentence of death required recusal.

Mr. Kokal was entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the

issues by a neutral, detached judge. The aforementioned circumstances of this case are of such a nature that they were "sufficient to warrant fear on [Mr. Kokal's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988).

In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993).

Additionally, Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.160(d)(1) & (2).

The United States Supreme Court has also recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings

> safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951)(Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or

> an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
>
> * * *
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the

> trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Suarez teaches that even the appearance of impartiality is sufficient to warrant reversal.

The circuit court was required to disqualify itself and not preside over Mr. Kokal's newly discovered evidence of innocence claim. "In a death penalty case, the question of judicial bias is of particular importance, since the judge will be called upon to make what is literally a life-or-death decision." Duest v. State, 654 So. 2d 1004 (Fla. 1995)(internal cites omitted).

In fact, the circuit court determined Mr. Kokal's motion to be legally sufficient:

> I have now made a finding in that case [Kight] that he [Hutto] was guilty of first degree murder. In fact, there is no doubt in my mind. And, I think for that reason the -- **probably the motion to disqualify is well taken**, assuming that I would ever be called upon to question the credibility of Mr. Hutto to begin with.

(PC-R3. 430)(emphasis added).

The circuit court stated that if a hearing was granted, "I clearly will recuse myself." Id. Further, "If I determine that evidence should be taken, I will tell you right now, I am going to disqualify myself as to that individual finding I made, that Mr. Hutto was equally culpable with Mr. Kight in that other case." (PC-R3. 433-434).

Once the circuit court determined Mr. Kokal's motion was legally sufficient, i.e., that the facts asserted justify a reasonable fear of judicial bias on his part, its work was done and no further action should have been taken. Canon 3 E., Code of Judicial Conduct. Mr. Kokal is entitled to an evidentiary hearing before an impartial judge.

ARGUMENT II

THE LOWER COURT ERRED IN DETERMINING THAT MR. KOKAL'S NEWLY DISCOVERED EVIDENCE WOULD NOT PROBABLY HAVE PRODUCED AN ACQUITTAL AND FAILED TO CONDUCT ANY ANALYSIS REGARDING WHETHER THE NEWLY DISCOVERED EVIDENCE PROBABLY WOULD HAVE PRODUCED A SENTENCE LESS THAN DEATH.

At the evidentiary hearing, Mr. Kokal presented evidence that his co-defendant, William O'Kelly, Jr., instigated and acted alone in killing Jeffrey Russell. In conducting an analysis of Mr. Kokal's newly discovered evidence the circuit court found that Mr. Kokal satisfied the diligence prong of the Hallman/Jones test. (PC-R3. 375). However, the circuit court found that as to the second prong,

"this new confession evidence, alone, is enough to convince the Court that the newly-discovered evidence now asserted by Mr. Kokal is not of such a nature that it would probably produce an acquittal on retrial." (PC-R3. 376-377). In finding that the evidence would probably not produce an acquittal on retrial, the circuit court relied on Mr. Westling's testimony at the 1997 evidentiary hearing regarding Mr. Kokal's alleged confession to him and determined that Mr. Hutto would have been impeachable. (PC-R3. 377).

The circuit court's order is flawed in several respects: 1) In denying Mr. Kokal's claim, the circuit court considered the alleged confession to Mr. Kokal's trial attorney; 2) The circuit court's determination that Mr. Hutto was impeachable is not supported by the evidence; and 3) The circuit court failed to consider whether the newly discovered evidence would have changed the result of Mr. Kokal's sentence or conduct a cumulative review of the evidence.

Mr. Kokal's purported "confession" to Mr. Westling should **not** be considered whatsoever in the analysis of the newly discovered evidence claim or for **any purpose unrelated to Mr. Kokal's ineffective assistance of counsel claims**. This is true for two reasons: (a) Mr. Kokal's waiver of the attorney-client privilege by asserting an ineffective assistance of counsel claim is only a partial, limited waiver; and (b) as demonstrated in Mr. Kokal's argument regarding his claim of Ineffective Assistance of

Postconviction Counsel, Mr. Westling's testimony is untrue and utterly without the necessary indicators of credibility.[5]

The attorney-client privilege is waived only to the extent necessary to evaluate ineffectiveness claims; only matters **relevant to the ineffectiveness claim** are deemed waived. See Reed v. State, 640 So. 2d 1094, 1097 (Fla. 1994). In fact, the contents of the trial attorney's file remain confidential if unrelated to the ineffective assistance of counsel analysis. See LeCroy v. State, 641 So. 2d 854 (Fla. 1994). Mr. Westling would be prohibited from testifying upon retrial of Mr. Kokal and therefore Mr. Westling's testimony should not have been considered in analyzing Mr. Kokal's newly discovered evidence. See Jones, 591 So. 2d 911, 916 (Fla. 1991).

The circuit court relied on United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987), cert. denied 484 U.S. 987 (1987), in determining that Mr. Westling's testimony would be admissible upon a retrial. However, the circuit court's reliance on Suarez is

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[5] The circuit court relied on testimony elicited at the evidentiary hearing in 1997, from Mr. Kokal's trial attorney, Mr. Westling. Mr. Kokal has challenged the effectiveness of his postconviction attorney, Mr. Morrow, in failing to show that Mr. Westling was not telling the truth in 1997 and in failing to undermine Mr. Westling's credibility and testimony with evidence from the record. See Argument III. It was inconsistent for the circuit court to rely on Mr. Westling's testimony in 1997 and to deny Mr. Kokal a hearing on his ineffective assistance of postconviction counsel claim.

misplaced. The Suarez court made clear that the testimony of Mr. Suarez's former attorney was related to the issue at Mr. Suarez' trial and therefore the testimony was not "beyond the scope of the waiver." Id. at 1160, fn. 4. In Mr. Kokal's case, the waiver of the attorney client privilege was limited to the issue of ineffective assistance of trial counsel -- an issue that would not exist at Mr. Kokal's new trial.

In fact, Mr. Kokal's alleged confession had absolutely no bearing on his trial counsel's performance or strategy at trial. The testimony regarding Mr. Kokal's alleged confession was irrelevant to the proceedings and should not have been elicited. Mr. Kokal only waived the attorney-client privilege as to the claims at issue during his 1997 evidentiary hearing. At the hearing, the following exchange occurred:

> Q At the time in 1984 what was your understanding of the ethical code regarding a client confessing to you to the crime charged and requesting to testify anyway untruthfully?
>
> A I think before I answer that question I probably ought to have some direction from the Court. It's my understanding that a motion of this type waives the privilege that exists between a lawyer and his client, but if I could have a direction from the Court in that regard I would feel more comfortable going forward.
>
> THE COURT: You want to be heard on that, Mr. Morrow?
>
> MR. MORROW: Yes, Your Honor. One of the allegations in the motion is that Mr. Westling

turned his file over to the State Attorney's Office and in the file in his handwriting is this same question that I asked him, I have advised my client not to testify and he wants to testify anyway untruthfully so he is demanding I put him on the stand and has him sign it.

He gives the file to the state attorney and the state attorney immediately xeroxes it and plasters the whole court file with their responses attached to this saying, see, the person confessed to his attorney. Now I want to ask him questions about that because I think that's relevant. It's become a part of file.

THE COURT: We are not talking about relevance here. We are talking about is there an attorney client privilege still in existence as to what had Mr. Kokal told Mr. Westling? Are you contending there is or isn't?

MR. MORROW: Well, actually I don't think there is. I mean I think there is a privilege because I don't think he needs to talk about that privilege unless he needs to defend himself on that narrow issue so I think it's not a general waiver. A 3.850 is not a general waiver of all of the attorney client privilege in my mind and I think --

THE COURT: It is as to any allegations in the motion, isn't it?

MR. MORROW: Right.

THE COURT: And you wouldn't be asking Mr. Westling about this unless it relates to an allegation in the motion, right? Otherwise --

MR. MORROW: I see your point.

THE COURT: I understand the law is the same as Mr. Westling. I am glad to give you an opportunity to respond to that.

MR. MORROW: Yeah, you are right. I appreciate that incite (sic). I looked at it in terms of the Huff Hearing that I read that -- there needed to be more issue on the evidence of him turning his file over to the State Attorney's Office so it may not be relevant for him to bring that up in defending himself but it was released. I mean one sense it's waived.

THE COURT: You are not asking --

MR. MORROW: It's almost unacceptable. It's a confusing issue but I know where you are coming from. I know what you are saying.

THE COURT: Well, what was the last question asked of Mr. Westling? I don't recall having to do with turning any files over to anybody. If you could read that back, please.

(The question was read back.)

MR. MORROW: So it was a general question.

THE COURT: What was your understanding of that?

THE WITNESS: I think that I can answer that question without you making a ruling on that.

THE COURT: Right.

THE WITNESS: But I think that it needs --

BY MR. MORROW:

Q Without involving Mr. Kokal.

A I can answer that.

THE COURT: Go ahead.

THE WITNESS: I think that the lawyer must do what the client directs, cannot foster or encourage perjury and can advise a client not to violate the laws of the State of Florida and that if a client insists on taking the stand and violating the laws of the State of Florida, to wit, a perjury, perjurious statement. Then once the lawyer advises him not to do it the lawyer has fulfilled his duty.

BY MR. MORROW:

Q But isn't it also true that under that hypothetical that the lawyer should not argue what the client states as truth on the stand to the jury? Isn't that also true?

A What you can say is which is what I said in the closing argument -- I don't think a lawyer can ever try to place a falsehood in front of a jury but what you can say which is what I said in my close is that the government or the state has filed to prove its case because here is the evidence that we presented.

Another point I didn't turn my file over to the state attorney. I gave it to those people in Tallahassee.

THE COURT: Let's wait and see what happens on that issue. If you are asked about it we can deal with it.

BY MR. MORROW:

Q I am speaking hypothetically though. Isn't it true though when a client tells you that you are not -- you are simply allowed to ask the client tell us in a narrative form what happened?

A Which is what I did and what I wrote in my little document that we have now got.

Q And isn't it also true that you are forbidden under the ethical code to argue to

> the jury what the client states on the stand since you know it to be untrue?
>
> A I don't think that you can argue that a lie is true but I think what you can do is to argue that the other evidence that was presented or was not presented would not support a conviction.

(PC-R2. 536-541).

Neither Mr. Kokal nor his postconviction attorney authorized a general waiver of Mr. Kokal's attorney-client privilege. The court and the parties were well aware that the privilege was waived only as to the ineffective assistance of counsel claims before the court in 1997.

Furthermore, the Suarez court refused to address the Simmons problem based on the facts presented to them because the issue was not properly preserved. 820 F.2d 1158, 1160-1161. Mr. Kokal faces no such a procedural default, i.e., if granted a new trial, he Simmons would preclude the introduction of Mr. Westling's testimony: "an undeniable tension" has been created between constitutional rights and it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968).

In Mr. Kokal's case his right to confidential, privileged communications with his attorney conflicts with his statutory right to postconviction and specifically requesting review of his Sixth

Amendment right to effective assistance of counsel.[6] In effect, introduction of Mr. Kokal's alleged confession upon retrial corrupt his right to postconviction proceedings and his attorney-client privilege:

> [a] defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

Miller v. Smith, 99 F.3d 120, 128 (4th Cir. 1996). See also Davis v. Wainwright, 342 F. Supp. 39, 42 (1971)("[i]f the person was forced to choose between waiving his privilege or foregoing another substantial benefit . . . there is no choice at all.").

The circuit court erred in considering Mr. Westling's testimony at the 1997 evidentiary hearing when evaluating the effect on Mr. Kokal's newly discovered evidence, because it is inadmissible in any future proceeding. See Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

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[6] That the attorney-client privilege rises to the level of a constitutionally protected right is undisputed. Myles v. State, 602 So. 2d 1278, 1280 (1992); L.T. Bradt v. Smith, 634 F.2d 796, 800 fn4 (5th Cir.), cert. denied, 454 U.S. 830(1981)(noting that the attorney-client privilege can assume constitutional significance); Black v. United States, 172 F.R.D. 511, 516 (S.D. Fla. 1997)(holding that there is a need to protect the constitutional guarantees of confidentiality that flow from the attorney-client privilege concept).

The circuit court found that Mr. Hutto's testimony was "highly impeachable", but made no finding that Mr. Hutto's was not credible. (PC-R3. 377). The circuit court concluded that: "The implication is clear, notwithstanding Mr. Hutto's testimony to the contrary, that he only came forward with evidence against Mr. O'Kelly in this case because Mr. O'Kelly had come forward with evidence against Mr. Hutto in that case of Charles Kight." (Id.).

The record clearly refutes the circuit court's finding that Mr. Hutto's testimony was impeachable. Mr. Hutto testified that he did not know that Mr. O'Kelly testified in 1999 about statements Mr. Hutto made to him. (PC-R3. 548). Mr. Hutto testified that he did not learn of Mr. O'Kelly's testimony in the Kight case until Assistant State Attorney Laura Starrett told him about Mr. O'Kelly's testimony in October, 1999, over two months after Mr. Hutto signed his sworn affidavit regarding Mr. O'Kelly's statement:

> A I was called on in the Columbia County institution and I was told by Ms. Laura Starrett that Mr. O'Kelly had filed a statement on me and et cetera, et cetera.
>
> Q Did you read it?
>
> A I still haven't. I still haven't seen it.
>
> * * *
>
> Q But [Ms. Starrett] told me -- I believe her exact words were don't you know O'Kelly is doing the same thing to you.
>
> And I had no idea. You know, what are you talking about.

> Well, don't you know that he is giving a deposition against you in the Kight case.
> I said no.
>
> Q And it's your testimony today that that doesn't bother you at all that Mr. O'Kelly would say that?
>
> A No. I don't care.
>
> Q It doesn't matter to you?
>
> A Why should it?
> I mean I'm serving my time. . . .

(PC-R3. 549-550).

The circuit court also ignored Jeffrey Walsh's testimony that he did not inform Mr. Hutto about Mr. O'Kelly's testimony or involvement in the Kight case. (PC-R3. 530). Mr. Walsh testified:

> Q Did you discuss that information that you received from Ms. Delk about Mr. O'Kelly's allegations with Mr. Hutto?
>
> A I did not.
>
> Q You never -- that never came up in your conversation with him?
>
> A That never came up.

(Id.). Additionally, the circuit court ignored the letter introduced at the evidentiary hearing as Exhibit 2. (PC-R2. 308). In the letter, dated October 21, 1999, Mr. Hutto told Mr. Walsh that he received a visit from Assistant State Attorney Starrett and a law enforcement officer. Mr. Hutto stated:

> Dear Jeff:

> Well, you were right! I had a visit from the State Attorney today. Laura Starrett came with some dude with a badge. I don't know who he was. They told me that O'Kelly had did the same thing I did. He gave a statement to the effect that I was the "Bad Guy" in Kight's case. **Did you know about this?**

(Id.)(emphasis added). The circuit court failed to consider the fact that had Mr. Hutto known of Mr. O'Kelly's testimony in the Kight case, he would not have asked Mr. Walsh about his knowledge of that information two months after he provided a sworn affidavit about Mr. O'Kelly's inculpatory statements. (See PC-R3. 560).

Furthermore, the circuit court found that Mr. Hutto would have come forward at the time of his sentencing rather than now in order to help himself. However, at the hearing Mr. Hutto testified: "And that's -- I mean, if you look back [to the time we were incarcerated] you can see what time it was then now. But you couldn't then. Because I was a greenhorn. I had never been in jail before. I had never been in trouble." (PC-R3. 538). Mr. Hutto also testified that his conversations with Mr. O'Kelly occurred after he pleaded guilty (PC-R3. 550), and that one of the conversations did not even occur until after both he and Mr. O'Kelly were sentenced. (PC-R3. 537). In fact, Mr. Hutto did negotiate a deal for himself in which he avoided the death penalty and was convicted of second degree murder, therefore it was unnecessary for him to use the information obtained from Mr. O'Kelly to benefit himself. At the time of the evidentiary

hearing, Mr. Hutto was scheduled for a parole hearing in January, 2004, and his scheduled date of parole was August 7, 2009. (PC-R3. 561). While Mr. Hutto's deal was not as "sweet" as Mr. O'Kelly's, he certainly received a lesser sentence than his co-defendant, Mr. Kight, and he will most likely be released from prison after serving less than twenty-five (25) years after pleading guilty to second-degree murder.

Mr. Kokal was convicted "as charged in the indictment" of premeditated First Degree Murder. (R. 228). Mr. O'Kelly's confession to Mr. Hutto undermines and defeats this verdict, which was apparently based upon perjured testimony by Mr. O'Kelly during the State's cross-examination at trial. (T. 696-709). Mr. O'Kelly told Mr. Hutto "Kokal had nothing to do with it." Mr. Kokal never struck the victim and encouraged Mr. O'Kelly to leave him beaten, but alive, after the robbery. This defeats any conviction for premeditated First Degree Murder.

Mr. Kokal's trial attorney testified that his defense was premised solely upon the assertion that the State's case was accurate except for one fact: Mr. O'Kelly, not Mr. Kokal, was the instigator and triggerman. The new evidence corroborates and strengthens that defense.

Further, the new evidence supports the conclusion that Eugene Mosley was mistaken regarding statements he attributed to Mr. Kokal

shortly after the homicide. Considering the trial evidence established that both Mr. Mosley and Mr. Kokal were intoxicated at the time they talked, in conjunction with Mr. O'Kelly's confession to Mr. Hutto, the jury would probably have rejected Mr. Mosley's testimony had it known of Mr. O'Kelly's confession. This, along with evidence of Mr. O'Kelly's guilt, would probably have resulted in Mr. Kokal's acquittal of First Degree Murder.

Beyond this, given the State's impulse to extend a generous plea offer to the minor participant in this episode, while strenuously pursuing a death sentence for the major participant, it is reasonable to assume, given the State's knowledge of Mr. O'Kelly's letter implicating himself and the questionable nature of Mr. Mosley's testimony, combined with the new evidence of Mr. O'Kelly's confession, that Mr. Kokal would have been offered the "sweet deal" rather than Mr. O'Kelly.

Additionally, Mr. O'Kelly told Mr. Hutto that he robbed the victim spontaneously while under the influence of drugs and alcohol. He did so without Mr. Kokal's knowledge, consent, or active participation. He completed the robbery and only then marched Mr. Russell to the beach, where he beat him further, left momentarily, and then returned alone and killed him. Under these facts, Mr. Kokal cannot be guilty of First Degree Felony Murder, as he was not an active participant in the underlying felony of robbery and the

robbery was completed long before Mr. O'Kelly marched the victim to the beach, at first left him alive, than returned to kill him. See Robles v. State, 188 So. 2d 789 (Fla. 1966); Straughter v. State, 384 So. 2d 218 (Fla. 3d DCA 1980).

As to Mr. Kokal's sentence of death, the circuit court also wholly failed to consider Mr. Hutto's testimony as it applied to Mr. Kokal's sentence. The newly discovered evidence standard is the same whether it pertains to guilt/innocence or penalty: would the new evidence probably result in a sentence of life rather than death. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

Assuming, arguendo, that Mr. O'Kelly's confession did not rule out Mr. Kokal's conviction for First Degree Felony Murder, he is still entitled to relief from the death sentence imposed. This is true based upon the impact Mr. O'Kelly's confession has on the findings regarding aggravation and mitigation and proportionality concerns in light of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987).

Mr. Hutto's testimony would probably produce a life sentence on retrial. The jury recommended that Mr. Kokal be sentenced to death. **The jury's recommendation of death contained the specific finding that Mr. Kokal was the actual killer**. (R. 236).[7] If this is untrue,

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[7] The jury was given the option of finding:

A) The Defendant, Gregory Kokal did actually

the underlying recommendation cannot be reliable and constitutionally sound. The trial court's sentencing order has as it's foundation the belief that Mr. Kokal was the actual killer of Mr. Russell and that he acted either alone or with minor participation from Mr. O'Kelly, and did so either from a premeditated design or in the course of a robbery. (R. 246-247). The court's findings are erroneous, unreliable, and cannot constitutionally support a sentence of death.

The jury based their recommendation on the testimony of a co-defendant who received a "sweet deal" for his testimony and on the testimony of an individual who admitted that the conversation he had with Mr. Kokal regarding the crime occurred while they were intoxicated. The jury was deprived of Mr. O'Kelly's confession to Mr. Hutto which was entirely consistent with Mr. Kokal's testimony. Mr. Hutto had no motive to fabricate or exaggerate his testimony. At the time he heard Mr. O'Kelly's confession he had already pleaded guilty to second-degree murder. Had the jury heard Mr. O'Kelly's confession they would have been unable to find beyond a reasonable

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> kill Jeffrey Russell.
>
> B) The Defendant, Gregory Kokal did not participate in the killing of Jeffrey Russell but did participate in the robbery knowing that Jeffrey Russell would be killed.

(R. 236). The jury found the first option -- that Mr. Kokal actually killed Mr. Russell.

doubt that Mr. Kokal actually killed Mr. Russell or that Mr. Kokal participated in the robbery of Mr. Russell.

Furthermore, the trial court also based the imposition of the death penalty on the mistaken belief that Mr. Kokal was the actual killer of Mr. Russell. The trial court stated:

> . . . The jury's recommendation of death contained a finding that the defendant had actually killed Jeffrey Russell.
>
> The finding of the jury is consistent with the Court's view of the evidence. Upon such basis, the Court considers the jury's recommendation to have met the Enmunds requirement and to be proper provided there is proof beyond a reasonable doubt of aggravating circumstances which are not outweighed by any mitigating circumstances.

(R. 249). Mr. O'Kelly's confession defeats the trial court's Enmund finding.

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

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

> character and record of the individual offender."

458 U.S. at 798 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Woodson v. North Carolina, 428 U.S. 280 (1976). The Supreme Court in Enmund concluded that the Eighth Amendment prohibits imposition of the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Id. at 797. The Supreme Court found that the sentencing court had erred in failing to consider each co-defendant's individual culpability and instead "attributed to Enmund the culpability of those who killed the [victims]." Id.

Similarly, Mr. O'Kelly's confession proves that the Enmund analysis performed by the jury and sentencing judge was factually flawed and thus incorrect. Mr. O'Kelly's confession indicates that Mr. Kokal did not actually kill the victim and he played no part in planning the murder. Mr. Kokal's death sentence is unconstitutional.

Also, Mr. O'Kelly's confession defeats the court's rejection of the mitigating factor that Mr. Kokal was merely an accomplice in the capital felony committed by another person and his participation was relatively minor. (R. 251). Mr. Hutto testified that Mr. O'Kelly told him Mr. Kokal had **no participation** in the capital felony.

Mr. O'Kelly's confession defeats or dilutes the court's finding that Mr. Kokal was an accomplice to a robbery. (R. 254). Mr. O'Kelly told Mr. Hutto that Mr. Kokal was unaware of his intention to rob Mr. Russell and that Mr. Kokal did not participate in the robbery.

Mr. O'Kelly's confession defeats any finding that Mr. Kokal killed Mr. Russell to avoid arrest. (R. 254-255). If Mr. O'Kelly killed Mr. Russell without Mr. Kokal's foreknowledge or participation, this finding cannot be sustained.

Mr. O'Kelly's confession defeats any finding that Mr. Kokal killed Mr. Russell in a cold, calculated and premeditated manner. (R. 255-256).

Mr. O'Kelly's confession obliterates the trial court's findings of four aggravating factors and no mitigation. (R. 257). Considering the evidence which could and should have been presented during Mr. Kokal's initial postconviction proceedings, the statutory mitigation alone would far outweigh the single, diluted aggravator remaining and a life sentence is required under the law. The non-statutory mitigation inexplicably waived by Mr. Morrow during the evidentiary hearing also dictates a life sentence.

The conflicting evidence presented at trial regarding Mr. Kokal and Mr. O'Kelly's culpability would surely have shifted in favor of Mr. Kokal has Mr. O'Kelly's confession been available.

This Court has found that a co-defendant's inculpatory statement can affect the outcome of the penalty phase. The Court has found that the failure to present such evidence undermines confidence in the outcome of a sentencing phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993); see also State v. Mills, 788 So. 2d 249 (Fla. 2001). In Garcia, only one of four perpetrators was sentenced to death, and the central focus of the trial was the identity of the actual shooter. As in Mr. Kokal's case, the co-defendant's inculpatory statement corroborated the defendant's own testimony and identified the co-defendant as the actual killer. This Court's conclusion in Garcia that the defendant was prejudiced by his counsel's failure to present this evidence supports Mr. Kokal's argument that his newly discovered evidence of Mr. O'Kelly's culpability entitled him to relief.

Also, pursuant to Garcia, the unavailability of impeachment evidence at trial may undermine confidence in the outcome of the trial and require relief during postconviction. Thus, the fact that Mr. O'Kelly's confession was hearsay evidence ignores the fact that impeachment evidence may be significant enough to undermine the outcome at trial and the law which allows hearsay evidence to be admitted during a capital penalty phase.

Mr. O'Kelly's confession **completely exonerates Mr. Kokal**. Compare Kight v. State, 784 So. 2d 396, (Fla. 2001)("While O'Kelly's

testimony corroborated Hutto's involvement in the murder, it did not exonerate Kight."). Had Mr. O'Kelly's true culpability been known by the jury and trial court Mr. Kokal legally could not have and would not have been sentenced to death.

The disparity in treatment between Mr. O'Kelly and Mr. Kokal must be considered in light of the new evidence. This Court has recognized the importance of a defendant's culpability as an essential requirement of the individual sentencing required by the Eighth Amendment and has overturned death sentences based on evidence of a co-defendant's lesser sentence. In Slater v. State, this Court explained:

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

316 So. 2d 539, 542 (Fla. 1975). If Mr. O'Kelly killed Mr. Russell and served but 5 1/2 years on a 14 year sentence, Greg Kokal cannot fairly be condemned to death. The degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision. See Spivey v. State, 529 So. 2d 1088 (Fla. 1988)(remanding for imposition of a life sentence because the co-defendants were the

"primary motivators" and received lesser sentences); Craig v. State, 510 So. 2d 269 (Fla. 1987). Where a defendant is guilty of murder, but not the actual killer and his co-defendants receive sentences of a term of years, these circumstances justify a jury's recommendation of life in prison. Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The death penalty is disproportionate for the crime of felony murder (the only crime Mr. Kokal could arguably be guilty of if Mr. O'Kelly killed Mr. Russell) where the defendant was merely a minor participant in the crime and the state's evidence of mental state does not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that results in murder is not enough culpability to warrant the death penalty. Jackson v. State, 575 So. 2d 181, 190-191 (Fla. 1991)(discussing Tison and Enmund). Mr. O'Kelly's confession to Mr. Hutto indicates Mr. Kokal had **no** participation in the robbery and homicide.

Further, the fact that the evidence is insufficient to establish premeditated murder by Mr. Kokal given Mr. O'Kelly's confession should be considered in determining an appropriate sentence. See Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). Presumably, the State of Florida believed at the time of Mr. Kokal's prosecution that participation along the lines which Mr. O'Kelly claimed, but in which Mr. Kokal actually engaged, was deserving of a

Second Degree Murder conviction and 5 1/2 years incarceration. Mr. Kokal has already served over three O'Kelly sentences.

The newly discovered evidence of Mr. O'Kelly's confession to his "full, perhaps single, participation in Russell's death" justifies that Mr. Kokal receive a life sentence.

Furthermore, a cumulative analysis of the new evidence, along with all prior claims and the complete record is required. Lightbourne v. State, 740 So. 2d 238 (Fla. 1999); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violation, ineffective assistance of counsel and/or newly discovered evidence. Specifically, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923.

In the trial court's written "Judgment and Sentence of Gregory Alan Kokal" (R. 244-258), the testimony of Mr. O'Kelly was relied upon in determining facts and evaluating aggravating and mitigating circumstances. The court specifically rejected the contention that Mr. O'Kelly was the triggerman and concluded the facts indicated Mr. Kokal's "full, perhaps, single participation in Russell's death". (R. 251-252). Further, the trial court relied upon Mr. O'Kelly's trial testimony in rejecting Mr. Kokal's claim that alcohol intoxication

and use of narcotics substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (R. 253). In considering aggravating circumstances and concluding Mr. Kokal subjected the victim to a "death march", the trial court accepted and relied in full upon Mr. O'Kelly's trial testimony.

Mr. Hutto's testimony corroborates Mr. Kokal's testimony and impeaches that of Mr. O'Kelly. Further, Mr. Kokal's attorney failed to properly investigate and prepare for the capital penalty phase. The circuit court recognized:

> Indeed, it appears to this Court that the defense lawyer's over-all preparation for the penalty phase of the trial may have fallen below that expected of reasonably competent counsel. The lawyer did little more than simply think about the penalty phase until after the guilt phase was completed.

(PC-R2. 304). Had trial counsel prepared for the penalty phase he would have been able to present: significant evidence regarding the severe physical and emotional abuse Mr. Kokal suffered as a child; evidence of Mr. Kokal's lifelong addiction to alcohol and drugs; statutory mental health mitigation and evidence of brain damage.

Had postconviction counsel effectively represented Mr. Kokal at his initial postconviction hearing this Court would have heard testimony from Dr. Robert A. Fox, who evaluated Kokal in 1988,

reviewed all background materials and historical information and opined in a written report:

> Summary
>
> In regard to the statutory mitigating circumstances, due to his impaired mental state and extreme intoxication, Mr. Kokal's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired. I further find that he acted under the influence of extreme mental and emotional disturbances. Mr. Kokal's emotional immaturity as documented by his family, teachers, history and records was a substantial factor in his inability to employ rational thought processes at the time of the offense.

(PC-R2. Supp. Vol. IX at 593).

Dr. Fox also found Kokal's age, considered in combination with his history and brain damage, to be mitigating. Id. Additionally, he found nonstatutory mitigation as follows: (a) disabling hyperactivity and attention deficit disorders as a child; (b) alcoholic and dysfunctional family; (c) extreme physical and psychological abuse from parents; (d) addiction to alcohol and drugs; (e) physical and emotional trauma resulting from being incarcerated in an adult prison at the age of 16; and (f) emotional immaturity, anxiety and depression. (PC-R2. Supp. Vol. IX at 594). This evidence combined with the newly discovered evidence of Mr. O'Kelly's culpability would certainly produce a life sentence at a new penalty phase.

Furthermore, error also occurred during Mr. Kokal's penalty phase when the jury was improperly instructed about aggravating circumstances and when the prosecutor argued lack of remorse to the jury. This Court found that these errors were not preserved for review. Kokal v. Dugger, 718 So. 2d 138, 143 (1998). However, under a cumulative analysis these errors must be considered.

Mr. Kokal is entitled to relief based upon Mr. O'Kelly's confession to Mr. Hutto.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. KOKAL AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL CLAIM. MR. KOKAL WAS DENIED DUE PROCESS WHEN HIS POSTCONVICTION ATTORNEY FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS POSTCONVICTION PROCEEDINGS.

Mr. Kokal presented the circuit court with his claim that his conflict postconviction attorney, Jefferson Morrow, was incompetent and ineffective during his initial postconviction evidentiary hearing. Mr. Kokal complied with this Court's dictate in Shere v. State, in that he filed his claim in the court in which the alleged ineffectiveness occurred. 742 So. 2d 215, 217 at n. 6 (Fla. 1999). Further, he filed his claim at the earliest time possible, in a timely fashion and pleaded specifically the errors of commission and omission committed by Mr. Morrow which prejudiced Mr. Kokal.

Mr. Kokal's conflict postconviction lawyer, Mr. Morrow, by errors of commission and omission, deprived Mr. Kokal of effective and competent representation during the initial postconviction proceedings.

After presenting his claim to the circuit court, the court found that a claim of ineffective assistance of postconviction counsel did "not present a valid basis for relief". (PC-R3. 265). Without any further analysis, the court denied Mr. Kokal an evidentiary hearing on his claim.

In denying Mr. Kokal an evidentiary hearing the circuit court ignored the longstanding line of caselaw which make clear that claims of ineffective counsel must be evaluated upon the individual and particular circumstances surrounding the specific case. See Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988)("We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."); Graham v. State, 372 So. 2d 1363 (Fla. 1979).

This Court has found that an attorney who lacks the necessary resources and/or capital trial experience will be deemed not competent to continue representation of death sentenced client. See Spaziano v. State, 660 So. 2d 1363, 1369-1370 (Fla. 1995). Thus,

this Court has explicitly acknowledged the need for effective representation in capital postconviction proceedings. Id.

In Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". Id. Further, in a special concurrence, the right to counsel in capital postconviction in terms of State Due Process was discussed. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. Id. at 329. Reference was also made to the Mississippi Supreme Court's opinion in Jackson v. State, 732 So. 2d 187 (Miss. 1999), wherein that Court ruled the right to counsel was constitutionally mandated in capital postconviction proceedings because "those proceedings provide the only opportunity for important constitutional issues such as the adequacy of trial counsel's performance to be considered". Id. at 330. No death sentenced person in Florida should be allowed to be executed unless he "has received the assistance of counsel in a **meaningful** postconviction proceeding". Id. (emphasis added).

As noted in Arbelaez, all capital litigation is particularly unique, complex and difficult. See White v. Board of County Comm'rs, 537 So. 2d 1376, 1378-1379 (Fla. 1989)("since the state of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital

cases"; "all capital cases by their very nature can be considered extraordinary and unusual"). The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent and effective representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. Arbelaez v. Butterworth, 738 So. 2d 331 at n. 12.

In Peede v. State, this Court made clear that ineffective representation at any level of the capital punishment process will not be tolerated. 748 So. 2d 253 (Fla. 1999). This Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation"**. Id. at 256, n. 5 (emphasis added). Less

than a week later, this Court entered an unpublished Order in Fotopoulos v. State, 741 So. 2d 1135 (Fla. 1999), which remanded the case for further proceedings in the lower court **despite having considered briefs on appeal and having heard oral argument**, because appellate counsel inappropriately attempted to raise issues and assert arguments and positions which should have been, but were not, presented to the lower court in the Rule 3.850 motion. The Court did not penalize Fotopoulos for his attorney's incompetence; rather, it remanded for corrective action to be taken prior to ruling on the appeal. This Court has made clear that it will not tolerate incompetent and ineffective representation in capital postconviction proceedings.

Additionally, this Court has also noted that section 27.710, Florida Statutes (Supp. 1998), requires the Court to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation".

In fact, this Court adopted minimum standards for certain attorneys litigating capital cases. In Re: Amendment to Florida Rules of Criminal Procedure -- Rule 3.112 -- Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610 (Fla. 1999). The opinion adopting new rules acknowledged the complexities, convoluted doctrines of procedural default, and uniqueness of capital law. This Court stated that under our system of justice, "the quality of

lawyering is critical" in capital cases and acknowledged the Court's "inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases". Id. at 613-614.

Federal and state due process requires that Mr. Kokal be effectively represented throughout his postconviction proceedings. In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998),the United States Supreme Court most recently addressed the general due process guarantees afforded a capital postconviction defendant in the context of Ohio's clemency scheme. 523 U.S. 272 (1998). A majority of the Court found that the Ohio clemency scheme did not violate due process, however, the court divided on the issue of the extent of due process rights which attach in capital postconviction proceedings. Id. In delivering the plurality opinion for the Court, Justice O'Connor, along with three (3) other justices held that: "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." Id. at 288 (J. O'Connor concurring in part and concurring in judgment).

In finding that due process may attach to postconviction proceedings, Justice O'Connor referenced her concurring opinion in Ford v. Wainwright, 477 U.S. 399 (1986). At issue in Ford was Florida's statute requiring that a capital postconviction defendant

be competent to be executed. Justice O'Connor, relying on precedent, found that "'[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of the States.'" 477 U.S. 399, 428,(J. O'Connor concurring in part, dissenting in part)(quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). Justice O'Connor made clear: "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." Ford, 377 U.S. at 428-429. In analyzing Mr. Ford's liberty interest at the time of his execution, Justice O'Connor noted that the Florida Statute governing postconviction procedures provided for mandatory action by the State. Id. at 428 ("The relevant provision of the Florida Statute, however, provides that the Governor "*shall*" have the prisoner committed . . . ")(emphasis in original).

Similarly, the Florida statute governing appointment of capital collateral counsel is mandatory. Fla, Stat. § 27.702 ("The capital collateral counsel shall represent each person convicted and sentenced to death in this state . . ."). The State of Florida has created a right by which Mr. Kokal is appointed capital collateral counsel. Therefore, as in Ford, due process is required. Because

Mr. Kokal's appointed counsel failed to effectively represent him, his right to due process has been violated.

Mr. Kokal has been penalized and deprived of due process because CCR was forced to conflict off of his case shortly before the scheduled evidentiary hearing. While CCR had been underfunded and overworked throughout its existence and was necessarily providing erratic and inconsistent representation to Mr. Kokal and its numerous other clients, a cursory review of the background materials, affidavits, expert witnesses, family history, and pleadings reveals Mr. Kokal's case had been investigated and was in need of a substantial and full and fair evidentiary hearing. The record establishes that Mr. Kokal's CCR counsel engaged in a thorough and time-consuming investigation in order to fully plead and present Kokal's family history, prior accidents and insults to his brain, evidence of brain damage, evidence of extensive alcohol and substance abuse, and expert testimony establishing that the two statutory mental health mitigating circumstances applied in this matter. (PC-R2. 25-132). The record further establishes that what took CCR years to amass and present purportedly took Morrow but ten weeks to comprehend, present to the circuit court, and argue. Even a cursory review of the postconviction hearing transcript reveals blatant incompetence on the part of Mr. Morrow. No reasonable evaluation of the claims and materials supports the proposition that this was a

"less than six hour" or two half-day hearing. No reasonable review supports the proposition that Mr. Westling should have been invited to explain away his questionable trial performance by a less than zealous postconviction lawyer. No reasonable review supports the proposition that Mr. Morrow was effective in conceding his client confessed to his former lawyer in the absence of any tangible proof and when such assertion is in egregious conflict with the trial record. No reasonable review supports the proposition that Mr. Morrow should have bonded with the trial attorney and the prosecutor in ridiculing and ignoring the substantial efforts by CCR lawyers to bring Mr. Kokal's substantial claims before the court for granting of relief. No reasonable review supports the proposition that mental health experts can be effective post-trial witnesses when they are not properly prepared, qualified, or directed in their testimony. No reasonable review supports the proposition that Mr. Morrow should have changed legal experts at the last minute (from William Shephard to Charles Cofer), and fail to require Mr. Cofer to read the trial record and consider the evidence developed in postconviction prior to offering opinions upon which the court was to depend. No reasonable review supports the proposition that Mr. Morrow could waive claims, agree others were procedurally barred, fail to argue the Ake claim which was established by Dr. Virzi and Mr. Westling's testimony, or simply fail to present available witnesses and evidence to rebut Mr.

Westling's bald assertions and self-serving statements, particularly when he did so without the knowing, intelligent, and voluntary consent of his client. See Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000)(client is completely denied effective assistance of counsel where counsel utterly fails to test the State's case and does so without consent of client). No reasonable review supports the proposition that Mr. Morrow was a zealous advocate and effective lawyer for Mr. Kokal when he called no family members other than an uncooperative father, failed to call available friends and acquaintances of Mr. Kokal, and failed to call available experts; all of whom possessed critical knowledge impacting any penalty phase prejudice analysis.

The prejudice which stems from Mr. Morrow's failure to confront and disprove Mr. Westling's testimony that Mr. Kokal confessed to him is evident. In 1998, this Court, without conducting the required de novo review, affirmed the circuit court's order denying Mr. Kokal relief on his ineffective assistance of counsel claims. The order, which this Court quoted in its opinion, cited Mr. Kokal's alleged confession to Mr. Westling in denying Mr. Kokal relief. Kokal v. Dugger, 718 So. 2d 138, 140 (Fla. 1998). Further, most recently, the circuit court again relied on the unchallenged assertion that Mr. Kokal confessed to Mr. Westling in order to deny Mr. Kokal relief. See PC-R3. 371-378.

Had 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. However, Mr. Morrow simply conceded that Mr. Kokal had lied on the witness stand and confessed to Mr. Westling: "I understand that." (PC-R2. 682).

Mr. Westling testified that documentary evidence existed in the form of a memorandum regarding Mr. Kokal's alleged confession. (PC-R2. 615). Mr. Westling testified that he could not produce the memorandum because CCR destroyed it. (Id.). Witnesses were available to testify that no such memorandum ever existed and was not included in the trial file Mr. Westling transferred to CCR.

Also, Mr. Westling's assertion that he knew Mr. Kokal perjured himself when he testified is belied by the record itself. Mr. Westling testified that he conducted his examination of Mr. Kokal in such a way to avoid any ethical problems. (PC-R2. 541). He testified that he didn't ask Mr. Kokal specific questions and just let Mr. Kokal tell "what happened", (PC-R2. 615-624; 682-683), and merely argued the State's case did not support a conviction. (PC-R2. 541-542). Mr. Westling's mischaracterization of both his presentation of Mr. Kokal's trial testimony and his closing argument went unrebutted. The record itself indicates quite the opposite. In his reserved opening, Mr. Westling assured the jury it would hear "the rest of the story". (T. 681). Since he only presented Mr. Kokal

and Mr. O'Kelly, this was the story he promised. He specifically argued that Mr. Kokal's forthcoming testimony was what actually occurred. (T. 681-688). He asserted Mr. Kokal had no participation in the crime. He asserted Mr. O'Kelly committed the crimes without Mr. Kokal's knowledge. He argued Mr. Kokal's state of mind: he was afraid of Mr. O'Kelly and violating probation. He explained Mr. Mosley away by drunkenness and "acting big". (T. 688-689). Mr. Morrow did not ask Mr. Westling any questions in this regard.

During Mr. Kokal's testimony (T. 714-745), Mr. Westling did not ask "what happened?"; he led Mr. Kokal into his testimony and his questions were extremely specific. See infra pages 11-18 (Excerpt of Mr. Kokal's testimony). Mr. Westling asked fifty (50) or sixty (60) questions. Id. This was not an attorney concerned with presenting "perjured" testimony and disavowing the truthfulness of his client's words. Mr. Morrow utterly failed to confront Mr. Westling with this during his postconviction testimony.

In his closing argument at trial, Mr. Westling asserted that the defense was not "created". (T. 781-782). Regarding Kokal's purported admissions to Mosley, Westling asserted:

> Mr. Kokal was confused about that night, there's no doubt about it. He told me and **I can't think of any reason he would lie**, I didn't say those things, and I asked do you remember what you said? And he said no, I really don't remember...**He could have gotten on**

> **the stand just as easily and said I never saw Mosley that night**.

(T. 793)(emphasis added). Mr. Westling cvontinued:

> Without Mr. Mosley in my opinion I would suggest to you that the government would have absolutely no case against Mr. Kokal. And, **we have a balance in that we have the testimony of Mr. Kokal himself**.
>
> Again, the court will tell you, I believe, that you ought to consider the **reasonableness, the forthrightness, the way it connects with other items of evidence**. **When you hear the tests of believability of a witness, I think you will see that Mr. Kokal passes them all**.

(T. 794)(emphasis added). Mr. Westling also told the jury:

> That's what you got to do because I think there is only really two people that know, aren't there? Three. One is dead and **there's only two people that really know what happened that night: O'Kelly and Kokal**. **Both of them have at one time or another said the gun was in Mr. O'Kelly's hand**.

(T. 796)(emphasis added). Finally, Mr. Westling argued:

> Does not, ladies and gentlemen, the letter of Mr. O'Kelly, the status of Mr. O'Kelly's presence, does that not in and of itself create a doubt in your mind as to whether or not this defendant is guilty of murder in the first degree? **Does it not, ladies and gentlemen, create a doubt when coupled with the testimony of Mr. Kokal who admitted good things and bad things about his life and about this case?**

(T. 798)(emphasis added).

Mr. Westling repeatedly argued to the jury that the State had not explained all the evidence, but "we" (meaning he and Mr. Kokal) had explained everything. (T. 798-799).

> Use that common sense. Look back in your mind and **look at Mr. Kokal as he sat there that day and say to yourselves today, did I believe him? Was it reasonable?**

(T. 800)(emphasis added).

Mr. Morrow inexplicably failed to confront Mr. Westling with any of the above record material. The record conclusively rebuts any assertion that Mr. Westling did not - at the time of trial - believe in his client and the truthfulness of his testimony. The facts indicate Mr. Westling's assertion that Mr. Kokal confessed to him is patently untrustworthy and perhaps motivated by his perceived mistreatment by the former CCR. Particularly now, where new evidence indicates Mr. O'Kelly confessed the killing to a cellmate, Mr. Westling's self-serving testimony regarding Mr. Kokal's purported confession is constitutionally unreliable.

The former hearing should be declared unreliable and this Court should vacate it's prior opinion and circuit court order denying Mr. Kokal postconviction relief and at a minimum remand for an evidentiary hearing on Mr. Kokal’s initial Rule 3.850 motion.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, GREGORY ALAN KOKAL, urges this

Court to reverse the lower court's order and grant Mr. Kokal Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 28, 2002.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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