IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01-882

LOWER TRIBUNAL No. 83-8975 CF

GREGORY ALAN KOKAL,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

REPLY 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

Appellee suggests that the standard of review for a motion to disqualify is an abuse of discretion standard. (Answer Brief at 35, fn. 16; 37, fn. 18)("The State is unaware of any Florida case explicitly stating the standard of review of the question whether a motion to recuse was timely filed. The State would suggest that once it is determined that counsel was put on explicit notice of the ground of recusal by the written response, the defense cannot excuse the delay by defense counsel's failure to read the State's response; the motion is untimely as a matter of law."). Appellee urges this Court to adopt an abuse of discretion standard in reviewing Mr. Kokal's claim that the circuit court erred in denying Mr. Kokal's motion to disqualify. (Answer Brief at 37, fn. 18).

Appellee's reliance on Arbelaez v. State, 775 So. 2d 909 (Fla. 2001), is misplaced because in Arbelaez, this Court conducted a de novo review of the claim regarding the motion to disqualify. 775 So. 2d 909 at 916. The Court held: "To determine if a motion to disqualify is legally sufficient, this Court looks to see whether the facts alleged would place a reasonably prudent person in the fear of not receiving a

fair and impartial trial." This Court then analyzed Arbelaez's claim under a de novo standard. Id. Timeliness was not at issue in Arbelaez, thus, Appellee's reliance is misplaced.

Further, Appellee argues that Mr. Kokal's motion to disqualify was untimely because "the asserted ground of recusal – that Judge Carithers had presided over the January 1999 Kight evidentiary hearing – has existed the entire time that Kokal's newly-discovered evidence claim has been pending in circuit court." (Answer Brief at 32). However, in making such an argument, Appellee mischaracterizes both the grounds upon which Mr. Kokal moved Judge Carithers to disqualify himself and the law regarding the timing of a motion to disqualify.

Appellee suggests that Mr. Kokal defaulted his motion to disqualify because Mr. Kokal had notice of the grounds for disqualification when the Office of the Capital Collateral Counsel was appointed to represent Mr. Kokal in October, 1999, and yet Mr. Kokal did not file his motion until five (5) months later. (Answer Brief at 33). Thus, Appellee urges this Court to find that the rule requires a diligence finding. However, the rule governing judicial administration makes clear that a motion to disqualify shall be brought within ten

(10) days **after the discovery of the facts constituting the grounds for the motion**. See Fla. R. Jud. Admin. 2.160 (e)(emphasis added). As Appellee concedes the rule contains no requirement "that counsel exercise diligence in learning of the grounds for recusal." (Answer Brief at 34, fn. 15).

Further, even if diligence were required, from the outset of his appointment as designated counsel, Mr. Kokal's counsel candidly and repeatedly informed the circuit court that he was lead counsel representing Anthony Bryan in warrant litigation and therefore was unable to devote any time to Mr. Kokal's case. (PC-R3. 117-118, 134-137).[1] In a motion to continue, filed in December, 1999, two (2) months after being appointed to represent Mr. Kokal, Andrew Thomas, Chief Assistant of the Northern Region, informed the circuit court about his

[1] In 1995, during the Jerry White warrant litigation, the State of Florida advocated the position that other responsibilities facing the Capital Collateral Representative (CCR), attorneys during the warrant period were "not truly essential" when compared to high priority owed a death warrant case, and therefore such responsibilities could be postponed so that full attention could be made to Mr. White's representation. In rejecting Mr. White's motion for a stay of execution, this Court apparently agreed with the State's position. Additionally, former Assistant Attorney General Richard Martell has argued to this Court that when CCR is operating under warrant, CCR's job is to "put out fires, not rescue cats from trees." Therefore, it would appear that Mr. Kokal's counsel's actions were "reasonable" when he devoted the majority of his time to the Anthony Bryan warrant litigation, which included litigating the constitutionality of the electric chair.

inability to devote any time to Mr. Kokal's case:

> 3. On October 21, 1999, Gregory C. Smith, Capital Collateral Counsel, Northern Region, complied with this Court's directive and specified undersigned counsel as counsel for Mr. Kokal. This Court was notified that undersigned was representing Anthony Bryan, who was under death warrant at the time, with execution scheduled for October 27, 1999.
>
> 4. On October 26, 1999, the United States Supreme Court entered a stay of execution in Mr. Bryan's case and granted certiorari review of the Florida Supreme Court's decision upholding use of the electrocution as Florida's sole means of execution.
>
> 5. On October 29, 1999, this Court set a Scheduling Conference for November 4, 1999.
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> 6. During the Scheduling Conference, this Court set December 10, 1999, as the Huff hearing . . . Undersigned agreed to the Huff hearing date based upon the good faith belief that the Bryan brief would be filed by December 5, 1999, and he would have time to review Mr. Kokal's case. It has been necessary to obtain an extension for the United States Supreme Court to complete this complex brief. The brief is now due December 20, 1999, and undersigned is involved in the review process. **This has precluded undersigned from devoting any time to Mr. Kokal's case**.

(PC-R3. 135)(emphasis added). Mr. Kokal's counsel also explained that his daughter was scheduled for surgery the same day as the hearing. (PC-R3. 135-136). The circuit court granted the motion to continue. (PC-R3. 140).

At the end of January, 2000, Mr. Kokal's designated

counsel again moved for a continuance. Counsel explained that the United States Supreme Court dismissed Mr. Bryan's petition following the passage of the Death Penalty Reform Act and lethal injection bill. (PC-R3. 145). Counsel informed the court that he was challenging the new legislation and that Mr. Bryan's execution had been rescheduled for February 24, 2000. (PC-R3. 145). Mr. Kokal's counsel concluded: "Undersigned must clear his calendar of all non-warrant litigation in order to competently represent Mr. Bryan under warrant and simultaneously challenge the new legislation. (PC-R3. 145-146). The circuit court granted the motion. (PC-R3. 149).

Further, at the Huff hearing, Mr. Kokal's counsel explained:

> MR. THOMAS: Your Honor, I would like to apologize for the timing of the motion. But, I also would like to – I was appointed back in October of '99 with absolutely no prior knowledge [about] Mr. Kokal's case. And, it was only in the process of amending the 3.850, which was originally requested in his pro se pleadings, that I discovered the tie-in between Charles Kight and Gregory Kokal.
>
> And, it was not until this past weekend that I actually obtained and reviewed the transcript of the evidentiary hearing in the Charles Kight newly discovered evidence matter.
>
> THE COURT: 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. 424-425).[2] Thus, contrary to Appellee's assertions, Mr. Kokal's counsel reasonably explained why he did not uncover the information leading to the motion to disqualify until shortly before the Huff hearing: The Anthony Bryan warrant litigation and Death Penalty Reform Act litigation made it impossible for him to uncover the testimony which constituted the basis for the motion to disqualify. Further, while Appellee does not accept counsel's explanation and would rather accuse Mr. Kokal's counsel of ignoring Mr. Kokal's case, the circuit court accepted counsel's explanation at the April Huff hearing. (PC-R3. 424-425).

Additionally, in advancing a diligence argument, Appellee claims that the Mr. Kokal was on notice that O'Kelly testified at the Kight hearing because Appellee's response to Mr. Kokal's pro se Rule 3.850 motion indicated that O'Kelly was a witness at Kight's hearing before Judge Carithers. (Answer Brief at 32-33). Appellee suggests that a single sentence in a pleading that stated Judge Carithers was the judge in the

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[2] The referenced amended Rule 3.850 motion was filed by Mr. Kokal's counsel on April 3, 2000, three (3) days before the scheduled Huff hearing. Counsel informed the circuit court that the issue underlying the motion to disqualify was discovered during his preparation of the amended motion. Appellee did not object to the filing of the amended Rule 3.850 motion.

Kight proceedings should have served as notice to counsel. However, it is not the fact that O'Kelly was a witness in Kight's evidentiary hearing that constituted the grounds of the motion to disqualify. Rather, the basis for the motion to disqualify was the findings Judge Carithers made following Kight's evidentiary hearing and the exchanges which occurred between O'Kelly and Judge Carithers regarding Mr. Kokal's case during the evidentiary hearing – specifics which were not included in Appellee's response to Mr. Kokal's pro se 3.850 motion.[3] (See PC-R3. Supp. 214-219). In any event, as Appellee concedes, a diligence finding is not required in determining a motion to disqualify. (Answer Brief at 34, fn. 15). Rather, the court must determine if the motion was filed within ten (10) days of the discovery of the information constituting the grounds for the motion. In Mr. Kokal's case, his counsel filed the motion to disqualify as soon as he

[3] Charles Kight is represented by the Office of the Capital Collateral Counsel for the Southern Region. His case files, pleadings and transcripts are not maintained or housed in the Northern Region. In order to obtain pleadings and transcripts, Mr. Kokal's counsel would have had to either contact the attorney representing Mr. Kight in the Southern Region or contact the Clerk of Court in Duval County. Undersigned is unaware as to how Mr. Kokal's former designated counsel obtained the transcripts and pleadings regarding the Kight case, but counsel informed the circuit court that he obtained the information during the weekend preceding the April 6, 2000, Huff hearing. (PC-R3. 424-425).

discovered O'Kelly's testimony in the Kight hearing. Appellee also contends that Mr. Kokal's motion to disqualify is meritless and that the circuit court's order denying the motion should be affirmed. (Answer Brief at 35-38). Appellee states the issue underlying Mr. Kokal's disqualification motion as: "in the Kight case, Judge Carithers had made some determination of the credibility of William O'Kelly, and of the degree of Mr. Hutto's guilt." (Answer Brief at 37). Appellee continues: "The State would note that if Kokal's allegation are a valid basis for recusal, the judge who presided over a defendant's trial and sentenced him to death could never preside over any of that same defendant's postconviction proceedings . . .". (Answer Brief at 38). Appellee misses the point. It is not that Judge Carithers presided over both Mr. Kokal and Kight's postconviction proceedings wherein their co-defendants testified at the other's hearing. Rather, any analysis of Hutto's testimony at Mr. Kokal's evidentiary hearing about Mr. Kokal's innocence requires that Judge Carithers grapple with the credibility of O'Kelly versus Hutto. Judge Carithers found that Hutto lied at Kight's trial and that Hutto is equally culpable in that murder. In so concluding, Judge Carithers had to believe O'Kelly regarding Hutto's confession. Mr. Kokal maintains

that O'Kelly lied during Mr. Kokal's capital trial and Judge Carithers should believe Hutto when he testified that O'Kelly confessed to acting alone and without Mr. Kokal's knowledge of O'Kelly's intent to murder Mr. Russell. Additionally, at Kight's hearing, O'Kelly and Judge Carithers discussed Mr. Kokal's case and O'Kelly professed his innocence of the Russell homicide. Therefore, it is not that Judge Carithers presided over both postconviction hearings, but that the credibility of the witnesses were at odds and Judge Carithers had already made a finding that O'Kelly was credible which would make it impossible to find Hutto credible and O'Kelly was able to profess his innocence to Judge Carithers during the Kight hearing.

Further, Appellee argues that this Court cannot rely on the record and Judge Carithers remarks at the April 6, 2000, Huff hearing finding that he should disqualify himself if he granted Mr. Kokal an evidentiary hearing because the finding was "off-the-cuff". (PC-R3. 34).

At the April 6th hearing, 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). Judge Carithers also definitively concluded that he would be required to disqualify himself if he decided to grant an evidentiary hearing. (PC-R3. 430, 432, 434). Later Judge Carithers stated:

> 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.
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> * * *
>
> 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.
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> * * *
>
> . . . 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).

Judge Carithers comments were not "off-the-cuff" as Appellee asserts. In fact, Judge Carithers stated that he had been considering the issue for several months. Judge Carithers acknowledged the issue and informed counsel that he would disqualify himself if he granted an evidentiary hearing. Appellee's attempts to minimize Judge Carithers' comments contained within the record are belied by Judge Carithers statements that a problem existed and admission that he had considered the issue for some time.

Judge Carithers made a merits ruling at the April 6, 2000, Huff hearing **in favor of Mr. Kokal**. Judge Carithers' written order denying Mr. Kokal's motion to disqualify, without explanation, conflicts with the determination he made on April 6, 2000. Mr. Kokal's motion to disqualify should have been granted as it was impossible for Judge Carithers to preside over Mr. Kokal's evidentiary hearing and be fair and impartial. Relief is proper.

ARGUMENT II

Appellee asks this Court to affirm the circuit court's order denying Mr. Kokal's claim of newly discovered evidence. (Answer Brief at 54).

Appellee argues that the circuit court's finding that Hutto's testimony is impeachable is supported by the record.

In arguing that Hutto was “paying O’Kelly back”,(Answer Brief at 48), for testifying against him in the Kight postconviction proceedings, Appellee, like the circuit court, fails to address the letter written to Investigator Jeff Walsh, **after** Hutto executed his sworn affidavit. Hutto wrote Mr. Walsh, in October 1999:

> 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?**

Exhibit 2. (PC-R2. 308)(emphasis added). At the evidentiary hearing Hutto explained why he wrote Mr. Walsh:

> Because when Ms. Starrett and that dude, and I still don’t have no idea who that dude was – it was some cop. He had a gold badge. And he thought he was Clint Eastwood. He was all propped up there and he thought it was just a big humongous joke and made me feel like a piece of s**t sitting there in the chair. It was like I’m trying to converse about something that I didn’t know nothing about.
>
> So, I asked Jeff, hey, if you knew this, why didn’t you tell me this when you were here.

(PC-R3. 559-560). The letter proves that Hutto told the truth when he testified that he was unaware that O’Kelly testified in the Kight case until the Assistant State Attorney informed

him of this. Had Hutto known that O'Kelly testified on behalf of Kight and provided the information to Mr. Walsh as payback he would not have asked Mr. Walsh about his knowledge of O'Kelly's testimony in Kight.

Further, there is no need for Hutto to "payback" O'Kelly because the fact that O'Kelly testified in the Kight proceedings about Hutto's alleged inculpatory statements has no bearing on Hutto's conviction or sentence. Hutto testified:

> 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. I'm doing my time for my wrong, however unjustified it be. I'm doing my time for society that I have to do, period.

(PC-R3. 549-550). O'Kelly's testimony in Kight is irrelevant to Hutto and his conviction and sentence.

In fact, when Hutto told Mr. Walsh that O'Kelly confessed to him, Hutto did not know that Mr. Walsh was interviewing him on behalf of Mr. Kokal. (PC-R3. 554)("Mr. Walsh made no statements as to whether he was for or against any particular inmate or anybody."). Mr. Walsh corroborated Mr. Hutto's

testimony. (PC-R3. 522).[4]

Also, contrary to Appellee's argument, the fact that Hutto did not come forward at the time of Mr. Kokal's trial does not reflect that his testimony is not true. (PC-R3. 553).[5] As Hutto explained at the evidentiary hearing, he was already negotiating with the State by assisting the State secure evidence against Kight. (PC-R3. 553). In exchange, he was allowed to plead guilty and avoid the death penalty. (PC-R3. 553). Further, as Hutto testified, he was not very experienced with the criminal justice system at the time of his murder conviction. (PC-R3. 538). Thus, in Hutto's opinion there was no need to provide anymore information to the State since he had already secured a deal for himself to avoid the death penalty.

Appellee argues that the length of time between O'Kelly's confessions and obtaining Hutto's testimony supports the

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[4] Appellee asserts that the State does not concede that Mr. Walsh was telling the truth. However, the State presented no evidence to contradict or disprove Mr. Walsh's testimony.

[5] Appellee asserts that Hutto gave conflicting statements about whether or not he would have testified at the time of Mr. Kokal's trial. Appellee's assertion is false. Hutto was consistent throughout his testimony that he would have provided the information he obtained about O'Kelly's role in the Russell homicide had someone asked him to do so. (PC-R3. 534).

circuit court's finding that Hutto is "impeachable". (Answer Brief at 48). However, the amount of time it took for Mr. Kokal's postconviction counsel to develop the connection between Hutto and O'Kelly does not indicate that Hutto was impeachable.[6] In fact, O'Kelly provided his statement to Kight's attorneys only three (3) years earlier (and almost fifteen (15) years after he obtained the information), and the circuit court did not find the delay reflected upon O'Kelly's credibility.[7]

Additionally, courts have granted relief to defendants based on newly discovered evidence where there is a delay even greater than the delay in Mr. Kokal's case. In State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court affirmed the lower court's grant of relief based on newly discovered evidence.[8] The newly discovered evidence consisted of the testimony of an inmate who had been incarcerated with Mr.

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[6] Judge Carithers found that Mr. Kokal was diligent in pursuing his claim. (PC-R3. 375).

[7] Likewise, Judge Carithers did not find the fact that O'Kelly did not use the information about Hutto to assist himself at the time of his trial as "impeachable". (PC-R3. Supp. 214-219). O'Kelly was found credible despite the fact that he changed his story about the Kight case several times and testified that he told people what they wanted to hear so that he would be left alone. (PC-R3. Supp. 239).

[8] At issue in Mills was who was the shooter or more culpable defendant.

Mills' co-defendant, Ashley, in 1980 and obtained a confession from Ashley. Id. at 250. Ashley did not provide Mills' attorneys with the evidence until twenty (20) years after he obtained it, yet the lower court granted Mr. Mills a new penalty phase based upon this evidence and this Court affirmed this judgment. Id.

Appellee also argues that Hutto's testimony was not consistent with the evidence at trial. (Answer Brief at 49). However, Hutto admitted that many years had passed since O'Kelly confessed. (PC-R3. 542). While O'Kelly may not have relayed every detail of the crime to Mr. Hutto, Hutto's testimony is not inaccurate with any of the testimony at trial or inconsistent with Mr. Kokal's testimony.

Appellee argues that Hutto's testimony does not entitle Mr. Kokal to relief. Appellee relies on the fact that Mr. Kokal's trial attorney, Mr. Westling, testified in 1997 that Mr. Kokal confessed to him. (Answer Brief at 38-46). Appellee also argues that Hutto's testimony would be admissible "at best, only as inconsistent statements to impeach O'Kelly's testimony." (Answer Brief at 51). In Robinson v. State, this Court recently outlined the analysis in reviewing a newly discovered evidence claim. This Court stated:

> In Jones II, we further explained that to reach the conclusion as to the probable

acquittal on retrial,

> [T]he trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, *an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence.* The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
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> We also required in Jones II that the trial court undertake a cumulative analysis in conjunction with evidence presented at all prior evidentiary hearing and evidence presented at trial. We agree with the district court that impeachment evidence could be part of this cumulative analysis, as this Court stated in Jones I, Jones II, and Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994).

770 So. 2d 1167, 1170-1171 (Fla. 2000)(emphasis in original)(citations omitted).

In regard to the requirement that a reviewing court must consider the newly discovered evidence in connection with the

evidence presented at trial and presented at any previous evidentiary hearing, Appellee focuses on Mr. Westling's testimony in 1997, that Mr. Kokal confessed to him. Appellee argues that this alleged confession would be admissible upon retrial because Mr. Kokal waived the attorney-client privilege. (Answer Brief at 40).

In Arbelaez v. State, this Court held that in postconviction the attorney-client privilege is waived as to those matters that relate to the defendant's claims of ineffective assistance of counsel. 775 So. 2d 909, 917 (Fla. 2001). In fact, Mr. Kokal's alleged confession was irrelevant to any of the issues discussed at the 1997 evidentiary hearing and should not have been introduced.

Further, upon retrial, Mr. Kokal's alleged confession would not be admissible. Appellee argues that no "Hobson's choice" exists because the attorney-client privilege is not a constitutional protection. This Court has previously held that the attorney-client privilege rises to the level of a constitutionally protected right. 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).

Appellee also misconstrues the issue. Appellee asserts: "[W]e

must now disregard his confession to his trial counsel because he would otherwise be compelled to forfeit one right (the right to attack his trial counsel) in order to pursue another right (the right to a new trial based on new evidence).” (Answer Brief at 41). At issue in Mr. Kokal’s case is whether his alleged confession can be used against him when it would not be admissible at a new trial because of the protections of the attorney-client privilege. Thus, under the analysis set forth in Jones Mr. Kokal’s alleged confession to his trial attorney should not be considered in analyzing his newly discovered evidence.

Also, unlike, Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), upon which Appellee relies, at issue is not what due process is afforded to a petitioner seeking clemency, but rather what due process is afforded in a postconviction proceeding. In fact, in Ohio Adult Parole Authority, the United States Supreme Court, in a plurality opinion, held: "[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). Thus, due process does attach in Mr. Kokal’s postconviction proceedings and creates a bar to the use of the “alleged” confession upon retrial.

Perhaps even more importantly, Mr. Kokal has always maintained his innocence in the Russell homicide. Appellee avers: “Kokal

presented no evidence that Westling lied or was mistaken about this confession . . . " (Answer Brief at 46). Appellee ignores the fact that Mr. Kokal presented the Hutto testimony, which in and of itself refutes Mr. Westling. Additionally, Appellee ignores Mr. Kokal's requests that the circuit court consider the records on appeal because Mr. Westling's testimony during the 1997 evidentiary hearing about Mr. Kokal's alleged confession is directly contradicted by his statements to the judge and jury during Mr. Kokal's capital trial. For example, Mr. Westling testified, in 1997, that he knew Mr. Kokal was going to commit perjury so he called Mr. Kokal to the stand and examined him by allowing Mr. Kokal to provide a narrative of what happened. (PC-R2. 615-624; 682-683). He also testified that he did not argue the truth of Mr. Kokal's testimony. (PC-R2. 541-542). However, the trial transcripts contradict Mr. Westling's entire testimony. Mr. Westling led Mr. Kokal through his testimony, "step-by-step" and Mr. Westling, during his closing, argued that Mr. Kokal was truthful and provided the jury with reasons why **he** believed Mr. Kokal and thus, why they should believe Mr. Kokal, too. (T. 714 -745; 681-688). For instance, Mr. Westling argued that the physical evidence supported Mr. Kokal's testimony. The transcript clearly refutes the reliability of Mr. Westling's testimony. See also Initial Brief at 11-19.

Contrary to Appellee's assertions, Mr. Kokal did not default

the opportunity to present evidence that Mr. Westling's testimony in 1997 is unreliable. (Answer Brief at 46, fn. 21). Record evidence existed to refute Mr. Westling's testimony and Mr. Kokal urged the circuit court to consider this evidence as well as Hutto's testimony when analyzing the value of Mr. Westling's testimony in 1997. Mr. Kokal's counsel argued:

> The biggest problem with the whole Westling-Kokal-confessed idea is that Mr. Westling lied during that hearing. Bald faced. Because he said I knew he was lying when he was on the stand, so all I did was put him on the stand and I asked him what happened. Because I knew that I couldn't get in there and ask him specific questions and vouch for his credibility.
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> * * *
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> . . . He asked probably 55, 60 questions. It goes on for pages. This is not what happened. This is a carefully orchestrated presentation by a defendant of a claim of innocence, saying Mr. O'Kelly was the triggerman, with the attorney vouching for it.

(PC-R3. 490-491). Also, Appellee's claim that the State encouraged Mr. Kokal to present evidence is refuted by the fact that the State argued that Mr. Kokal was not entitled to present his newly discovered evidence and request that the court summarily deny Mr. Kokal's claim. (PC-R3. 427, 445-446).

In regard to the effect of Hutto's testimony, Appellee argues that "Hutto's testimony is mere hearsay" and provides only impeachment evidence. (Answer Brief at 50, 51). Mr. Hutto's

testimony should be received as substantive evidence because it is admissible as a statement against interest and under Chambers v. Mississippi, 410 U.S. 284 (1973).

In Chambers, the United States Supreme Court permitted hearsay evidence of a confession to be admitted as substantive evidence based on four (4) factors. 410 U.S. 284, 300-301. Those factors included: 1) each confession was made spontaneously to a close acquaintance shortly after the murder occurred; 2) each confession was corroborated by some other evidence in the case; 3) each confession was self-incriminatory; and 4) if there was any question as to the truthfulness of the statements, the declarant was available for cross-examination. Id. Likewise in Mr. Kokal's case, O'Kelly confessed to Hutto while they incarcerated together pretrial, after the Russell homicide and again in 1984 when they were incarcerated in the Department of Corrections together. (PC-R3. 537). Also, O'Kelly's confession to Hutto is corroborated by the physical evidence and O'Kelly's letter written at trial that he was the shooter. O'Kelly's confession was certainly incriminating in that he was the actual shooter and instigator in the homicide.[9] Thus, Hutto's testimony would meet the factors set forth in Chambers.

[9] Whether O'Kelly would be available at a retrial is uncertain. In Kight, O'Kelly testified, but he only traveled to Florida because he was under court order and the threat of spending six (6) months in jail if he did not appear. (PC-R3. Supp. 239).

Furthermore, in Robinson v. State, this Court held: "We agree with the district court that impeachment evidence could be part of this cumulative analysis, as this Court stated in Jones I, Jones II, and Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994)." 770 So. 2d 1167, 1170-1171 (Fla. 2000). Most recently, in State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court affirmed the lower court's grant of relief based on newly discovered evidence. The newly discovered evidence at issue was the testimony of an inmate who had been incarcerated with Mr. Mills' co-defendant, Ashley, in 1980 and obtained a confession from Ashley. Id. at 250. The testimony was impeachment evidence of Ashley. Id. Therefore, Mr. Hutto's testimony, even if only considered to be impeachment of Mr. O'Kelly is sufficient to overturn Mr. Kokal's conviction and/or sentence.

Appellee also argues that the lower court did consider Hutto's testimony when analyzing whether or not Mr. Kokal was entitled to a new penalty phase. (Answer at 52). Appellee points out that in the title of the order the court uses the expression "Motion to Vacate Judgment and Sentence", "[t]hus Judge Carithers ruled on Kokal's claim as to sentence." (Answer Brief at 52). Appellee's argument is ridiculous.

Nowhere in the order does the court ever discuss how Hutto's testimony impacts Mr. Kokal's sentence of death.

Further, Appellee suggests that Mr. Kokal is at fault for the court's failure to address this issue. (Answer Brief at 52). However, Mr. Kokal comprehensively and specifically addressed O'Kelly's confession and the effect on Mr. Kokal's sentence in his amended Rule 3.850 motion and again in his written closing argument. (PC-R3. 173-176, 353-364).[10] Mr. Kokal specifically pointed out that the verdict form indicated that the jury found Mr. Kokal was the shooter, (PC-R3. 173), and he argued that O'Kelly's confession was significant to this finding in addition to several others. Therefore, the court's failure to address this aspect of Mr. Kokal's claim was error that cannot be ascribed to Mr. Kokal and requires that his case be remanded so that the circuit court can conduct the appropriate analysis.

Also, Appellee urges this Court to adopt the circuit court's analysis as to the guilt phase issues in order to deny Mr. Kokal's claim for relief as to the penalty phase. (Answer

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[10] Appellee's suggestion that Mr. Kokal waived his argument because he did not include the sentencing issue in his Motion for Rehearing and their reliance on Morrison v. State, is disingenuous and specious, at best. Mr. Kokal litigated his claim in the circuit court and preserved the issue for review.

Brief at 52)(“These reasons are more than adequate to demonstrate that Hutto’s testimony would not, and could not, probably result in a life sentence.”). But, while the Jones standard also applies to the sentencing phase, the effect of O’Kelly’s confession implicates several aspects of the sentencing phase.

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). If this is untrue, 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 O'Kelly, and did so either from a premeditated design or in the course of a robbery. (R. 246-247). The newly discovered evidence would have also affected the trial court’s Enmund analysis. Enmund v. Florida, 458 U.S. 782 (1982). O'Kelly's confession proves that the Enmund analysis performed by the jury and sentencing judge was factually flawed and thus incorrect. 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, 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). O'Kelly's confession defeats or dilutes the court's finding that Mr. Kokal was an accomplice to a robbery. (R. 254). 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.

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

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

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.[11]

The circuit court did not consider the newly discovered evidence in light of the mitigation presented at trial and at the 1997 evidentiary hearing to determine whether Mr. Kokal is entitled to relief under a cumulative analysis.

Issues about proportionality and disparate sentencing were also overlooked by the circuit court.

Thus, Appellee's argument that this Court can adopt the analysis performed by the circuit court in regards to the guilt phase overlooks the range of issues which must be addressed by the circuit court in regards to the sentencing phase.

The circuit court erred in failing to consider the effect of Hutto's testimony in regards to Mr. Kokal's penalty phase issues. Further, the circuit court erred in not finding that Hutto's testimony would not probably have produced an acquittal. Relief is proper.

ARGUMENT III

Appellee correctly states that: "It is well settled that [a claim that previous postconviction counsel rendered ineffective assistance] 'does not state a valid basis for

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[11] Appellee gratuitously mentions that Mr. Kokal was "in fact an accomplished criminal at age 20." Mr. Kokal had no prior violent criminal history and no aggravator based on prior criminal convictions. (R. 254-257).

relief." (Answer Brief at 54)(quoting King v. State, 808 So. 2d 1237 (Fla. 2002). However, equally settled, and the basis of Mr. Kokal's claim is that by statute Mr. Kokal is entitled to effective representation from his state appointed counsel throughout his postconviction proceedings. See Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988); Graham v. State, 372 So. 2d 1363 (Fla. 1979).

In Spaziano v. State, this Court 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. 660 So. 2d 1363, 1369-1370 (Fla. 1995) (discussing capabilities of attorney who was not employed by the Capital Collateral Representative (CCR)). Thus, at the time that Mr. Morrow assumed responsibility for representing Mr. Kokal, this Court had explicitly acknowledged the need for effective representation in capital postconviction proceedings. Id.

Mr. Kokal's collateral counsel throughout the history of his postconviction litigation was counsel provided by the State of Florida pursuant to Fla. Stat. §27.702 and §27.703. In Spalding v. Dugger, 526 So.2d 71, 72 (Fla. 1988), this Court stated:

> 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. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings.

Thus, Mr. Kokal was not only provided counsel by the State of Florida, but he was also provided with the right "to effective legal representation" by his collateral counsel.[12]

Where the State of Florida extends a right, the right may only be extinguished in a manner that comports with due process. This was explained by the United States Supreme Court in Evitts v. Lucey, 469 U.S. 387 (1985). There, the Court noted that the States were not required to provide a right to a direct appeal of a criminal conviction. However, where the right was nonetheless extended, due process protection attached:

> The right to appeal would be unique among state actions if it could be withdrawn

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[12] Mr. Morrow was appointed to represent Mr. Kokal in 1996 pursuant to Florida Statute §27.703. (PC-R2. Supp. Vol. VIII, 564-565). That, Spalding applies to state appointed conflict attorneys is without question. Recently, in determining the obligations of attorneys appointed to represent postconviction defendants pursuant to the Registry Act, Fla. Stat. §27.711, this Court held: "Because the Legislature created this registry of attorneys to alleviate CCRC's workload, it is clear that registry attorneys stand in a position similar to CCRC lawyers." Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002). Likewise, an attorney appointed to represent Mr. Kokal due to a conflict with CCR is obligated to provide effective representation.

> without consideration of applicable due process norms. For instance, although a State may chose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.

Evitts, 469 U.S. at 400-01. See also Ford v. Wainwright, 477 U.S. 399, 428-429 (1986)("[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.").

This Court need look no further than the record on appeal which contains the pleadings and transcripts from Mr. Kokal's initial Rule 3.850 proceedings to determine that Mr. Kokal did not receive the effective assistance of counsel during his initial Rule 3.850 proceedings. See Kokal v. State, Appeal No. 90,622.

Appellee focuses on Mr. Kokal's contention that his trial attorney was not properly examined during his evidentiary hearing. (Answer Brief at 55). Mr. Morrow's ineffective performance allowed Mr. Kokal's trial attorney, Mr. Westling, to discuss an alleged confession he claimed he obtained from Mr. Kokal. However, while the trial transcript completely undermines Mr. Westling's testimony at the evidentiary hearing, Mr. Morrow never confronted Mr. Westling with his

blatant misrepresentation to the court during his testimony. Mr. Kokal maintains that the testimony regarding his alleged confession is false, but this is only one instance of postconviction counsel Morrow's failure to effectively represent Mr. Kokal.

Appellee argues that nothing prohibited Mr. Kokal from presenting testimony to refute the evidence presented at his 1997 evidentiary hearing. (Answer Brief at 55). However, the circuit court's order following the Huff hearing specifically limited the scope of the evidentiary hearing to Mr. Kokal's newly discovered evidence claim and specifically denied Mr. Kokal a hearing on his ineffective assistance of postconviction counsel claim. (PC-R3. 265-267). Additionally, Appellee argued throughout the proceedings in the circuit court that Mr. Kokal's claim should be summarily denied. (PC-R3. 492-493).

Further, Appellee's assertion that Mr. Kokal chose not to attempt to discredit his trial attorney's testimony regarding his alleged confession is belied by the record. Mr. Kokal urged the circuit court to consider the trial transcript which proved that Mr. Westling was untruthful during his testimony at the evidentiary hearing. (PC-R3. 490-491). Mr. Kokal also pleaded that Mr. Westling's defensive demeanor and open

hostility toward both his former client and CCR suggested that he lacked any credibility and was only trying to rebut what he characterized as an "attack" by CCR. (PC-R2. 533).

Mr. Kokal informed the circuit court that Mr. Westling's testimony that CCR had stolen all of his trial notes and memorandum and destroyed his file was patently false and could have been disproved by calling a single witness to rebut this claim. (PC-R2. 543, 555, 600). Instead, Mr. Morrow simply agreed that neither he nor Mr. Westling had 2/3 of the trial file. (PC-R2. 593-594). Thus, 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.

Additionally, Mr. Kokal urged the circuit court to consider all of the evidence CCR developed, including the extensive background material compiled which supported Mr. Kokal's claims and none of which were presented at the 1997 evidentiary hearing.

Mr. Kokal specifically pleaded the errors of commission and omission by his postconviction attorney, including the fact that, without consulting his client, Mr. Morrow waived claims which the circuit court had already deemed meritorious and about which an evidentiary hearing was scheduled. (PC-R2.

Supp. Vol III). Mr. Morrow's actions caused the court to enter 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. Mr. Morrow also waived the deposition of the trial attorney.

Mr. Kokal argued that CCR prepared a Rule 3.850 motion on his behalf which contained in excess of 200 pages of allegations; the appendix comprised in excess of 1300 pages, yet Mr. Morrow agreed to present Mr. Kokal's claims at an evidentiary hearing 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).

In his successive Rule 3.850 motion, Mr. Kokal also provided the circuit court with specific examples of Mr. Morrow's blatant incompetence and lack of preparation, including the fact that Mr. Morrow failed to qualify Mr. Kokal's neuropsychologist as an expert during the hearing and failed to elicit the bases for the neuropsychologists findings

(PC-R2. 315-319; 489-490). Additionally, without explanation, Mr. Morrow failed to present the testimony of Dr. Robert Fox, a psychiatrist obtained by CCR who made significant, helpful findings regarding Mr. Kokal's mental health, including statutory and non-statutory mental health mitigating factors.

Further, in attempting to illustrate Mr. Morrow's ineffectiveness, Mr. Kokal reminded the circuit court that Mr. Westling admitted that he completely neglected 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). In preparing for the penalty phase, trial counsel asked Mrs. Kokal:

> 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).

It is clear that 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).

Mr. Kokal also reminded the circuit court, that in denying relief, the court ruled that Kokal had failed to adduce any evidence of prejudice regarding the deficient penalty phase. ("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). Mr. Kokal urged the circuit court to allow him the opportunity to prove the prejudice he suffered at trial and during his evidentiary hearing. Had he been allowed to present the testimony and evidence that Mr. Morrow failed to present during his evidentiary hearing, there is no doubt that the circuit court would have determined that Mr. Kokal was prejudiced by his trial counsel's failure to provide effective assistance of counsel.

Appellee's position that Mr. Kokal failed to provide the circuit court with examples of Mr. Morrow's incompetence and the resulting prejudice are disproved by the record.

Mr. Kokal relied upon the State to insure that he received his state-created right to effective collateral counsel. Because the State failed to provide Mr. Kokal with the effective assistance of counsel to which he was statutorily entitled and which was denied him without due process, he must be granted a full and fair hearing in order to present the extensive evidence he asserted in his initial postconviction proceedings.

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. The denial of Mr. Kokal's initial Rule 3.850 motion was not fair, consistent or reliable due to the failure to provide him with an effective postconviction attorney. Relief is proper.

CONCLUSION

The circuit court's order denying Mr. Kokal's motion to disqualify and his newly discovered evidence claim is not supported by the record. Mr. Kokal did not receive a full and fair evidentiary hearing before an impartial arbiter. The evidence establishing Mr. Kokal's newly discovered evidence claim entitled him to relief Further, Mr. Kokal was entitled to an evidentiary hearing on his claim that he did not receive the effective assistance of counsel during his initial postconviction proceedings. Prejudice is apparent from the record and he must receive a full and fair evidentiary hearing on his initial Rule 3.850 motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Curtis French, Assistant Attorney General, The Capitol - PL-01, Tallahassee, FL 32399, on July 8, 2002.

CERTIFICATION OF TYPE SIZE AND STYLE

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