IN THE SUPREME COURT OF FLORIDA

GREGORY ALLEN KOKAL,

Appellant,

v. CASE NO. SCO1-882

STATE OF FLORIDA,

Appellee.

_____/

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATE'S RECORD CITATION FORMAT IN THIS BRIEF

This supplemental brief addresses issues arising out of the denial of relief in the proceedings on remand. The supplemental record of the remand proceedings consists of two volumes. This two-volume record supplements the three volumes and two supplemental volumes of record already filed in this case. The State will cite to the three original record volumes as "R," to the initial two supplemental volumes as "Supp R," and to the two post-remand supplemental volumes as "Remand."

In addition, if necessary, the State will reference the original trial record as "TR," and the record on appeal from the denial of relief on Kokal's initial motion for postconviction relief (FSC case no. 90,622, affirmed on appeal in Kokal v. Dugger, 718 So.2d 138 (Fla. 1998)), as "PCR" or "Supp PCR."[1]

STATE REJECTS DEFENSE STATEMENT OF CASE AND FACTS

The State cannot accept Kokal's "Supplemental Statement of the Case and Facts," or matters of "fact" set out in Kokal's argument on his first issue. Kokal's factual assertions are inaccurate, misleading and incomplete. More specifically, the State objects to appellate counsel's practice of citing her own

[1] This citation format is consistent with that used by the State in its Answer Brief filed May 2, 2002, with the addition of citation to the record the proceedings on remand. See Answer Brief of Appellee, "Preliminary Statement," at p. 1.

oral or written comments and allegations as established "fact." Allegations are not evidence, and comments by counsel do not constitute proof. As will be demonstrated, the actual "evidence" presented below consists of one witness and one exhibit. Many, if not most, of the "facts" asserted by Kokal in his brief are unsupported by evidence or testimony. The State will present its own Statement of the Case and Facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

This supplemental statement of the case and facts is offered in addition to that set out in the State's original answer brief, filed in this Court on May 2, 2002. Kokal appealed to this Court from the denial of his successive motion for postconviction relief which alleged, inter alia, newly-discovered evidence of innocence, based, primarily, on the testimony of Gary Hutto. On October 3, 2002, shortly before oral argument was scheduled in this case, Kokal filed a motion to hold oral argument in abeyance so that he could pursue DNA testing in the circuit court. On October 31, 2002, this Court granted Kokal's motion, and temporarily relinquished jurisdiction to the circuit court for resolution of the DNA issue.

By way of background, the DNA issue first arose on April 6, 2000, when Kokal's postconviction counsel, then Andrew Thomas of

CCR-North, filed a motion to conduct DNA comparison testing of blood on Kokal's tennis shoes and the victim's blood (2R 237-242).[2] In this motion, Mr. Thomas asserted that he was

> currently unaware of the location and condition of the sneakers and vial of [the victim's] blood obtained during autopsy for comparison purposes, but believes this evidence is either in the custody of the Clerk of Court or in the custody of the Jacksonville Sheriff's Office.

(2R 238). Mr. Thomas referenced this motion six months later, at the conclusion of the Huff hearing on September 12, 2000, stating that "at this point I still don't know what they have or what they don't have," because "I haven't had an opportunity to send my investigator over there" (3R 495). Mr. Thomas asked the court for an order directing the Duval County Sheriff's Department to cooperate by showing them Kokal's shoes so "we can inspect them and make a determination whether they are subject to testing" (3R 495-96). Assistant State Attorney Laura Starrett suggested that since the shoes were admitted in evidence, the clerk's office would have them, not the Sheriff (3R 496). Mr. Thomas acknowledged that the clerk's office was the likely location and stated that he would "have no problem looking at anything" there (3R 496).

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[2] Testimony was presented at trial that the victim's blood was type B (7TR 635), and that the blood on Kokal's tennis shoes was also type B human blood (7TR 636-37).

One month later, Mr. Thomas again broached the issue of DNA at the outset of the October 31, 2000, evidentiary hearing, noting that he had inspected "the evidence" that morning, "pursuant to the discussions that we had previously on the motion for DNA testing," and "it is available" (4R 514). He stated:

> It is very difficult with the naked eye to find out how much volume of any substance is on the tennis shoes. But they are available.
>
> But I would ask that they be tested and that the test results be made available to the court prior to ruling on the instant motion.
>
> My replacement on this case, as you know, this is my last day, is Linda McDermott. She will be counsel of record for Mr. Kokal in the future.
>
> She is familiar with the chain of custody and labs and the Florida Department of Law Enforcement and DNA testing.
>
> So, we would ask for leave for *her to contact the clerk* and the state and try to arrange for that to take place.

(4R 515) (emphasis supplied). The State had no objection to a DNA analysis, but Assistant State Attorney Laura Starrett did suggest that the court "set some kind of time limit," so that the DNA issue would not "drag on forever" (4R 516-17).

At the conclusion of the testimony at the evidentiary hearing, the subject of DNA testing came up again, in the context of whether or not it the evidence should be held open

pending the results of testing or should be the subject of a separate motion. Mr. Thomas suggested that it would be more appropriate to resolve the DNA issue in the context of the instant hearing. Undersigned counsel, speaking for the State, agreed, noting that if (as the State expected) the DNA analysis showed the blood to be the victim's, the court could consider that in resolving Kokal's claim of newly discovered evidence of innocence (4R 569-70). Undersigned counsel, however, did question why Mr. Thomas had "waited so long on this because this was brought up many months ago," and the State had "never opposed their looking at it" (4R 569). The court directed the State to consult with Ms. McDermott at the earliest opportunity and attempt to come to some agreement about who would conduct the testing and about a "timetable" for concluding the analysis (4R 571-74). The court agreed that it would leave the evidence open "until we find out something about the DNA," but stated: "I just don't want to leave the DNA issue hanging out there and never getting the answer" (4R 574).

On December 15, 2000 (a month and a half after the conclusion of the evidentiary hearing), Judge Carithers held a status conference on the DNA issue (4R 577 et seq). At this juncture, Ms. McDermott still did not know if Kokal's sneakers had enough blood on them to analyze for DNA, but claimed to have

"quite a bit of work" finding someone who could come to Jacksonville and look at the evidence to make that determination (4R 579-80). She had located someone "yesterday," who was out of town (4R 580). Undersigned counsel expressed some confusion about "what is going on here," because Ms. McDermott had referenced only the shoes and there might be "nothing to compare [the shoe DNA] to, unless Ms. McDermott has found something" (4R 581).

Ms. McDermott stated that she had just talked to her expert the day before, and needed additional time to determine if there was sufficient blood on the shoes to allow for a DNA analysis (4R 580, 582). Further, "at this point" (some eight months after the DNA issue had first arisen) she had not yet determined if any comparison sample existed (4R 582).

Assistant State Attorney Starett noted that "normally when you ask to examine something, you have like some goal in mind" (4R 583). Starrett asserted that no blood samples of the victim now existed (4R 584), and that, if "we don't have the victim's blood, which we definitely do not have, I'm not really sure where we are going with this, or what you're looking for (4R 583).

Undersigned counsel expressed his "understanding" that Ms. McDermott "was going to investigate" to determine whether "there

might be anything else" containing the victim's genetic material that could be used for comparison purposes (4R 587). Ms. McDermott, noting that normally evidence in a capital case would be "maintained until the individual either gets released or is executed," stated that, at some point, she would want to inquire further about the absence of a blood sample from the victim; however, she first wanted to determine whether or not "the shoes have any value" (4R 584-85). The court agreed that the first issue would be the question of whether or not the shoes had sufficient material to be tested, stating:

> Well, I can envision many months of litigation over what happened to the alleged samples, if they ever existed, if in fact we start worrying about that issue first.
>
> If we don't have anything on the shoes from which a sample can be taken, that's going to be the end of the issue.
>
> So why don't we allow [the defense expert] to come next week to look at the shoes in the company of an investigator designated by Ms. Starrett from the Office of the State Attorney.

(4R 588). The parties agreed (4R 588).

A month after the conclusion of this status conference, Ms. McDermott informed the court by letter dated January 17, 2001 that, after reviewing FDLE reports and "based upon the State's representation that the victim's blood sample has been destroyed," the defense would not conduct any testing (2R 332).

The Court thereafter cancelled the status conference scheduled for February 1, 2001, and ordered the parties to submit post-evidentiary-hearing written closing arguments (4R 333). By written order dated February 12, 2001, the circuit court issued a final judgment denying all relief on Kokal's 3.850 motion.

Kokal appealed to this Court. The parties submitted briefs and the case was scheduled for oral argument. However, on October 31, 2002, this Court granted Kokal's motion to relinquish jurisdiction to the circuit court for further pursuit of the DNA issue.

The circuit court held a status conference on November 13, 2002. The court stated its surprise at the defense motion for DNA testing, because it was the court's recollection that there had not been sufficient substance on the shoes to test for DNA and that the DNA issue had been completely resolved (Remand 149-50). Ms. McDermott stated that her expert had determined that the shoes could be tested, but that she had not looked for a comparison sample after "the state" told her there was no comparison sample (Remand 150). She stated that recently she had "decided to ... review all my cases" to determine which ones might have potential DNA issues, and so had journeyed to Jacksonville and

> reviewed all my Jacksonville cases in the Clerk's Office and in doing that I came upon the blood sample

> that is in the Clerk's Office and apparently has been there now for several years that we all just missed back in December of 2000.

(Remand 150-51). Ms. McDermott explained:

> Well, Judge, when I inspected the evidence, it's actually a tube of [the victim's] blood that is contained in a little manila envelope and I guess that's why it didn't strike me as being anything odd when I saw it because it's sort of - it wasn't on the - it wasn't like sticking out of anything and I didn't - it's on the envelope. It doesn't - I don't think it says what it is so it's actually a whole full tube of blood that is in the Clerk's - in that box in the Clerk's Office. . . . I believe the sample when it was - when it was retrieved from the victim it didn't have - he didn't have - they hadn't identified him yet what I am trying to say, to on the tube it has a case number and it doesn't have the identity of the victim but I think from what I recall it's pretty conclusive it's the victim's blood. You can deduct that from what it says on the blood sample.

(Remand 151-52). Assistant State Attorney Mark Borello stated that he had checked with the Clerk's Office the day before, and it was his understanding that the clerk did have such a tube of blood (Remand 153). Asked if the State had any objection to the requested DNA analysis, undersigned counsel stated:

> MR. FRENCH: . . . What the defendant filed of course was the motion to hold oral argument in abeyance[.] [T]o explain the circumstances, [defense counsel] tried to excuse the delay in discovering there was a sample of the victim in the Clerk's Office, by reference [to the assertion] by Laura Starrett that the blood sample of the victim did not exist, and I have never been in the Clerk's Office myself. I personally have no idea what's there and what's not.

> I don’t know why Ms. Starrett made that statement or what she looked at or what she was referring to exactly. My own feeling is that really doesn’t excuse the defense from - for their failure to go down there and carefully check the Clerk’s Office and see if in fact the blood sample of the victim did exist.
>
> In addition, when it came up I recall there were a number of discussions, and this is on the record, about the first step was going to be to determine whether or not there was enough blood on the shoe to make a comparison. To my knowledge, that first step was never undertaken and I still don’t know if there is enough blood on the shoe to conduct an evaluation. Maybe there is and maybe there isn’t.
>
> THE COURT: Ms. McDermott is indicating that she thinks there is. My recollection is that we were told that there was not, but there either is or there isn’t.
>
> MR. FRENCH: Honestly, Judge, I don’t recall them saying one way or the other, and maybe I was just assuming that they had determined they had not made the determination one way or the other. At any rate, we argued lack of diligence in our response to the Florida Supreme Court and of course there are some factual issues on that and Ms. McDermott took issue with some of the facts I stated, and I can take issue with some of hers and we can litigate that.
>
> Frankly, at this point I would just a[s] soon go ahead and conduct the analysis. I think they waited much too long. I think they should have done this a long time ago[.] [A]t the same time[,] [f]rankly I think it can only help us, and my understanding [is] Mr. Borello has talked with the FDLE and they can give this priority and have the analysis conducted within a month or so, and my vote would be to just go ahead and do that.

(Remand 153-55). The court deemed that a reasonable suggestion, noting that, in view of the State’s agreement to conduct DNA testing, no evidentiary hearing on diligence would be required

and the court could simply enter an order for the DNA testing of the shoe and the victim's blood sample (Remand 156). On November 25, 2002, the court issued such written order (Remand 22-24).

On April 14, 2003, Ms. McDermott filed on Kokal's behalf a motion for evidentiary hearing. In this motion, Ms. McDermott asserted the following: (1) she had spoken to FDLE analyst Sherie Enfinger, who had told her that the victim's blood sample could not "be tested due to the condition of the sample"; (2) analyst Enfinger had told her "she believed" a sample of the victim's saliva was "maintained" by the Jacksonville Sheriff's Office, and that such sample "would be adequate for testing"; (3) on March 7, 2003, the court had entered an order to release evidence from the sheriff's office to FDLE;[3] (4) on March 27, 2003, Lieutenant Burt of the sheriff's office informed the court that it did not have the "evidence in question." Ms. McDermott requested "an evidentiary hearing to determine where the evidence obtained in the Russell homicide investigation is located, or why such evidence was destroyed. (Remand 25-27).

On June 12, 2003, the court held a status conference. The court noted the pending motion for evidentiary hearing, but

[3] No such order appears in the supplemental record on appeal.

stated it was "not exactly sure what it is" that Ms. McDermott was asking for a hearing on; the court was unaware of "any other pending motion." Rather than attempt to summarize the colloquy that ensued, the State will set it out in its entirety:

> MS. MCDERMOTT: Judge what I was filing a motion regarding was the letter that your received from Sheriff Glover, former Sheriff Glover on March 27th which stated that he didn't have the evidence relating to Mr. Kokal's case that should be maintained by the Sheriff's Office, that he didn't have that evidence and he provided no explanation for that, and certainly there is case law that if that evidence was destroyed intentionally or something was done with that there may be constitutional claims that would arise from such an issue and so therefore originally I had asked for an evidentiary hearing on the matter and then after the State didn't object and in retrospect kind of rethought it and though perhaps the better way to do it would be to take a deposition of the evidence custodian and apparently the State has objected to that procedure.
>
> So I guess now I am back in my position of saying, well, at a minimum then we should be provided an evidentiary hearing to determine what happened to this evidence because we still want to go forward with the DNA testing and the FDLE analyst believes that there should be a saliva sample that would be testable in its current state and so I need to try to find that so that I can provide it to them.
>
> THE COURT: Well, that would - my simply holding a hearing on that would kind of put me in the unique position of being the investigator in the case, I believe. If you had a pending substantive motion on which I could rule I could hold a hearing on such a motion without getting into the substance of what your are talking about. I think I would need to have a specific motion to hold a hearing on and you could present testimony at that time if you wanted to.

My understanding is that the Sheriff's Office says they simply turned all the evidence over to the Clerk's Office.

MS. MCDERMOTT: Well, Judge, with all due respect, that simply is just not true. I have examined the evidence. They have what was introduced at trial, and I think all of us would agree that it's customary for the Sheriff's Office to maintain evidence that is not introduced during the trial in all of the counties in this State and that's been my experience in dealing with these issues in other cases.

So for them to just simply say we don't have the evidence and provide absolutely no explanation for that when I have reports that show that they did in fact have the evidence at one point, and I am referring to a FDLE report that I think I had attached to my DNA motion which was dated back in - let's see, in October of 1983 where it lists all of the items - I am sorry, May of 1984 it listed all of the items from FDLE, what was tested, what the results were and at the conclusion it directed to the Jacksonville Sheriff's Office and told them the evidence is available for you to come and pick up, and we know that they did that because that evidence - some of this evidence was put into evidence during the trial.

MR. FRENCH: Your Honor, may I interject here? First of all, Ms. McDermott suggested that we all agree that the sheriff's policy is this and this and this, and for the record I don't agree to anything because I don't know what the Sheriff typically does [with] evidence and where it typically goes and I don't know what the Sheriff did with it, and we have not objected to having a hearing on this.

I am not sure what we are having a hearing on, and the State would tend to agree with the Court that Ms. McDermott ought to file a motion, state what she is claiming, and let her try to prove that, whatever it is.

I have one other thing to bring up, too, and that's the Supreme Court of Florida on May 30th ordered the parties to submit status reports. I just got that

a couple of days ago and Ms. McDermott hasn't replied to that and had filed a status report. Paragraph two of that status report states undersigned has proposed rather than having an evidentiary hearing the party depose persons responsible for JSO. The lower court has authorized this action.

I am unaware that this Court has authorized that action, and if I understand what you said earlier correctly I don't think the Court has authorized that action. I was just wondering if that's correct.

THE COURT: Well, it's the first I have heard of it.

MS. MCDERMOTT: I can explain something for the record because I thing it needs to be clear. When I was contacted by your judicial assistant towards the end of May, I think it was on May 23rd, although my date may be off, I can't find my notes from that conversation, I suggested to her that rather than have an evidentiary hearing I would suggest and I would contact the State and see if it was - it would be more efficient to just take a deposition of the records custodian of the Jacksonville Sheriff's Office to determine what exactly happened to the evidence before filing a motion saying that there was any wrongdoing, which I don't know that there was, and your judicial assistant returned that call and contacted me and told me that would be fine with you so that is why I represented that to the Florida Supreme Court, and it was after that that the state attorney objected to the idea of taking depositions, which I am not really clear on why they would not object to having a hearing but they would object to taking depositions.

It doesn't seem to make sense to me, and also those status reports - I am required to file status reports every 30 days with the Florida Supreme Court. That was in the course of those status reports. It wasn't in response to the May 30th order from the Supreme Court, and I will be filing another status report on June 20th in response to that.

THE COURT: Well, I am not in the habit of having ex-parte communications directly or through my

assistant and I would hope you would disregard anything she may have told you in that vein. I certainly haven't taken a position on whether or not your should take depositions.

Getting beyond that, Mr. French, what would be your objection to her deposing -

MR. FRENCH: Just in general there is no provision for discovery in post-conviction, although the Court has the discretion to allow it. I guess the State's position is I am not sure why we would - our concern is that we would have to do depositions, you know, and then have a hearing, too, and I am not sure what the point of that is.

If Ms. McDermott wants to find out from the Sheriff what happened just ask them, and apparently she has asked them and they have given her an answer that she is not satisfied with. I just - the State doesn't see the point in the depositions, and if Ms. McDermott wants to have a hearing the State doesn't object to that. That's our position, anyway.

THE COURT: Well, it seems to me she is saying she doesn't want to just file a willy-nilly motion without doing investigation prior to doing it, and I think that would be an appropriate position for her in this matter. I know there is an issue as to whether or not there ever was a saliva exemplar as well in your motion for evidentiary hearing filed April 16th. Ms. McDermott, there is some oblique reference to that.

["]Analyst Enfinger informed post-conviction counsel that she believed a sample of the victim's saliva was maintained by the JSO and that the sample would be adequate for testing.["] I would certainly want to explore that as to why she believes that, whether she knew it or whether it was conjecture on her part and so forth.

MS. MCDERMOTT: Well, I can fax your Honor the report that shows that there was an oral swab taken from the victim.

THE COURT: Okay.

MS. MCDERMOTT: And I think that that's the report that she was relying on.

THE COURT: Okay.

MS. MCDERMOTT: To make that assertion to me which then I confirmed through the report as well and it seemed reasonable that this exists and it's somewhere and we just need to find it so that we can have the DNA testing to which I think we are entitled.

MR. FRENCH: Judge, if I may just say one more thing. The Florida Supreme Court has of course relinquished this case back to this Court to investigate and resolve the DNA issue. The latest order extends the relinquishment through, to an including June 20th, 2003. I guess another concern about the - the state has concerning the depositions is it just seems to us that if we want to go ahead and resolve the issue we have a hearing and resolve it instead of puttering around with the depositions for a while and then - I don't know. I just think we need to bring this thing to a head one way or another and if it takes a hearing to do that then the State would like to do that and just resolve once and for all is there any DNA that can be examined and if there is let's go ahead and examine it, and we have been dealing with this issue for several years.

I am not sure exactly how long but I know it was originally raised even before the evidentiary hearing we had, and I would just note for the record that the State has never had any objection to a DNA analysis and the State has always been willing to provide counsel for Mr. Kokal time to investigate this and to present it and a lot of time has gone by and it hasn't been resolved yet and the State would just like to resolve it.

THE COURT: So you would have me must construe the current motion for evidentiary hearing as being a Motion to Compel the DNA analysis and we could hold a hearing on that motion to determine what, if any, material there is to analyze.

MR. FRENCH: Yes, sir.

> THE COURT: Okay. Do you have a problem with that, Ms. McDermott?
>
> MS. MCDERMOTT: No, Your Honor.
>
> THE COURT: Well, let's proceed in that fashion then and I would ask then that the two of you confer and submit a joint report to the Florida Supreme Court indicating that we intend to as expeditiously as possible hold an evidentiary hearing based upon a Motion to Compel DNA examination and I will certainly work with both of your to set that hearing as soon as we can.

(Remand 167-175).

The requested hearing took place on June 27, 2003. Ms. McDermott called one witness, James L. Burt, a lieutenant with the Jacksonville Sheriff's Office (Remand 190).

Lt. Burt testifed that "[a]round the middle of 1990" he was commanding officer of the property and evidence unit for "about two-and-a-half years" (Remand 190). He was then transferred elsewhere, and then reassigned to the property and evidence unit in August 2002 (Remand 190). Burt explained that when he was first assigned in 1990, the property and evidence room was full, and "the old Christopher building across the street" was being used as an "auxiliary storage site" (Remand 191), even though the sergeant in charge knew the "roof was collapsing" (Remand 192). Burt testified that water got on the evidence stored there every time it rained (Remand 192). Evidence was moved from that building to the "old juvenile detention facility" next

door (Remand 192). Much of the evidence stored in the Christopher building had deteriorated to the point that it no longer had evidentiary value; it had rusted or rotted or been eaten away (Remand 192). Such evidence was discarded rather than moved (Remand 193). The discarded evidence would have been documented on "paper property cards," but such cards no longer exist, as state law only required maintenance of such records for "three or maybe five years" (Remand 193). In September of 1992, everything they still had was entered into a computer database (Remand 192-93). The "saliva sample" sought by Ms. McDermott was never entered into the computer database, so if the Sheriff's Office ever had it, it no longer had it by 1992 (Remand 193, 196). Lieutenant Burt was "100 percent positive" that no saliva sample existed from the original Kokal prosecution (Remand 196). He did not know if the Sheriff's office ever received a saliva sample in this case from FDLE or anyone else; he had no personal knowledge of such, and there are no records in the property room to confirm the receipt of such evidence (Remand 197).

At the conclusion of Burt's testimony, Ms. McDermott told the court:

> Judge, that's all I had for that issue other than just saying I don't know where to proceed from here in terms of - we certainly don't want to abandon this issue but it appears that there is really nothing to

> test, and the blood sample apparently according to the FDLE is not in any condition to test and since we can't track down the saliva sample I think - I don't exactly know where to go from here in terms of our motion.

(Remand 198-99). Ms. McDermott suggested that if she had more time, she could contact an independent lab "just to confirm that if a blood sample was maintained in the Clerk's Office the way it was," it would "be too degraded to do testing on it" (Remand 199).

Undersigned counsel opposed leaving the issue open any longer; in the State's view, that "avenue should have been exhausted by now" (Remand 200). Undersigned counsel stated he was unaware of any purpose for the hearing other than to establish whether or not some testable DNA sample existed; there had been no demonstration that a "saliva sample" ever existed, or that it was ever delivered to the Sheriff's Office; in addition, if it ever existed, it was "quite clear" that does not exist now (Remand 200).[4] And there had been no showing that even if such a sample had been preserved, it would amenable to DNA testing (Remand 200-01). Undersigned counsel stated: "I don't know what other issue Ms. McDermott might by trying to make out

[4] Exhibit 1, admitted as a business record, indicates that an "oral swab" was taken from the victim, that the "oral swab" tested negative for the presence of semen, and that the "oral swab" was being retained by the FDLE, but could be reclaimed by the Sheriff's Office.

of this, none that I'm aware of, but in terms of whether or not we can conduct a DNA analysis now the answer appears to be no" (Remand 202).

The circuit court stated, "In terms of future lab activity, Ms. McDermott, I don't know what you might propose to do at this point," but the court would issue "an order in the near future as to this particular motion" (Remand 204). The court asked her if she had "Anything else on that subject?" (Remand 204). She answered, "No, Your Honor" (Remand 204).

On July 2, 2003, the court issued an order on Kokal's motion for DNA testing, finding: (1) the victim's blood sample which Kokal sought to test had degraded to such extent that DNA testing was not possible; (2) an oral swab taken from the victim after his death no longer existed; (3) because no physical evidence existed to support a DNA comparison, the court could not determine if the results of such testing would be admissible at any retrial; and (4) even if it could be have been shown that the blood on Kokal's tennis shoes was not that of the victim, it was not reasonably probable that Kokal would have been acquitted or received a lesser sentence in view of the overwhelming evidence of guilt, including his own admissions of guilt of the crime for which he was convicted (Remand 81-82).

On August 4, 2003, Ms. McDermott filed a notice of appeal. Almost one month after filing the notice of appeal, on September 2, 2003, Ms. McDermott filed with the clerk of circuit court a letter dated August 22, 2003, purporting to have been written by James D. Martin, FDLE Assistant General Counsel, asserting that the oral swab taken from the victim in this case was returned to the Sheriff's Office in October of 1984 (Remand 129-131). The State moved to strike this filing, noting that the evidence was closed, and Ms. McDermott had not sought to reopen it and, further, that the letter was neither a pleading, nor a motion, nor filed in connection with any pleading or motion (Remand 138-42). Ms. McDermott responded that the "letter is not being offered as evidence," but as "information" relating to Kokal's case (Remand 144).

In addition to the DNA issue, Kokal raised in circuit court a claim under Ring v. Arizona, 536 U.S. 584 (2002), by way of a June 16, 2003 successive motion for postconviction relief (Remand 39-57). The State filed its response on June 27, 2003, and the parties thereafter presented argument and proposed orders. On July 16, 2003, the circuit court summarily denied relief (Remand 84-6).

SUMMARY OF SUPPLEMENTAL ARGUMENT

Kokal makes supplemental argument on two issues:

Issue 1. Kokal failed to present below a claim that the State violated his due process rights by failing to preserve evidence for a DNA analysis some 20 years after the evidence was first collected. He has no right to present such a claim for the first time on appeal.

Moreover, the evidence presented utterly fails to support such a claim. There are two alleged samples at issue: the tube of the victim's blood allegedly found in the custody of the Clerk of Court (although no actual evidence was presented to establish this), and an oral swab (which Kokal insists on calling a saliva sample despite the lack of any evidence showing that any saliva was recovered from the deceased victim's mouth).

Kokal has failed to present any evidence to support an allegation that the Clerk of Court was even negligent, much less guilty of bad faith, in preserving the blood sample; even if the Clerk could have been charged with the duty to preserve it for two decades in such a way as to allow testing by a process unknown at the time the sample was collected (and Kokal cites no authority for the existence of such a duty), Kokal has failed to establish how the sample should have been stored for future DNA

analysis. No evidence whatsoever has been presented to establish when, or how, the sample became too degraded for analysis, or to establish what, if anything, could have been done to prevent such degradation. Nor has Kokal ever presented evidence establishing that the sample on the shoe was of sufficient size and condition as to be amenable to DNA testing. If not, there would be nothing to compare the victim's blood sample to. If so, one wonders why the tube of blood degraded, but the blood on the shoe did not. In the absence of evidence, we can only speculate about any of this, and speculation is insufficient to warrant relief.

Nor has Kokal presented sufficient evidence to establish a due process violation with regard to the oral swab. While the evidence does suggest that the Sheriff's Office had some evidence stored in an inadequate facility at some time years after Kokal's trial, Kokal has failed to establish that the oral swab was among the items of evidence that were lost due to improper storage. Nor has Kokal presented any evidence whatever that the oral swab taken by FDLE generated sufficient genetic material to support a DNA analysis. All we know about the oral swab is that it contained no traces of semen. Nothing in Exhibit 1 (which is the *only* evidence we have about the oral swab) establishes that any *saliva* was present in the deceased

victim's mouth at the time the swab was taken, or that any saliva *could* be present in a body many hours after death. Finally, even if we assumed, arguendo, that the oral swab was lost due to negligence, the evidence fails to show bad faith.

Kokal's suggestion that this Court abandon the bad-faith standard for evaluating the loss of potentially exculpatory evidence decades after trial is not supported by any authority anywhere. This case does not involve the pre-trial destruction of evidence before the defense had the opportunity to inspect and test it. Kokal has presented no evidence demonstrating that the blood sample or the oral swab were unavailable for defense inspection and testing before trial, and what he proposes - that the State be held to a species of strict liability for failing to maintain every shred of evidence indefinitely in such condition that it could be subjected to tests not even imagined at the time of trial - should be rejected.

Issue II: Kokal's Ring-based attack on Florida's capital sentencing procedure is procedurally barred. Further, Ring is not retroactively applicable Kokal's conviction and sentence, which were final long before Ring was decided. Finally, this Court has consistently held that Florida's capital sentencing procedures are unaffected by Ring.

ARGUMENT

ISSUE I

KOKAL'S DUE PROCESS CLAIM REGARDING THE PRESERVATION OF EVIDENCE FOR DNA TESTING WAS NOT RAISED OR LITIGATED BELOW AND HAS NOT BEEN PRESERVED FOR APPEAL; MOREOVER, THE MINIMAL EVIDENCE PRESENTED BY KOKAL BELOW UTTERLY FAILS TO ESTABLISH STATE MISCONDUCT OR BAD FAITH, AND UTTERLY FAILS TO ESTABLISH THAT HE HAS BEEN HARMED BY ANY DESTRUCTION OR LOSS OF MATERIALLY EXCULPATORY EVIDENCE BY INNOCENT MEANS OR OTHERWISE

Kokal's due process claim of harmful failure to preserve evidence should be rejected for numerous reasons. Kokal failed to raise or litigate this claim below. As a consequence, there are neither findings of fact nor a ruling on this issue by the court below. Nor has the State been given the opportunity to present evidence in rebuttal to any evidence relied on by Kokal as to this issue. Thus, the claim can and should be rejected on the ground that it has not been preserved for appeal. Additionally, however, the claim can be rejected on the merits, because Kokal seeks relief on conjecture and innuendo rather than on evidence, of which there is practically none. Finally, even if we accept Kokal's conjecture and innuendo at face value, and assume that his unsupported factual assertions are true despite the lack of evidentiary support for them, Kokal's showing still falls short of showing the kind of bad faith on the part of one or more state actors as might establish a due process violation. The State shows as follows:

A. KOKAL'S DUE PROCESS CLAIM IS NOT PRESERVED

It is well settled that issues raised on appeal must have been preserved by being properly raised in the court below. *E.g.*, Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987) ("in order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court"). Kokal's present due process claim obviously is one that should have been raised by proper motion in the court below. It clearly was not.

The record does show that Kokal's postconviction counsel contemplated raising such issue. At the June 2003 status conference, Ms. McDermott noted that if "evidence was destroyed intentionally . . . there may be constitutional claims that would arise" (Remand 167). However, she stated she wished to "determine exactly what happened to the evidence before filing a motion saying that there was any wrongdoing" (Remand 171). The absence of any substantive motion was noted by the trial court (Remand 168), undersigned counsel (Remand 170) and by Ms. McDermott herself (Remand 171). The evidentiary hearing was conducted solely to determine "what, if any, material there is to analyze" - a directive agreed to by Ms. McDermott (Remand 175). At no time after the June 2003 status conference did Ms. McDermott raise or assert any due process claim as to the loss

or destruction of evidence. The absence of any pending DNA issues other than whether or not some testable DNA sample existed was expressly noted by undersigned counsel at the conclusion of the evidentiary hearing (Remand 200). Ms. McDermott expressed uncertainty as to "where to go from here," but declined to offer anything else on the subject of DNA when expressly invited to do so by the trial court (Remand 204), and made no due process claim in circuit court thereafter. Kokal's due process claim was raised for the first time on appeal.

Kokal's due process claim was not raised below, and has not been preserved for appeal. It may and should be denied on that basis alone.

B. THE RECORD FAILS TO SHOW THAT KOKAL HAS BEEN DEPRIVED OF MATERIAL EVIDENCE BY ANY ACTION OF THE STATE

Pretermitting for the moment what standard should apply to the loss or destruction of material evidence through state action, Kokal's claim founders on a more fundamental problem: his evidence fails to show that he was deprived of DNA evidence by state action.

Initially, although Kokal has asserted repeatedly that a tube of the victim's blood in the custody of the circuit court clerk's office has been determined to be too degraded to test, no actual evidence has ever been presented that the clerk's

office was in possession of a tube of the victim's blood, or that it was too degraded to test for DNA. In saying this, the State acknowledges that the circuit court found as a fact that the "victim's blood sample from which Defendant requests testing has degraded to such a condition that DNA testing upon it is not possible" (Remand 81-82). The court, however, made this finding in connection with a determination whether testable DNA existed, not in connection with any kind of due process claim of state misconduct. It is one thing for the court to have denied a motion for DNA testing based upon the defendant's own concession that a testable sample did not exist. It is quite another to find a due process violation urged by the defense based solely on a defense allegation without any evidence to support it. The circuit court has made **no** findings of fact as to any alleged due process violation, for the simple reason that no such claim was before it. In fact, no *evidence* has ever been presented to support Kokal's assertion that the clerk of court was in possession of a tube of the victim's blood, *or* that such blood was too degraded for DNA analysis.

Even assuming there was some sort of blood sample in the clerk's office (and the State acknowledges that, during the November 13, 2002 status conference, Assistant State Attorney Mark Borello stated that he had checked with the clerk's office

and it was his "understanding" that a tube of blood existed, Remand 153), even Ms. McDermott did not claim to be 100% certain that the unidentified blood sample was the victim's blood (Remand 152). Granting Kokal relief here would require us to *assume* that the clerk had a sample of blood, *and* that such sample came from the victim, absent any *evidence* to prove the truth of such assumption.

Likewise, Ms. McDermott represented to the court below that she had been informed by FDLE analyst Enfinger that the victim's blood could not "be tested due to the condition of the sample" (Remand 25). However, no actual testimony has been presented as to the condition of the sample, either by Enfinger or anyone else. We have only Ms. McDermott's assertion in her motion for evidentiary hearing, not any evidence actually presented at such hearing or at any other time.

Additional vagaries exist. Kokal asserts now that the sample was "degraded"; however, the only support for this "fact" is the above assertion about the "condition" of the sample. Presumably the "condition" was "degraded," but there is no actual testimony that this is so. Nor, even if we assume that the sample could not be tested because it "degraded," the record sheds no light on when or why or how such degradation occurred, including whether it occurred before or after the clerk obtained

custody of it. Moroeover, while it may perhaps be assumed that continuous refrigeration of the sample might have prevented such degradation, Kokal has presented no evidence or testimony that this is so. In fact, no evidence whatever has been presented as to how such a sample might have been preserved for DNA analysis 20 years after it was collected, or even if such preservation is possible. Nor do we know any of the conditions of the storage of this sample other than that it apparently was in a sealed envelope at the clerk's office in the fall of 2002. Nor do we have any idea how long an unrefrigerated sample might be testable for DNA, or at what point this sample became untestable. This last factor is important, because Kokal made no attempt to seek a DNA analysis of the blood on his shoes until May 2000. But forensic use of DNA analyses had begun a good ten years earlier. If the blood sample had still been testable then, and only became degraded much later, Kokal would be in no position to complain about improper preservation.

In short, the record is bereft of facts to support Kokal's claim that the clerk's irresponsibility caused the loss of evidence, regardless of what standard we might apply to the clerk's conduct.

The same is true of the so-called "saliva sample." Kokal contends the Sheriff's Office was at least negligent in its

handling of this "saliva sample." But, although Kokal did present evidence to suggest that the Sheriff's Office had stored some evidence in an inadequate facility at some time years after Kokal's trial, he has failed to establish that the Sheriff's Office was ever in possession of a "saliva sample," or that it was among the items of evidence lost during improper storage. The Sheriff's Office had no record of ever having such evidence, and the only other *evidence* presented (Exhibit 1) indicated that it was in the custody of FDLE.[5]

Moreover, Exhibit 1 refers not to a "saliva sample," but to an "oral swab." Even if it is assumed that this oral swab was at some point in the custody of the Sheriff's Office, Kokal has never established that the oral swab generated a "saliva sample," and the State can think of no reason to assume in the absence of testimony that an oral swab taken many hours after

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[5] The State acknowledges that the appellate record contains a letter purportedly from FDLE Assistant General Counsel James D. Martin to Ms. McDermott dated August 22, 2003, in which he states that the oral swab taken from the victim was returned to the Sheriff's Office in October of 1984. The letter (which is dated and was filed **after** the evidence was closed, **after** the circuit court ruled, and **after** Ms. McDermott had filed a notice of appeal) obviously is not and could not be deemed evidence (Ms. McDermott did not offer it as such, Remand 144). The State objects to any factual reliance by Kokal on this letter. Moreover, even if it had been timely proffered, it is still hearsay, and the State has had no opportunity to cross-examine Mr. Martin about his personal knowledge, if any, or why he believed the sample was returned to the Sheriff's Office.

the victim's death would generate any saliva. Nor has Kokal established that this "oral swab" **ever** contained enough genetic material to allow for a DNA analysis. Although Ms. McDermott asserted in her April 14, 2003 motion for an evidentiary hearing that FDLE analyst Enfinger informed her that a saliva sample "would be adequate for testing" (Remand 26), she never presented any testimony from Enfinger or anyone else that might support such conclusion, despite having been put on notice by the circuit court that it "would certainly want to explore that as to why [Enfinger] believes that, whether she knew it, or whether it was conjecture on her part" (Remand 173). Thus, Kokal has failed to establish any reasonable likelihood that the oral swab ever contained enough genetic material to allow for a DNA analysis. Finally, to the extent that Kokal argues that this sample was lost due to storage in an inadequate, leaky building, he also has failed to establish that the sample would not have become too degraded for analysis if stored in a watertight building.

Another significant failure of proof regards the blood on Kokal's shoe. As the circuit court noted, if amount of blood on Kokal's tennis shoes were insufficient to support a DNA analysis, "that's going to be the end of the issue" (4R 588). Despite having been reminded repeatedly that the initial

question to resolve would be whether or not there is a sufficient amount of blood on the shoe to analyze for DNA, Kokal has - once again - presented no evidence whatever on this question. All we have is the statement of Ms. McDermott at the November 13, 2002 status conference, that her "expert" had determined that the shoes could be tested (Remand 150), an assertion that was not accepted by undersigned counsel or by the court.[6] If the shoes cannot be analyzed for DNA, any failure to preserve the victim's blood or saliva sample becomes inconsequential, and no due process violation can have occurred. Thus, once again, Kokal's due process claim lacks evidentiary support, regardless of the applicable standard (bad faith, negligence, or strict liability) for reviewing a due process claim of failure to preserve evidence.

C. THE RECORD FAILS TO DEMONSTRATE BAD FAITH ON THE PART OF FORMER ASSISTANT STATE ATTORNEY LAURA STARRETT

Before addressing the bad-faith standard of Arizona v. Youngblood, 488 U.S. 51 (1988) as to the conduct of other state actors regarding the blood and saliva evidence at issue here, the State must address Kokal's accusation that former Assistant

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[6] When undersigned counsel stated that, to his knowledge, he still did not know if there is enough blood on the shoes to test for DNA, the court observed that Ms. McDermott "is indicating that she thinks there is," noting that the court's recollection was that "we were told that there was not" (Remand 153-55).

State Attorney Laura Starrett deliberately misrepresented the evidence, to Kokal's detriment.

At a status conference on December 15, 2000 - a month and a half after the conclusion of the evidentiary hearing on Kokal's claim of newly discovered evidence of innocence, and some eight months after Kokal had initially raised the DNA issue - Starrett stated, "we don't have the victim's blood" (4R 583-84). Kokal argues that this "misrepresentation" caused his counsel to forego looking for a sample of the victim's blood in the clerk's office for two years, implying (the State assumes) that perhaps the blood sample would still have been testable if not for the extra two-year delay, and attributing this "misrepresentation" by Ms. Starrett to "bad faith."

Here again, the State must remark upon the lack of evidence or opportunity to be heard. And once again, the State must note the absence of evidence that the clerk's office was in possession of a blood sample of the victim when Ms. Starrett made her "misrepresentation" or since. More importantly, however, and assuming that Ms. Starrett was mistaken about the clerk's possession of the victim's blood sample, the issue of her bad faith simply has not been litigated or proved. Nor has Kokal demonstrated that he relied on any misrepresentation to his detriment.

Resolution of any issue of bad faith requires determination of the reason Ms. Starrett misspoke. Did she know that a blood sample existed and deliberately misrepresent that fact? Did she conduct a search of the clerk's office and fail for whatever reason to discover the tube of the victim's blood? Did she rely on the word of someone else (like defense counsel, perhaps)? Kokal has made no attempt to answer any of these questions.

The State would note, however, that Kokal's defense team had been given ample opportunity long before December 15, 2000 to conduct its own search of the clerk's office, and in fact had done so, on October 31, 2000 (4R 514). Moreover, the evidence was held open so that Ms. McDermott could retain an expert to come to Jacksonville and look at the shoes to determine if the blood on them could be analyzed for DNA. While Ms. McDermott stated to the court at the November 13, 2002 status conference on remand that she had not looked for a comparison sample, she later asserted at the same status hearing that, when she came to Jacksonville in 2002 to search the clerk's office, she "came upon the blood sample that is in the Clerk's Office and apparently has been there now for several years *that we all just missed back in December of 2000*" (Remand 150-51). By itself, this would suggest that defense counsel **did** look for the blood sample in December of 2000 and simply failed to find it. If

such is the case, defense counsel could well have communicated this failure to Ms. Starrett. If so, then Ms. Starrett's statement about the absence of the blood sample was the product of defense counsel's (presumably inadvertent) misrepresentation **to her**, and not the other way around.

Such a conclusion is reinforced by Ms. McDermott's description of the blood sample and its cover envelope as lacking reference to the victim.

It is at least as reasonable to infer from the record, in its present form, that Ms. Starrett's "misrepresentation" was the product of innocent mistake, either by her, or by defense counsel, or both, as it is to assume that Ms. Starrett, acting in bad faith for reasons known only to her, deliberately misrepresented the state of the evidence to defense counsel. While, like everything else in Kokal's first issue on appeal, any due process claim that Ms. Starrett acted in bad faith is procedurally barred for failure to raise it below, it also fails for lack of evidence.

Furthermore, even if we assume, arguendo, that Ms. Starrett acted in bad faith, Kokal cannot establish that he relied upon her misrepresentation to his detriment, as his defense team can and should have gone to the clerk's office to determine the truth themselves, either before or after this so-called

misrepresentation. Moreover, absent any evidence that the victim's blood sample was testable for DNA in December of 2000, Kokal cannot attribute any detrimental consequence to any reliance on any alleged misrepresentation at that time.

D. KOKAL HAS MADE NO SUFFICIENT SHOWING OF BAD FAITH

Relying on the bad faith standard set out in Arizona v. Youngblood, supra, Kokal argues that he "has made a sufficient showing of bad faith." Supplemental Initial Brief at 17. With regard to the victim's blood sample, he argues:

> The victim's blood sample was not properly maintained, but rather left in the custody of the clerk of the court where it was placed in a box in a warehouse without climate control or any efforts made to preserve the sample.

Supplemental Initial Brief at 17. Once again, the State must note the absence of any litigation below on any issue of bad faith. Moreover, the State must once again register a complaint about Kokal's statements of fact. In addition to what the State has already observed about the evidence regarding the alleged sample of victim's blood, and even assuming that the clerk's office did have a tube of the victim's blood (and at least there was some discussion in the record about that) the record utterly fails to support any assertion that the victim's blood sample was "placed in a box in a warehouse" with or "without climate

control." The record also is utterly silent about the "efforts made to preserve the sample."

Furthermore, the State would note that Youngblood is about a criminal defendant's right to a fair **trial**, and addresses the prosecution's constitutional duty **prior to conviction**. Youngblood thus primarily address the destruction or loss of evidence **pre-trial**, before the defense has had the opportunity to test and inspect that evidence. No evidence has been presented by Kokal to demonstrate any pre-trial loss or destruction of evidence.

To the extent, however, that Youngblood implicates broader due process concerns, see Harvey v. Horan, 278 F.3d 370, 386-87 (4th Cir. 2002) (King, J., concurring in part and concurring in the judgment), and thus has potential application to the loss or destruction of evidence years after trial, this Court has held that due process would be violated "only if the defendant can show bad faith on the part of the police or prosecution." Guzman v. State, 28 Fla. L. Weekly S829 (Fla. decided November 20, 2003). Bad faith exists "only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant." Ibid.

The record in this case utterly fails to demonstrate any intentional destruction of evidence. Thus, Kokal's bad faith claim fails.

Additionally, Kokal has not demonstrated that anyone having custody of the victim's blood or saliva could have had any reason to believe that such evidence might exonerate him. The blood evidence, in fact, incriminated Kokal, and the oral swab was neutral (the swab was not even introduced in evidence). No one in 1983 or for many years afterward could have had any reason to anticipate that such evidence might be subjected to more precise identification by a means (DNA testing) unimaginable at the time. Because neither the blood or oral swab was subjected to DNA testing "by government agents," it did not have "'apparent exculpatory value' and thus cannot form the basis of a claim of bad faith destruction of evidence." Ibid.

E. THIS COURT SHOULD REJECT KOKAL'S SUGGESTION THAT HE SHOULD NOT BE REQUIRED TO DEMONSTRATE "BAD FAITH"

Kokal argues that this Court should conclude that the "bad faith" standard presents him with an impossibly high burden, and that this Court should apply the standard announced in concurrence to Youngblood by Justice Stevens, who suggests relaxing the bad faith standard when the "loss or destruction of evidence is nonetheless so critical to the defense as to make a

criminal trial fundamentally unfair." Kokal supports this argument with citations to various state cases.

The State would note, first, that the standard suggested by Justice Stevens references the loss or destruction of evidence before "trial." Moreover, each of the state cases cited by Kokal concerns the loss or destruction of evidence before trial, and before the defense has had the opportunity to inspect or test that evidence. None of these cases address the question of preservation of evidence after the defendant has had a fair trial and a fair opportunity to avail himself of any and all means available at the time of trial to contest the state's evidence.

Moreover, Justice Stevens' concerns about fundamental fairness are not implicated in this case. While this Court has rejected the argument that a mere possibility that evidence, if tested, "might" exonerate a defendant is sufficient to establish a due process violation, the State would assert that it cannot even be said in this case that the evidence at issue "might" exonerate Kokal. If, as is highly likely, the blood on Kokal's shoe is conclusively shown to be the victim's, the State's evidence would be marginally stronger.[7] If, on the other hand,

[7] It would be some coincidence if Kokal had blood on his shoe of the same type as the victim, but was not the victim's. Kokal has never offered any explanation of how such blood could

DNA testing showed that Kokal somehow got blood on his shoes of the same type as the victim by some innocent coincidence, he still would not be exonerated; although he has contended that it would corroborate O'Kelly's statement, as related to us by Hutto, that Kokal had not participated in the robbery or the murder and had stayed at the truck when the victim had been led down to the beach, that alleged statement is contradicted by Kokal's own testimony at trial that he had walked down to the beach with O'Kelly and the victim and watched O'Kelly repeatedly strike the victim (8TR 728-31). It is further contradicted by Kokal's statements to Dr. Virzi (the psychiatrist who had examined Kokal prior to trial), in which Kokal had admitted walking down to the beach and to having hit the victim on the head with a cue stick in order to rob him (Dr. Virzi's pre-trial report, exhibit 1 at the 1997 evidentiary hearing). And, of course, it is contradictory to Kokal's confession to Eugene Mosley and to his own trial attorney, to whom Kokal, in great and "chilling" detail, admitted having beaten and shot the victim. Besides Kokal's own statements admitting his involvement in greater or lesser degree, there are the additional facts that, several days after the murder, Kokal was

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have gotten on his shoes if not during the robbery/murder of the victim in this case, or whose blood it might be, if not the victim's.

in possession of the victim's driver's license and of the murder weapon, on which his fingerprint was found. Proof that the blood on Kokal's shoes did not belong to the victim would contradict none of this evidence. Nor would it make Hutto on whit more credible than he is now, which is to say, not at all. Kokal's pursuit of DNA testing has never been more than a "fishing expedition." Hitchcock v. State, Case No. SC02-2037 (Fla. Decided Jan. 15, 2004).

Finally, this Court only two months ago rejected a defense argument that bad faith may be shown by the destruction of evidence post-trial in violation of established practices and procedures, and insisted on a showing of bad faith. Guzman, supra. No bad faith having been shown in this case, Kokal's due process claim must fail.

F. CONCLUSION

In effect, Kokal asks this Court either (a) to find that the State acted in bad faith just on his say so, without evidentiary support and without giving the State timely notice or opportunity to rebut, or (b) to relieve him of any duty to prove bad faith and to impose a species of strict liability on the state for any loss or destruction of evidence, no matter how innocent, no matter how long after trial it occurs, and no matter how inconsequential it may be as to proof of guilt. Both

of these extreme positions should be rejected, along with this entire unpreserved, unlitigated and factually unsupported claim.

ISSUE II

THE CIRCUIT COURT CORRECTLY DENIED KOKAL'S RING CLAIM ON THE GROUNDS THAT IT WAS PROCEDURALLY BARRED AND MERITLESS

On June 16, 2003, Kokal filed his third motion for postconviction relief, raising a Sixth Amendment challenge to his death sentence based on Ring v. Arizona, 536 U.S. 584 (2002). Kokal's motion failed to comply with Fla.R.Crim.P 3.851(e)(1)(E), which requires the movant in an initial or successive motion to explain why claims that were or could or should have been raised on appeal are being raised for the first time on postconviction relief, and also failed to comply with Rule 3.851(e)(2)(B), which requires that a successive motion for postconviction relief must include "the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions." The circuit court summarily denied the motion, finding that it was procedurally barred as a claim that "could and should have been, but was not, raised at trial and on direct appeal," and, moreover, that Kokal also had failed to raise such a claim in his first or second motions for postconviction relief (Remand 84). As the circuit court noted,

this claim was first raised in Kokal's *third* successive motion for postconviction relief. The circuit court also rejected the claim as meritless, based upon binding precedent from this court. The court's ruling is correct for the reasons stated and also for the additional reason that Ring is not retroactively applicable to cases such as this one, in which the conviction and sentence were final long before Ring was decided.

1. *Kokal failed to preserve this claim for review*

As noted above, Kokal failed to satisfy the pleading requirements of the Rule: he asserted neither that he did raise his present Sixth Amendment claim earlier and thus preserved the issue for review, nor that he failed to raise it earlier but has a legally sufficient excuse for that failure. The issue addressed in Ring is by no means new or novel - that claim, or a variation of it, has been known since before the United States Supreme Court issued its decision in Proffitt v. Florida, 428 U.S. 252 (1976), holding that jury sentencing is not constitutionally required, and has since been raised and rejected repeatedly. E.g., Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984). Kokal cannot avoid the consequences of his failure to raise this claim previously on the ground that Ring had not been decided at the time of his trial or direct appeal or, for that matter, at the

time of his initial or first successive postconviction motion, and that earlier decisions demonstrated the futility of raising this claim. The very existence of these earlier decisions demonstrates that the issue is not novel, and the perceived futility of such a claim prior to Ring cannot serve as adequate cause to excuse his failure to raise this claim earlier. Turner v. Crosby, 339 F.3d 1247, 1281-82 (11th Cir. 2003). See also, Bousley v. United States, 523 U.S. 614, 623 (1998) ("futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time"). Thus, the basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Kokal, but none of the arguments he makes today were asserted as a basis for relief previously. Because Kokal failed to demonstrate that he raised any of the three sub-parts of his Ring claim in a timely manner, they are now barred under settled Florida law and the circuit court correctly denied relief on that basis.

2. *Neither Ring nor Apprendi are applicable retroactively to Kokal's case.*

Ring was decided on June 24, 2002, and was an extension of the Court's prior decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Kokal's conviction became final 1986 when it was

affirmed on direct appeal. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."). In Griffith v. Kentucky, 479 U.S. 314 (1987), the United States Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, *pending on direct review or not yet final* . . . ." Id. at 328 (emphasis added). Because Kokal's appeal was not pending on direct review and became final in 1986 -- long before the United State Supreme Court decided Ring or Apprendi -- neither decision applies to his case under the rationale of Griffith.

Nor are Apprendi or Ring otherwise applicable. Both involve are rules of procedure, not substantive law. They are about who decides a fact, *i.e.,* the jury or the judge, which is procedural. Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002) (holding Apprendi is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard

(preponderance versus reasonable doubt) and explaining that Apprendi did not alter which facts have what legal significance). Ring did not make certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, nor does Ring involve the accuracy of the conviction or a bedrock procedural element essential to the fundamental fairness of a proceeding.

Only those rules that seriously enhance accuracy are applied retroactively. Graham v. Collins, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury factfinding in capital sentencing does not "seriously" enhance accuracy. The *Ring* Court did not determine that jury factfinding was more rational or fair than judicial factfinding; rather, it was required regardless of fairness.

Every federal circuit court that has addressed the issue has held that Apprendi is not retroactively applicable to cases already final when Apprendi was decided.[8] Since Ring is merely

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[8] United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 573 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); United States v. Brown, 305 F. 3d 304 (5th Cir. 2002)(holding Apprendi is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or

an extension of Apprendi to capital cases, these decisions would seem to foreclose any contention that Ring is retroactive. And two federal circuit courts of appeal have so held.

Last year, the Tenth Circuit Court of Appeals rejected a defendant's attempt to distinguish Ring from Apprendi and concluded that, since Apprendi was not retroactive, then Ring could not be, either. Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir.2002) (precedent holding that Apprendi announced rule of procedure not applicable retroactively forecloses argument that

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innocence of a defendant); Goode v. United States, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 711 (2002)(holding Apprendi is not a watershed rule citing Neder v. United States, 527 U.S. 1, 15 (1999)); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002) (holding Apprendi is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); United States v. Moss, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002)(holding that Apprendi is not of watershed magnitude and that Teague bars petitioners from raising Apprendi claims on collateral review); United States v. Sanchez-Cervantes, 282 F.3d 664, 667 (9th Cir. 2002)(holding Apprendi does not meet either prong of Teague because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, Apprendi is not to be retroactively applied); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir.2002), *cert. denied*, 123 S.Ct. 388 (2002)(concluding Apprendi is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in Apprendi does not apply retroactively on collateral review).

Ring would be retroactive because "Ring is simply an extension of Apprendi to the death penalty context.").[9]

More recently, the Eleventh Circuit Court of Appeals explicitly addressed whether or not Ring should be applied retroactively to a *Florida capital defendant* whose conviction and sentence were final before Ring was decided, and concluded that the answer is no. Turner v. Crosby, supra. Initially, Turner observed that Ring was purely a procedural rule:

> Just as Apprendi "constitutes a procedural rule because it dictates what fact-finding procedure must be employed," United States v. Sanders 247 F.3d 139, 147 (4th Cir. 2001), cited with approval in McCoy[v. United States], 266 F.3d [1245,] at 1256 [(11th Cir. 2001)], Ring constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. Ring, 536 U.S. at 609. Ring changed neither the underlying conduct the

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[9] See also Ring v. Arizona, 122 S.Ct. 2428, 2449-2450 (2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)); Colwell v. State, 59 P.3d 463, 473 (Nev. 2002) (Ring not afforded retroactive application on collateral review); Sanders v. State, 815 So.2d 590, 591-592 (Ala. 2001) (Apprendi held not to apply retroactively to cases on collateral review under Teague v. Lane, 489 U.S. 288 (1989)), cert. denied, 534 U.S. 956 (2001); Whisler v. State, 36 P.3d 290, 300 (Kan. 2001) (same), cert. denied, 122 S.Ct. 1936 (2002); State ex rel. Nixon v. Sprick, 59 S.W.3d 515, 520 (Mo. 2001) (Apprendi not subject to retrospective application); State v. Sepulveda, 32 P.3d 1085, 1088 (Ariz. App. Div. 2 2001) (Teague precluded retroactive application of Apprendi); People v. Bradley, 2002 WL 31116769 *6 (Colo. App. Sept. 2, 2002) (same); People v. Montgomery, 763 N.E.2d 369, 378 (Ill.App. 1 Dist. 2001) (same); Teague v. Palmateer, 57 P.3d 176, 186 (Or. App. 2002) (same).

> state must prove to establish a defendant's crime warrants death nor the state's burden of proof. Ring affected neither the facts necessary to establish Florida's aggravating factors nor the State's burden to establish those factors beyond a reasonable doubt. Instead, Ring altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.
>
> Our conclusion that Ring announces a procedural rule is bolstered by Ring's status as an extension of Apprendi. We agree with other courts who have concluded that because Apprendi was a procedural rule, it axiomatically follows that Ring is also a procedural rule.

339 F.3d at 1284. Because Ring is procedural, and because it is a new rule not dictated by existing precedent, it is not applicable retroactively to convictions which were already final unless it meets one of two exceptions to Teague's non-retroactivity standard: (1) the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority," or (2) the new rule "requires the observance of those procedures that are implicit in the concept of ordered liberty." 339 F.3d at 1285 (quoting Teague). Turner holds that Ring "clearly does not implicate" the first exception, and the second exception did not apply because the accuracy of the sentence was not diminished by judge sentencing:

> Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. Ring simply does not fall within the ambit of the second Teague exception.

339 F.3d at 1286. Since Turner was decided, another panel of the Eleventh Circuit has also held that Ring is not retroactive. Zeigler v. Crosby, 345 F.3d 1300, 1312 (footnote 12) (11th Cir. 2003) ("Zeigler's challenge fails because neither Apprendi nor Ring applies retroactively on collateral review to convictions that became final before they were decided."). Turner and Zeigler are compelling persuasive authority for the State's argument that Ring is not retroactively applicable to Kokal's death sentence.[10]

Moreover, Kokal is not entitled to retroactive application under the State-law principles of Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980). Hughes v. State, 826 So.2d 1070, 1073-1075 (Fla. 1st DCA 2002), review granted (1/10/03).[11] Pursuant to Witt, this Court must consider three factors: the purpose served

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[10] However, see, contra, Summerlin v. Stewart, No. 98-9902 (9th Cir. Sept. 2, 2003) (en banc). Summerlin concludes, inter alia, that Ring is substantive, not procedural, because it changed the substantive law of Arizona. The dissenters in Summerlin pointed out that federal courts (including the Ninth Circuit) have uniformly concluded that Apprendi is not retroactive, and argued that, since Ring is an application of Apprendi to capital cases, there was no logical basis to conclude that Apprendi is procedural but Ring is substantive. The State would urge this Court to reject the reasoning of Summerlin outright; at the very least, its conclusions should be confined to Arizona's capital sentencing procedures, whereas Turner and Zeigler explicitly address the retroactivity of Ring in the context of Florida's capital sentencing procedures.

[11] Oral argument occurred in Hughes on March 6, 2003.

by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So.2d 306, 311 (Fla. 2001). When deciding whether to apply a decision retroactively, "the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." Johnston v. Moore, 789 So.2d 262, 267 (Fla. 2001).

As this Court stated in Ferguson,

> For a new rule of law to warrant retroactive application it must satisfy three elements: "The new rule must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance."
>
> * * * * *
>
> As emphasized by this Court in *Witt*, "only major constitutional changes of law will be cognizable in capital cases under Rule 3.850. 387 So.2d at 929. These major constitutional changes in the law typically fall into one of two categories: "(1) those which place beyond the authority of the state the power to regulate certain conduct or to impose certain penalties, or (2) those changes which meet the three-prong test for retroactivity set forth in *Stovall v. Denno*." McCuiston v. State, 534 So.2d 1144, 1146 (Fla.1988) (citations omitted).
>
> The three factors considered under the test announced in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), are: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the

> administration of justice of a retroactive application of the new rule." *McCuiston*, 534 So.2d at 1146 n. 1.

Ferguson, 789 So.2d at 309, 311.

Applying Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court has rejected retroactive application of its holding that a violation of the right to a jury trial is not subject to retroactive application:

> The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtably relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. . . . Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen with the Sixth Amendment guarantee as it had been construed by this Court. . . . Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now according the Sixth Amendment guarantee.

DeStefano v. Woods, 392 U.S. 631, 634 (1968) (internal citations omitted).

Similarly, there is no basis for application of Ring or Apprendi in this case. Hughes, 826 So.2d at 1073-1075.

3. *Kokal's Ring/Apprendi claims are without merit under binding precedent from this Court.*

Finally, even if this Court were to determine that appellant's claims under Ring and Apprendi are properly before the Court for decision on the merits, relief should be denied. This Court has consistently held that our capital sentencing procedures do not violate Apprendi or Ring. Florida's capital sentencing procedures are constitutionally acceptable, as this Court has consistently held when addressing numerous Ring-based attacks upon Florida's capital sentencing procedures. E.g., Pace v. State, 854 So.2d 167 (Fla. 2003); Chandler v. State, 848 So.2d 1031 (Fla. 2003); Lugo v. State, 845 So.2d 74, 119 (Fla. 2003); Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003); Conahan v. State, 844 So.2d 629 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003); Banks v. State, 842 So.2d 788 (Fla. 2003); Spencer v. State, 842 So.2d 52 (Fla. 2003); Grim v. State, 841 So.2d 409 (Fla. 2003); Anderson v. State, 841 So.2d 390 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla 2003).

CONCLUSION

For the foregoing reasons, the judgement of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Linda McDermott, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 15th day of January, 2004.

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