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.

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334

SUPPLEMENTAL PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Kokal's motion for DNA testing and his successive motion for postconviction relief, following relinquishment from this Court. The motions were brought pursuant to Fla. R. Crim. P. 3.853 and 3.850, respectively.

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.

"PC-R4." -- record on appeal from the denial of Mr. Kokal's motion for DNA testing and successive Rule 3.850 motion.

SUPPLEMENTAL REQUEST FOR ORAL ARGUMENT

Mr. Kokal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Kokal, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The standard of review regarding Mr. Kokal's request for DNA testing and successive Rule 3.850 premised upon Ring v. Arizona is de novo.

TABLE OF CONTENTS

Page

SUPPLEMENTAL PRELIMINARY STATEMENT i

SUPPLEMENTAL REQUEST FOR ORAL ARGUMENT ii

STANDARD OF REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS 1

SUPPLEMENTAL SUMMARY OF ARGUMENT 7

SUPPLEMENTAL ARGUMENT 8

ARGUMENT I

THE STATE'S FAILURE TO PRESERVE EVIDENCE WHICH COULD BE TESTED BY USE OF DNA ANALYSIS VIOLATES DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS 8

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. KOKAL'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS EVIDENCED BY RING v. ARIZONA, RENDERING MR. KOKAL'S DEATH SENTENCE ILLEGAL AND ENTITLING HIM TO A LIFE SENTENCE 23

CONCLUSION 47

CERTIFICATE OF SERVICE 48

CERTIFICATION OF TYPE SIZE AND STYLE 48

TABLE OF AUTHORITIES

Page

Apprendi v. New Jersey,
530 U.S. 466 (2000) 43, 47

Arizona v. Youngblood,
488 U.S. 51 (1988) 21

Bostnick v. State,
773 N.E.2d 266 (Ind. 2002) 30

Bousley v. United States,
523 U.S. 614 (1998) 47

Bunkley v. Florida,
123 S. Ct. 2020 (2003) 46

Commonwealth v. Henderson,
411 Mass. 309 (1991) 21

Connecticut v. Morales,
657 A.2d 585 (Conn. 1995) 21

Duest v. State,
855 So. 2d 33 (Fla. 2003) 33

Duncan v. Louisiana,
391 U.S. 145 (1968) 45

Ex Parte Gingo,
605 So. 2d 1237 (Ala. 1992) 22

Ex parte Waldrop,
___ So.2d ___, 2002 Ala. LEXIS 336,
(Ala. November 22, 2002) 34

Fiore v. White,
531 U.S. 225 (2001) 46

Garden v. State,
815 A.2d 327 (Del. 2003) 34

Guzman v. State,
2003 Fla. LEXIS 1993
(Fla. Nov. 20, 2003) 17

Hammond v. State,
569 A.2d 81 (Del. 1989) 22

Hildwin v. Florida,
490 U.S. 638 (1989) 31

Johnson v. State,
59 P.3d 450 (Nev. 2002) 24, 35

Jones v. United States,
526 U.S. 227 (1999) 44

King v. State,
808 So. 2d 1237 (Fla. 2002) 17

Martin v. State,
___ So.2d ___, 2003 Ala. Crim. App. LEXIS 136,
(Ala. App. May 30, 2003) 35

Merck v. State,
664 So. 2d 939 (Fla. 1995) 17

Overstreet v. State,
783 N.E.2d 1140 (Ind. 2003) 31

People v. Swift,
781 N.E.2d 292 (Ill. 2002) 30

Reyes v. State,
819 A.2d 305 (Del. 2003) 34

Ring v. Arizona,
536 U.S. 584 (2002) 23

Sattazahn v. Pennsylvania,
123 S.Ct. 732 (2003) 24

State v. Delisle,
648 A.2d 632 (Vt. 1994) 22

State v. Fetterly,
52 P.3d 875 (Idaho 2002) 29

State v. Gales,
658 N.W.2d 604 (Neb. 2003) 29

State v. Krantz,
1998 Tenn. Crim. App. LEXIS 26,
(Ct. Cr. App. Tenn. 1998) 21

State v. Matafeo,
787 P.2d 671 Haw. 1990) 22

State v. Ring,
65 P.3d 915 (Ariz. 2003) 29

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003) 25

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003) 41

Summerlin v. Stewart,
341 F.3d 1082 (9th Cir. 2003) 25

Thorne v. Dept. of Public Safety,
774 P.2d 1326 (Alaska 1989) 22

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 46

Walton v. Arizona,
497 U.S. 639 (1990) 43

Woldt v. People,
64 P.3d 256 (Colo. 2003) 29

Wrinkles v. State,
776 N.E.2d 905 (Ind. 2002) 31

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Last year, Mr. Kokal's case was pending before this Court on his appeal from the denial of his successive Rule 3.850 motion. In his initial brief, Mr. Kokal raised issues of newly discovered evidence, disqualification of the lower court judge and ineffective assistance of his prior postconviction counsel.

On October 3, 2003, Mr. Kokal filed a motion to reschedule his oral argument before this Court. Simultaneously with his motion to this Court, Mr. Kokal filed a motion for DNA testing with the circuit court based on the recently promulgated Florida Rule of Criminal Procedure 3.853 (PC-R4. 1 -19). On October 31, 2002, this Court granted Mr. Kokal's request to reschedule his oral argument and temporarily relinquished jurisdiction to the circuit court to resolve his motion for DNA testing.

On November 13, 2002, a hearing was held at which time the lower court granted Mr. Kokal's request for DNA testing (PC-R4. 146-162). Subsequently, the court entered an order directing the clerk of court to release the victim's blood sample and white Nike tennis shoes which were introduced at Mr. Kokal's capital trial to the Florida Department of Law

Enforcement (FDLE) for DNA testing (PC-R4. 22-23). On December 20, 2002, the evidence was sent to FDLE (PC-R4. 24).

In the following months, FDLE Analyst, Sherie Enfinger, informed Mr. Kokal's postconviction counsel that the blood sample, which was submitted in liquid form, could not be tested due to the condition of the sample, but that FDLE's records reflected that the Jacksonville Sheriff's Office obtained a saliva sample from the victim and that sample would be adequate for testing (PC-R4. 25-27). Based on that information Mr. Kokal requested that the lower court direct the Jacksonville Sheriff's Office to release the saliva sample and any other biological evidence obtained from the victim to FDLE. The lower court granted Mr. Kokal's motion on March 7, 2003.

In response to the lower court's order, Lieutenant Burt of the Jacksonville Sheriff's Office sent the lower court a letter in which he stated: "After a search of the Property and Evidence Room it has been determined that we do not have the evidence in question." (PC-R4. 26). Lieutenant Burt provided no further explanation.

Mr. Kokal requested that the lower court hold an evidentiary hearing in order to determine where the evidence obtained in the Russell homicide investigation was located or

why such evidence was destroyed (PC-R4. 24-26). The State did not oppose an evidentiary hearing (PC-R4. 30).

Before a hearing could be held on Mr. Kokal's request for an evidentiary hearing, postconviction counsel learned of the elimination of the Capital Collateral Counsel for the Northern Region, and requested that the circuit court appoint her to represent Mr. Kokal (PC-R4. 33-38).

A hearing was held on June 12, 2003, at which time the circuit court granted Mr. Kokal's request for an evidentiary hearing, but construed the motion as a motion to compel DNA testing and granted postconviction counsel's request for appointment of counsel (PC-R4. 163-184; 60-61). Mr. Kokal's counsel also informed the court and opposing counsel that she would be filing a successive Rule 3.850 motion based on Ring v. Arizona, which she did that same week (PC-R4. 39-57).

On June 27, 2003, the circuit court held an evidentiary hearing on Mr. Kokal's motion to compel DNA testing and heard argument on Mr. Kokal's successive Rule 3.850 motion (PC-R4. 185-215).

During the evidentiary portion of the hearing, Lieutenant James L. Burt of the Jacksonville Sheriff's Office testified that he was currently assigned to the property and evidence unit in the Jacksonville Sheriff's Office and that in March,

2003, he had been asked to locate any biological evidence in the Russell homicide investigation (PC-R4. 190-1). He found no evidence.

Lt. Burt also testified that in 1990 he served as the commanding officer of the property and evidence unit for two and a half years (PC-R4. 190).

Lt. Burt explained:

> A: Yeah. It's real simple, and if I can go back and tell a little story from my first assignment down there. I think it's 99 percent accurate as probably what happened to this evidence.
>
> When I was first assigned there in '90 our property and evidence room was full and probably the Judge will remember the old Christopher building across the street that the property room was using for an auxiliary storage site.
>
> * * *
>
> The sergeant in charge of the property room at that time was storing property over there knowing that the roof was collapsing. Every time it rained water was pouring in on the evidence. He did nothing to preserve or protect it at that time.
>
> As we transitioned to move out of that building to the old juvenile detention facility which was located right next door we found out that most of the evidence that had been stored in there was no longer – had any evidentiary value. In other words, if you went to pick up a piece of carpet you might as well been trying to pick up a piece of pudding.
>
> If it was something that was metal it was a solid piece of rust. If it was rotatable it had rotted. In searching our

> – in September of '92 everything in the property room was physically touched and entered into the computer. Prior to that it was a paper system.
>
> September of '92 we had put our hands on everything and entered it to (sic) the database. Everything was in the computer. [The Russell homicide] evidence was never entered into the computer so whatever happened to it was prior to September of '92 since it was never inputted and in all likelihood it had been stored in the Christopher building and wound up in a construction dumpster.

(PC-R4. 191-193).

Lt. Burt also testified that there was no documentation of the destruction of the Russell homicide evidence because the paper records were destroyed after three or five years (PC-R4. 193).

Also, over no objection from the State, Mr. Kokal admitted the FDLE reports which identified the evidence which had been collected during the Russell homicide investigation and indicated that the evidence should be maintained by the Jacksonville Sheriff's Office (Def. Ex. 1; PC-R4. 72-79).

After taking evidence on Mr. Kokal's motion to compel DNA testing, the circuit court heard argument on Mr. Kokal's successive Rule 3.850 motion based on the argument that Florida's capital sentencing scheme and Mr. Kokal's sentence of death violated the Sixth Amendment to the United States Constitution (PC-R4. 205-213).

At the conclusion of the hearing, the circuit court requested that the parties submit proposed order on Mr. Kokal's Ring issue (PC-R4. 213-214).

On July 2, 2003, the circuit court entered an order denying Mr. Kokal's motion for DNA testing because the court found that there was no physical evidence available for testing (PC-R4. 81-83). The court also found that there was overwhelming evidence of Mr. Kokal's guilt (PC-R4. 81-83).

On July, 16, 2003, the lower court denied Mr. Kokal's successive Rule 3.850 motion based on Ring, finding that Mr. Kokal's claim was procedurally barred (PC-R4. 84-86). The court denied Mr. Kokal's timely motion for rehearing (PC-R4. 99-117; 118).

Mr. Kokal filed a timely notice of appeal on both the denial of his motion for DNA testing and his successive Rule 3.850 motion (PC-R4. 120-121). After filing his notice of appeal, Mr. Kokal also filed a letter received from FDLE's Assistant General Counsel, James Martin, in which FDLE confirmed that the saliva sample of the victim in the Russell homicide investigation was returned to Detective Hugh Eason of the Jacksonville Sheriff's Office in October, 1984 (PC-R4. 129-131).

This appeal follows.

SUPPLEMENTAL SUMMARY OF ARGUMENT

1. The State's failure to preserve evidence which could be tested by the use of DNA analysis violates due process under the Florida and United States Constitutions. The Jacksonville Sheriff's Office and the State in bad faith allowed for the destruction or loss of evidence that had previously been used by the State against Mr. Kokal at his trial and subsequent appeals. Mr. Kokal is entitled to relief.

2. Mr. Kokal's sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as evidenced by Ring v. Arizona. Mr. Kokal's death sentence must be vacated and a life sentence imposed.

SUPPLEMENTAL ARGUMENT

ARGUMENT I

THE STATE'S FAILURE TO PRESERVE EVIDENCE WHICH COULD BE TESTED BY USE OF DNA ANALYSIS VIOLATES DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

In 1983, the Florida Department of Law Enforcement (FDLE) assisted the Jacksonville Sheriff's Office in the collection and analysis of physical evidence throughout the Jeffrey Russell homicide investigation. FDLE reports reflect that Detective Hugh Eason requested such assistance (Def. Ex. 1; PC-R4. 72-75). An FDLE crime scene analyst authored a report, dated October 31, 1983, identifying all of the evidence collected and the origin of the evidence (Id.). Evidence was collected during the autopsy of the victim, including, a head hair standard, blood standard and an oral swab and smear (Id.). A pair of white Nike tennis shoes was collected from Mr. Kokal (Id.).

The victim's blood was typed and an FDLE analyst reported that: "The tube of blood from the victim was determined to be International (ABO) Type B." (Def. Ex. 1; PC-R4. 78 A). Additionally, human bloodstaining "demonstrating "B" antigenic activity was determined to be present on the tongue of the left "Nike" tennis shoe" (Id.).

Following the testing, FDLE instructed Detective Eason that the evidence was available to be reclaimed at his convenience (Id.). Some of the evidence tested by FDLE and which was available for Detective Eason to reclaim was in fact admitted into evidence during Mr. Kokal's capital trial.

At trial, FDLE Analyst Paul Doleman testified regarding his serological analysis performed on the evidence submitted to him and to his conclusions (T. 630-641). Mr. Doleman testified:

> Q: Mr. Doleman, if you take a look at this exhibit 25, the blood sample of Mr. Russell, did you perform any tests on this blood sample?
>
> A: Yes, sir, I did.
>
> Q: And what tests did you perform?
>
> A: I performed tests that would enable me to make some determination as to the blood type of Mr. Russell.
>
> Q: Will you please explain to the jury what you mean by blood typing?
>
> A: Yes, sir. In this particular instance I was testing for what is called the international blood type and most people are familiar with that blood typing system. That is the system that would classify a person as to whether their blood was A, B or O or Type AB.
>
> Q: Mr. Doleman, are those the four blood types that you just named?
>
> A: Yes, they are.

Q: Will you please explain to the jury what percentage of the population falls within each blood type?

A: Yes, sir. These are approximate figures on very large population studies, but approximately within a couple of percentage points the most common type would be blood type O which would occur in approximately forty-five percent of the population.

The next most common would be Type A which is found in approximately forty percent of the population. Blood type B is the third type most common which is found in ten percent of the population and blood type AB is found in approximately five percent of the population.

Q: And what tests did you conduct on the blood contained in Exhibit No. 25?

A: State's Exhibit 25 which is a liquid blood sample, I performed the test to determine what are called antigens present in the cells of red blood cells, and I also determined what antigen bodies were present in the serum of the blood sample. Using commercially prepared antiserum which we use in the laboratory, I mixed a suspension of the red cells with what is termed antiserum, anti-B antiserum and H lithium accelerant to anti-O antiserum.

The serum from the sample was mixed with the known blood type O cells and the reactions that occurred in performing that test, red cells from the standard from Mr. Russell agglutinated when I added the anti-B antiserum to them, the serum from the sample agglutinated A cells.

My interpretation of that particular procedure would indicate to me that the blood type of Mr. Russell was international blood type B.

Q: So based on the test performed that is a blood type B?

A: Yes, sir, it is.

Q: Mr. Doleman, I want to show you what has been marked as State's Exhibit 19 in evidence and ask you to take a look at that, if you would, sir.

A: Yes, sir.

Q: What do recognize that to be, sir?

A: I recognize this as a pair of Nike tennis shoes that were brought to my attention by Ernest Hamm of the latent print section of our laboratory.

Q: And did you, yourself, examine those tennis shoes?

A: Yes, sir, I did.

Q: On what date did you examine those?

A: I examined the tennis shoes on the 10th of October, 1983.

Q: And what tests did you perform on those shoes?

A: The first test I performed was to make a visual observation of them to determine if there were any stains on the tennis shoes that could be blood stains. I determined that there were areas on the tennis shoes that in my opinion could be blood stains. So, I followed up on my initial visual observation by performing certain chemical tests. The results of which were that on the right shoe where I have the little circle here (indicating) there is an indication of blood staining which means I was able to get a positive test on my preliminary testing procedure

that indicates that the stain could be blood; however, I was not able to confirm that with additional testing.

Q: Mr. Doleman, let me ask you this: Does it assist you in confirming that sort of thing to have sufficient quantity of blood?

A: Usually the limiting factor of my being able to determine or form an opinion that it is definitely a blood stain or definitely a human blood stain is the quantity of sample present, yes, sir.

Q: Did you examine those shoes further, Mr. Doleman?

A: Yes, I did. On the left shoe I noticed an area that in my opinion could be a blood stain and I performed similar tests and it was my opinion in performing that test that I had a human blood stain present on the tongue of the left tennis shoe. That means I was able to perform both my preliminary test and confirmatory test and then a test to determine the species or origin and it was my opinion that it also contained human blood stain.

Also, after determining it was a human blood stain to do a blood typing of the stain and the results of that typing were that I found B antigen present in that blood stain of the left tongue of the tennis shoe was a stain from an individual whose blood typing was B.

Q: So, there was sufficient quantity to determine that it was human blood type B on that shoe?

A: Yes, sir.

Q: And that was consistent with the same test you explained just a few moments ago?

A: Yes, sir, that is the same type.

(T. 634-637).

During the State's closing argument, the State relied upon the blood analysis of Mr. Kokal's shoe to argue that the blood was Mr. Russell's, thus, Mr. Kokal's testimony was not credible and the State's witnesses were credible (T. 777-778). The State also argued: "[H]ow in the world does Mr. Kokal get some blood on him and the defendant, according to his testimony, was innocent and didn't have anything to do with this crime?" (T. 818-819).

During Mr. Kokal's successive Rule 3.850 proceedings, based on the newly discovered evidence that Mr. Kokal's co-defendant, William O'Kelly, confessed to Gary Hutto that he had beat and shot Mr. Russell, Mr. Kokal requested that the circuit court authorize DNA testing of the blood sample on his shoes (PC-R3. 237-242). In his motion, dated April 6, 2000, Mr. Kokal stated:

> "Mr. Kokal maintains the substance on his sneakers is not the blood of Jeffrey Russell, as he was never close enough to the victim during his beating and shooting at the hands of O'Kelly.
> . . . The results of DNA testing of the aforementioned items may corroborate Mr. Kokal's claim of innocence. If the substance on the shoes is not Russell's blood, such results would assist the court in determining the cumulative impact of the

newly discovered evidence of O'Kelly's confession to Hutto.

(PC-R3. 238-239).

When Mr. Kokal first raised the issue of DNA testing of his shoes, before even investigating the issue, the State took the position that there was no biological evidence to compare with any analysis of the substance on the shoes (PC-R3. 581-582). The State informed the court: "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." (PC-R3. 583). Due to the State's misrepresentation, Mr. Kokal abandoned his request for DNA testing at that time.

The circuit court's order regarding Mr. Kokal's newly discovered evidence claim, which is pending review before this Court, specifically used the blood analysis and conclusions presented to Mr. Kokal's jury to deny Mr. Kokal's claim of newly discovered evidence (PC-R3. 371-378). The circuit court stated: "Further, evidence that bloodstains of the victim's type were found on Mr. Kokal's shoes the morning after the murder appears to contradict the theory that Mr. Kokal was not at the murder scene." (PC-R3. 377).

Following the promulgation of Fla. R. Crim. P. 3.853, Mr. Kokal's postconviction counsel reviewed the evidence in all of

her cases, including Mr. Kokal's (PC-R4. 150). At that time, counsel discovered that the blood sample taken from Mr. Russell did in fact exist (PC-R4. 151). Thus, Mr. Kokal renewed his request for DNA testing of his shoes.

On November 13, 2002, a hearing was held at which time the lower court granted Mr. Kokal's request for DNA testing (PC-R4. 146-162). Subsequently, the court entered an order directing the clerk of court to release the victim's blood sample and white Nike tennis shoes which were introduced at Mr. Kokal's capital trial to the Florida Department of Law Enforcement (FDLE) for DNA testing (PC-R4. 22-23). On December 20, 2002, the evidence was sent to FDLE (PC-R4. 24).

In the following months, FDLE Analyst, Sherie Enfinger, informed Mr. Kokal's postconviction counsel that the blood sample, which was submitted in liquid form, could not be tested due to the condition of the sample, but that FDLE's records reflected that the Jacksonville Sheriff's Office obtained a saliva sample form the victim and that sample would be adequate for testing (PC-R4. 25-27). Based on that information Mr. Kokal requested that the lower court direct the Jacksonville Sheriff's Office to release the saliva sample and any other biological evidence obtained from the victim to

FDLE. The lower court granted Mr. Kokal's motion on March 7, 2003.

In response to the lower court's order, Lieutenant Burt of the Jacksonville Sheriff's Office sent the lower court a letter in which he stated: "After a search of the Property and Evidence Room it has been determined that we do not have the evidence in question." (PC-R4. 26). Lieutenant Burt provided no further explanation.

On June 27, 2003, the circuit court held an evidentiary hearing on Mr. Kokal's motion to compel DNA testing (PC-R4. 185-215).

At the hearing, Lieutenant James L. Burt of the Jacksonville Sheriff's Office testified that he was currently assigned to the property and evidence unit in the Jacksonville Sheriff's Office and that in March, 2003, he had been asked to locate any biological evidence in the Russell homicide investigation (PC-R4. 190-1). Lt. Burt located no evidence. Lt. Burt also testified that in 1990 he served as the commanding officer of the property and evidence unit for two and a half years (PC-R4. 190).

Lt. Burt explained:

> A: Yeah. It's real simple, and if I can go back and tell a little story from my first assignment down there. I think it's

> 99 percent accurate as probably what happened to this evidence.
>
> When I was first assigned there in '90 our property and evidence room was full and probably the Judge will remember the old Christopher building across the street that the property room was using for an auxiliary storage site.
>
> * * *
>
> **The sergeant in charge of the property room at that time was storing property over there knowing that the roof was collapsing. Every time it rained water was pouring in on the evidence. He did nothing to preserve or protect it at that time**.
>
> As we transitioned to move out of that building to the old juvenile detention facility which was located right next door we found out that most of the evidence that had been stored in there was no longer – had any evidentiary value. In other words, if you went to pick up a piece of carpet you might as well been trying to pick up a piece of pudding.
>
> If it was something that was metal it was a solid piece of rust. If it was rotatable it had rotted. In searching our – in September of '92 everything in the property room was physically touched and entered into the computer. Prior to that it was a paper system.
>
> September of '92 we had put our hands on everything and entered it to (sic) the database. Everything was in the computer. [The Russell homicide] evidence was never entered into the computer so whatever happened to it was prior to September of '92 since it was never inputted and in all likelihood it had been stored in the Christopher building and wound up in a construction dumpster.

(PC-R4. 191-193)(emphasis added).

Also, over no objection from the State, Mr. Kokal admitted the FDLE reports which identified the evidence which had been collected during the Russell homicide investigation and indicated that the evidence should be maintained by the Jacksonville Sheriff's Office (Def. Ex. 1; PC-R4. 72-79).

The circuit court denied Mr. Kokal's motion for DNA testing because the court found that there was no physical evidence available for testing (PC-R4. 81-83). The court also found that there was overwhelming evidence of Mr. Kokal's guilt (PC-R4. 81-83).

In Arizona v. Youngblood, the United States Supreme Court imposed on defendants the burden of demonstrating "bad faith" when evidence is lost or destroyed by State authorities. 488 U.S. 51 (1988). This Court has adopted the Youngblood standard. See Guzman v. State, 2003 Fla. LEXIS 1993 (Fla. Nov. 20, 2003); King v. State, 808 So. 2d 1237 (Fla. 2002); Merck v. State, 664 So. 2d 939 (Fla. 1995). Mr. Kokal has made a sufficient showing of bad faith. 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.

Likewise, as to the other biological evidence, including the victim's saliva sample, Lt. Burt testified that the sergeant who oversaw the maintenance of evidence following Mr. Kokal's capital trial was well aware that evidence was being destroyed and made no efforts to prevent the loss and destruction of evidence (PC-R4. 191-193).

Furthermore, the State misrepresented that the evidence, including the blood sample had been destroyed when Mr. Kokal originally requested DNA testing, well over three years ago.

The State and the Jacksonville Sheriff's Office failed to properly preserve crucial evidence from Mr. Kokal's trial.

Additionally, the evidence Mr. Kokal has requested testing on – the blood found on his white Nike tennis shoes – has been used against him at every juncture of his capital proceedings. Evidence was introduced at trial that the blood type of the victim matched the blood type found on the left tennis shoe (T. 634-637). The State then used the evidence of blood comparison to argue that it was evidence that Mr. Kokal had beat and shot the victim and that Mr. Kokal's testimony was not credible (T. 777-778; 818-819).

Recently, in his postconviction proceedings used the blood evidence against Mr. Kokal in denying his successive Rule 3.850 motion (PC-R3. 238-239). Thus, the State must not

be allowed to use evidence against Mr. Kokal when the State has prevented Mr. Kokal from effectively challenging that same evidence.

This Court's prior opinions finding that the State had not exercised bad faith are distinguishable from Mr. Kokal's case. For example, unlike in <u>King</u>, at the time the saliva sample and other evidence maintained by the Jacksonville Sheriff's Office was destroyed, DNA testing was known as a viable means of testing. 808 So. 2d at 1242-43. And, in <u>Guzman</u>, this Court found that bad faith was not proven because the evidence was destroyed **and not used to incriminate Guzman:** "the evidence shows that police officers believed that the hair evidence was irrelevant to solving the case." ___ Fla. L. Weekly ___ (Fla. Nov. 20, 2003), slip op. at 22. As stated previously, in Mr. Kokal's case, law enforcement and the State certainly believed that the blood evidence was relevant because the State introduced it at trial to implicate Mr. Kokal and argue that his version of the crime was not credible (T. 634-637; 777-778; 818-819).

In <u>Youngblood</u>, in joining the majority in judgment, Justice Stevens focused on three factors which he believed were important: 1) the time of the loss or destruction of evidence; 2) the fact that the defense was able to use the

loss or destruction to its advantage through argument and an instruction, without having to subject the evidence to testing; and 3) that the evidence appeared to be "immaterial" due to the jury verdict. Id. at 59-60 (J. Stevens, concurring in judgement).

Applying the factors set forth by Justice Stevens in his concurrence to Mr. Kokal's case, the loss or destruction of evidence followed the State's inculpatory use of the blood results. Thus, there was no advantage to the defense at all, only disadvantages at trial and in Mr. Kokal's subsequent appeals. Furthermore, due to the State's use of the results, undoubtedly they are material to Mr. Kokal's case. Therefore, while Justice Stevens joined in the majority's judgment only, he also provided important guidance in terms of what factors were important in determining whether bad faith was shown. Mr. Kokal's case demonstrates that he, unlike Youngblood, must be provided relief based on the factors.

Mr. Kokal has proven bad faith and the materiality of the blood evidence to his conviction and sentence. Relief is warranted.

Should this Court find that Mr. Kokal has not shown bad faith, then in the alternative, Mr. Kokal submits that the "bad faith" burden is impossibly high and requests that this

Court recede from requiring a defendant to meet that standard. Rather, Mr. Kokal submits that the standard announced by Justice Stevens in his concurrence in Youngblood should apply: "In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Arizona v. Youngblood, 488 U.S. 51, 61 (1988)(J. Stevens, concurring in judgment).

As a second alternative, Mr. Kokal also asserts that the standard announced by the dissenters in Youngblood should apply; their standard would focus on the materiality of the evidence, its potential to exculpate, and the existence of other evidence on the same point of contention. 488 U.S. 51, 70-1 (J. Blackmun, dissenting).

While this Court currently employs the Youngblood standard, several other states have, on state law grounds, chosen to apply less harsh standards from either Justice Stevens' concurrence or the dissenting opinion rather than the "bad faith" standard. "[T]he majority of states that have considered Youngblood in relation to their state constitutions have rejected the majority opinion." State v. Krantz, 1998 Tenn. Crim. App. LEXIS 26, n.2 (Ct. Cr. App. Tenn. 1998); See

also Connecticut v. Morales, 657 A.2d 585, 592-3 (Conn. 1995); Commonwealth v. Henderson, 411 Mass. 309, 310-1 (1991)(requiring a trial court to "consider and balance the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant in order to protect the defendant's constitutional due process rights to a fair trial."); State v. Delisle, 648 A.2d 632, 643 (Vt. 1994); Hammond v. State, 569 A.2d 81, 87 (Del. 1989); Ex Parte Gingo, 605 So. 2d 1237 (Ala. 1992); State v. Matafeo, 787 P.2d 671 Haw. 1990); Thorne v. Dept. of Public Safety, 774 P.2d 1326, 1330 n.9 (Alaska 1989).

Mr. Kokal submits that the Florida courts should recede from adherence to the majority opinion in Youngblood.[1] This is even more important in light of the ever-changing advances in scientific technology which require preservation of old evidence; such advances, and the well-publicized exonerations of inmates all over the country, give law enforcement a motive to "lose" or destroy evidence. See Confronting the New Challenges of Scientific Evidence, 108 Harv. L. Rev. 1557 (May, 1995)(noting that "prosecutors and state officials under political pressure to reduce crime, as well as those with a

---

[1]In fact, Larry Youngblood was eventually exonerated and released from prison in 2000 based on DNA testing.

firm belief in finality, may feel induced to destroy evidence as soon as the appeals process is initially exhausted. The supposed incentives that generally provide the state with a reason to preserve opaque evidence, if they exist prior to conviction, would virtually disappear after conviction. Cost and finality considerations may well push aside concerns about the convicted innocent, absent constitutional and legislative directions to the contrary"). Relief is warranted.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. KOKAL'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS EVIDENCED BY RING v. ARIZONA, RENDERING MR. KOKAL'S DEATH SENTENCE ILLEGAL AND ENTITLING HIM TO A LIFE SENTENCE.

In the circuit court, Mr. Kokal raised a claim pursuant to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). In Ring, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury:

> [W]e overrule *Walton* [*v. Arizona*, 497 U.S. 639 (1990),] to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death

> penalty. . . . Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *. . .* the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (citations omitted). The Court's ruling was in conformity with its earlier ruling in Apprendi v. New Jersey, where the Supreme Court held, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." 530 U.S. at 482-83. Ring applied Apprendi to the category of capital murder cases and concluded any fact rendering a person eligible for a death sentence is an element of the offense. 536 U.S. at 604, *quoting* Apprendi, 530 U.S. at 494 ("In effect, 'the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict'"). The Supreme Court has even more recently elaborated upon the meaning of Ring. In Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739 (2003), the Supreme Court explained:

> Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact–no matter how the State labels it– constitutes an element,

> and must be found by a jury beyond a reasonable doubt.

In Ring, the Supreme Court noted that Arizona was one of five states that committed sentencing factfinding and the ultimate sentencing decision to judges. Ring, 536 U.S. at 609 n. 6 (the other four were identified as Colorado, Idaho, Montana, and Nebraska). The Supreme Court further noted that four additional states had hybrid capital sentencing schemes. Id. (Alabama, Delaware, Florida, and Indiana). Subsequently, it has been recognized that additional hybrid states were overlooked by the United States Supreme Court. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002)(under Nevada law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)(under Missouri law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence).[2] In Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003)(in banc),

---

[2]Even though the United States Supreme Court in its opinion did not suggest that Ring had any implications for the capital sentencing schemes in Nevada or Missouri, the courts in those states took the logic of the decision in Ring, analyzed their state law, and reached the conclusion that under the principles enunciated in Ring that Sixth Amendment error was present in individual cases.

the in banc Ninth Circuit concluded that Ring announced substantive criminal law which by definition applied retroactively. Further, the in banc Ninth Circuit concluded that Ring error was structural error not subject to harmless error analysis.

In Mr. Kokal's case, the circuit court denied Mr. Kokal's claim and found that his claim was procedurally barred and that the current precedent from this Court required that the court deny Mr. Kokal's claim (PC-R4. 84-85).

The circuit court erred in its holdings. First, in Botoson v. Moore and King v. Moore, the Florida Supreme Court's decisions were reached on the merits; the decisions did not go off on any procedural ground; nor did it hold that, if Ring invalidated the Florida procedure used to sentence Bottoson and King to death, that the petitioners could not claim the benefit of such a ruling under Florida's established criteria for determining the retroactive application of constitutional decisions of the United States Supreme Court in Florida capital cases.

Furthermore, the majority of the justices held that Ring and Apprendi did apply to Florida's capital sentencing procedures.

Mr. Kokal's case presents many of the problems identified in Bottoson and King which entitle Mr. Kokal to relief. For example, during the voir dire at Mr. Kokal's capital trial, the trial judge told the venire that the "judge has the ultimate responsibility to sentence the defendant" (T. 121). The jurors were then told individually that their responsibility was merely to make a recommendation and advise the Court (T. 122, 123, 125, 129, 131, 132, 135, 138, 149, 152, 161-2, 163, 167, 171, 173, 177, 178, 180, 184, 185, 190, 191, 195, 196, 197, 198, 199, 200, 201, 205, 206, 207, 216, 218, 219, 225, 228, 229, 231, 232, 235, 237, 238, 241, 242, 243, 244, 247, 248, 250, 251, 253, 254, 256, 259, 262, 264, 265, 267, 268, 269, 273, 274, 276, 280, 281, 282, 283, 288, 290, 291, 295, 300, 302, 304, 305, 308, 309, 314, 316 and 317). In fact, each prospective juror and all of the ultimate jurors repeatedly heard that they were responsible for providing a recommendation, only, and that the judge was the sentencer (Id.) The court, prosecutor and even defense attorney characterized the jury's role as advisory. This view was also reenforced by the judge's instruction at the end of the guilt phase proceedings. He instructed the jury: "The final decision as to what punishment shall be imposed rests solely with the judge of this Court" (T. 860).

The jury was also instructed upon four (4) aggravating circumstances. The totality of the instructions given the jury on these aggravating circumstances were:

> The aggravating circumstances which you may consider are limited to any of the following that are established by the evidence:
>
> The first is the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit a robbery.
>
> The second aggravating circumstance is the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> The third is the capital felony was especially heinous, atrocious, or cruel.
>
> And the fourth, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist to outweigh the aggravating circumstances.

(T. 911-12). Mr. Kokal had no prior violent felony convictions and this aggravator was not considered.[3]

---

[3]The fact that Mr. Kokal's death sentence was not dependent upon the "previously convicted of a crime of

The jury was also advised that it was its duty to render to the Court an advisory sentence and that the final decision was with the judge (T. 910). Thereafter, an advisory verdict was returned stating, "A majority of the jury by a vote of 12 to zero advise and recommend to the Court that it impose the death penalty upon Gregory Kokal" (T. 917).

The trial court imposed a sentence of death (R. 244-258), and found the same aggravating circumstances upon which the jury was instructed (Id.). As to mitigating circumstances, the Court found no mitigating circumstances (Id.).

Another, problem is that Mr. Kokal was never charged with robbery, or attempted robbery. In fact, he was only charged with first-degree murder and the jury found that the murder was premeditated. Thus, the jury made no unanimous finding, beyond a reasonable doubt, in the guilt phase or even in the penalty phase that Mr. Kokal committed the crime during the course of a robbery.

The errors that occurred at Mr. Kokal's penalty phase entitle him to relief.

Finally, the circuit court also failed to look at the jurisprudence that has developed in the wake of Ring. Not

---

violence" aggravating circumstance distinguishes Mr. Kokal's case from that of Mr. Bottoson and Mr. King.

surprisingly, the states labeled by the United States Supreme Court as being in the same category as Arizona have generally recognized that Sixth Amendment error pervades their capital sentencing schemes. State v. Fetterly, 52 P.3d 875 (Idaho 2002)(in light of Ring, death sentence vacated and remanded for further proceedings); State v. Gales, 658 N.W.2d 604, 624 (Neb. 2003)("It is clear that the jury made no explicit determination that any of the statutory aggravating circumstance existed in this case. Instead, that determination was made by a judge."); Woldt v. People, 64 P.3d 256 (Colo. 2003)(death sentences vacated in consolidated direct appeal for two of the three individuals sentenced to death under 1995 scheme providing for three-judge panel to conduct capital sentencing factfinding and cases remanded for the imposition of life sentences); State v. Ring, 65 P.3d 915 (Ariz. 2003)(in a consolidated case involving those on Arizona's death row, Arizona Supreme Court established parameters for evaluating each case for harmless error analysis).[4] Each of these states has found that the necessary facts under Ring to render the defendant death eligible were not made by the jury at the guilt phase of the capital case.

---

[4]These opinions show disparity in application of harmless error analysis to the Sixth Amendment violation defined by Ring.

Also, as to the hybrid states, such as Florida, courts have also acknowledged Ring's impact on their capital sentencing statutes. For example, in Indiana, the hybrid sentencing scheme is employed not just in determining whether to impose death, but also in determining what sentence to impose in murder cases not reaching the capital level. In Bostnick v. State, 773 N.E.2d 266 (Ind. 2002), the Indiana Supreme Court was faced with a case in which the judge overrode a jury's recommendation against a sentence of life without parole. The Bostnick court concluded, "[t]he jury during the sentencing phase was unable to reach a unanimous recommendation, and thus there was no jury determination finding the qualifying aggravating circumstances beyond a reasonable doubt." Id. at 273. Under the Indiana sentencing scheme, the judge made the finding of the aggravating circumstances necessary to warrant the imposition of life without parole. "Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore vacate the trial court's sentence of life without parole." Id.[5]

---

[5]A similar decision was reached in People v. Swift, 781 N.E.2d 292 (Ill. 2002)(non-capital application of Ring in a murder case). There the Illinois Supreme Court stated, "the 'sentencing range' for first degree murder in Illinois is 20 to 60 years imprisonment. This is the only range of sentence

Another case further illuminates Indiana law and its interplay with Ring.[6] In Overstreet v. State, 783 N.E.2d 1140, 1160-61 (Ind. 2003), while addressing a capital case, the Indiana Supreme Court explained, "[u]nder the terms of our death penalty statute, before a jury can recommend a sentence of death, it must unanimously find that one or more of the charged aggravating circumstances was proven beyond a reasonable doubt."[7] In Overstreet, the defense had requested to have a special finding to this effect made by the jury. The Indiana Supreme Court noted that on the basis of Hildwin

---

permissible based on an ordinary jury verdict of guilt." 781 N.E.2d at 300. Accordingly, a sentence above that range imposed after a judge found one aggravating factor was overturned.

[6]In Wrinkles v. State, 776 N.E.2d 905 (Ind. 2002), the Indiana Supreme Court found it unnecessary to consider the implications of Ring in a successor post-conviction motion because the defendant had been convicted of three murders thereby rendering the defendant death eligible.

[7]The obvious and important distinctions from Florida include: 1) the unanimity requirement on which the jury is instructed, 2) the charging requirement, and 3) the provision under Indiana law specifically requiring the jury to determine whether one or more aggravating circumstances are present.

The Indiana legislature specifically defined the eligibility issue solely upon the presence of one aggravating circumstance. The Florida legislature has defined the issue differently, and has not sought to modify the statute in the wake of Ring. The sentencer is to determine whether "**sufficient** aggravating circumstances exist" to warrant the imposition of a death sentence, and if so, whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(emphasis added).

v. Florida, 490 U.S. 638 (1989), the trial court had denied the requested special verdict. No reversible error was found because the jury had been explicitly instructed that this unanimous finding beyond a reasonable doubt was necessary before it could return a death recommendation.[8] In another hybrid state, the Delaware legislature enacted legislation following the decision in Ring. In pending capital prosecutions, four questions were certified to the Delaware Supreme Court in light of the new legislation passed in an effort to conform with Ring. The Delaware Supreme Court thereupon undertook a review of Delaware's capital sentencing scheme. Brice v. State, 815 A.2d 314, 322 (Del. 2003). The new statutory language provided that a death sentence could not be imposed unless "a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstances exists."[9] Further under Delaware law, first degree murder was

---

[8]However, the Indiana legislature had amended the statute after the Ring decision to require that the jury make a special finding that it had unanimously found one or more of the charged aggravating circumstances beyond a reasonable doubt. Both the Indiana Supreme Court and the Indiana legislature implicitly recognized that Hildwin v. Florida did not survive the reasoning of Ring.

[9]This is decidedly different than Florida law which requires 1) the presence of an aggravating circumstance; 2) the determination that sufficient aggravating circumstances

defined by the statute in seven alternative ways. Delaware Code, Title 11, §636(a)(1-7).[10] According to Delaware law, "[i]n any case where the defendant has been convicted of murder in the first degree in violation of any provision of §636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed." Delaware Code, Title 11, §4209(e)(2). Thus, the Delaware legislature had defined first degree murder on the basis of the presence of six alternative aggravating circumstances and determined that a finding by the jury of the presence of one these circumstances constituted capital first degree murder subject to the death penalty. Accordingly, the Delaware Supreme Court found that the provisions complied with Ring. Brice, 815 A.2d at 322-23.[11]

---

are present to justify a death sentence; and 3) the aggravating circumstances are not outweighed by the mitigating circumstances. §921.141, Fla. Stat.

[10]The first definition under the statute is intentional murder. The second through the seventh definitions are premised upon alternative aggravating circumstances.

[11]In Duest, Justice Pariente cited Brice for the proposition that the "determination that aggravators outweigh the mitigators is not a factual finding that must be made by jury under Ring." Duest v. State, 855 So. 2d 33, 46 (Fla. 2003). Unfortunately, this overlooks the fact that the Delaware legislation specifically defined the issue differently than the Florida legislature has defined it (under

Delaware law, the guilt phase verdict includes aggravating circumstances from the penalty phase). The real lesson of Brice is that the proper Ring analysis must focus on the Florida statute which sets forth three

In Brice, the Delaware Supreme Court indicated that it would review cases in which death had been imposed under the old law case-by-case to determine whether any Ring error was harmless or whether relief was warranted. Subsequently, the court has issued opinions. Garden v. State, 815 A.2d 327, 342 n.4 (Del. 2003)
(death sentence vacated in an override case because judge failed to give life recommendation sufficient weight; therefore the Ring challenge was held to be moot); Reyes v. State, 819 A.2d 305, 316 (Del. 2003)(jury that returned a nine to three death recommendation had first explicitly and unanimously found during the guilt phase a statutory aggravator; therefore relief was denied). In these case, the Sixth Amendment right of confrontation was neither implicated nor discussed.

The Alabama Supreme Court has also analyzed its capital sentencing provisions in light of Ring. The Alabama Supreme Court has explained that under Alabama's statutory definition of capital first degree murder, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death-eligible. Ex parte Waldrop, ___

---

factual findings that must be made before the defendant is death eligible.

So.2d ___, 2002 Ala. LEXIS 336, *13 (Ala. November 22, 2002)("'Unless at least one aggravating circumstance as defined in Section 13A- 5-49 exists, the sentence shall be life imprisonment without parole.'"); Martin v. State, ___ So.2d ___, 2003 Ala. Crim. App. LEXIS 136, *55 (Ala. App. May 30, 2003)("the jury in the guilt phase entered a verdict finding Martin guilty of capital murder because it was committed for pecuniary gain. Murder committed for pecuniary gain is also an aggravating circumstance"). Thus, like Delaware, Alabama provides that unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment. This clearly distinguishes Alabama law from Florida law in a critical fashion.

Recently, the Nevada Supreme Court found that its capital scheme was a "hybrid" scheme because if the jury failed to return a unanimous verdict, the judge made the sentencing findings. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002). Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances.[12] Because in Johnson,

[12]The steps are defined and numbered somewhat differently than they are in Florida's statute. But the Nevada statute is much closer to the Florida statute than either the Alabama or

the jury had been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.

The Missouri Supreme Court also found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court explained that in those circumstances Ring was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury:

> In the second, or "penalty" phase, the jury is required to be instructed to follow the four-step process set out in section 565.030.4:
>
> > The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
> >
> > (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
> >
> > (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence

---

Delaware statutes. According to the Nevada Supreme Court, the legislative definition of capital murder determined what "facts" were subject to the right to trial by jury. Certainly, the right of confrontation would apply to proceedings at which the State was held to prove these elements at a jury trial because both rights arise from the same source, the Sixth Amendment.

> supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

Id . Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against defendant before a death sentence can be imposed. ***Id.; see Whitfield*****, 837 S.W.2d 503, 515 (Mo. banc 1992)**.

Step 1. Step 1 requires the trier of fact to find the presence of one or more statutory aggravating factors set out in section 565.032.2. Both the State and Mr. Whitfield agree that this is a fact that normally must be found by the jury in order to impose a sentence of death.

The State contends that steps 2, 3, and 4 merely call for the jury to give its subjective opinion as to whether the death penalty is appropriate, however, not to make findings as to whether the factual predicates for imposing the death penalty are present. It urges that the principles set out in ***Ring*** are not offended even if the judge rather than the jury determines those three steps. This Court disagrees.

Step 2. Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty.

As noted, the State argues that this step merely calls for a subjective opinion by the trier of fact, not a finding. But, the State fails to note that this Court rejected this very argument in its opinion on Mr. Whitfield's appeal of his initial conviction, in which it remanded for the new trial at issue here. In that decision, this Court held that step 2 requires a "finding of fact by the jury, not a discretionary decision." ***Whitfield*, 837 S.W.2d at 515**. This holding is supported by the plain language of the statute. In order to fulfill its duty, the trier of fact is required to make a case-by-case factual determination based on all the aggravating facts the trier of fact finds are present in the case. This is necessarily a determination to be made on the facts of each case. Accordingly, under ***Ring***, it is not permissible for a judge to make this factual determination. The *jury* is required to determine whether the statutory and other aggravators shown by the evidence warrants the imposition of death. . . .

Step 3. In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees.

The analysis undertaken in three recent decisions by other state courts of last resort, interpreting similar statutes, is instructive. In ***Woldt v. People*, 64 P.3d 256 (Colo. 2003)**, the Supreme Court of Colorado reversed the death sentences of two capital defendants after determining that Colorado's three-judge capital sentencing statute was unconstitutional in light of ***Ring***. Colorado's death penalty statute, like Missouri's, requires the fact-finder to complete a four-step process before death may be imposed. First, at least one statutory aggravator must be found. Second, whether mitigating factors exist must be determined. Third, mitigating

factors must not outweigh the aggravating factors. Finally, whether death is the appropriate punishment is considered.

The Supreme Court of Colorado described the first three of these four steps as findings of fact that are "prerequisites to a finding by the three-judge panel that a defendant was eligible for death." ***Woldt*, 64 P.3d at 265**. It noted that states are sometimes grouped into "weighing states" that require the jury to weigh the aggravating circumstances against those in mitigation in arriving at their determination of punishment, and "non-weighing states." It explained that, while in steps 1, 2, and 3 the jury is permitted to consider and weigh aggravators and mitigators, and to that extent Colorado's process is like that used in weighing states, Colorado is a non-weighing state in that, in step 4, in which the jury decides whether to impose death or to give a life sentence, the jury is permitted to consider all of the evidence without being required to give special significance to the weight of statutory aggravators or mitigators. ***Id.* at 263-64** . This last step thus "affords the sentencing body unlimited discretion to sentence the defendant to life imprisonment instead of death." ***Id.* at 265** . Because Colorado's death penalty statute required a three-judge panel to make the first three of these findings, the statute was declared unconstitutional. ***Id.* at 266-67**.

Similarly, in ***Johnson v. State*, 59 P.3d 450 (Nev. 2002)**, Nevada's Supreme Court considered the constitutionality of its capital sentencing scheme in light of ***Ring***. Its sentencing scheme provides for a three-judge panel to determine punishment if the jury is unable to do so. ***Johnson*** noted that Nevada "statutory law requires two distinct findings to render a defendant death-eligible: 'the jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'" ***Johnson*, 59 P.3d at 460** (citation omitted).

Johnson determined the requisite statutory finding that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances is at least "in part a factual determination, not merely discretionary weighing." ***Id.* at 460** . It held that, as a result, the rule announced in ***Ring*** required a jury rather than a judge to determine the mitigating as well as the aggravating factor issues. ***Id.***

Finally, on remand from the United States Supreme Court, the Supreme Court of Arizona rejected the state's contention that the requirement of Arizona law -- that the court weigh mitigating circumstances against aggravating circumstances -- did not require a factual determination, stating:

> In both the superseded and current capital sentencing schemes*, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency*. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. [sections] 13-703.E (Supp.2002) and 13-703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme.

***Ring* II, 65 P.3d at 943** (emphasis added). The Court continued:

> We will not speculate about how the State's proposal [to allow the judge to make these findings] would impact this essential process. *Clemons v. Mississippi,* 494 U.S. 738, 754, 110 S.Ct. 1441, 1451, 108 L.Ed.2d

> 725 (1990) ('In some situations, a state appellate court may conclude that peculiarities in a case make appellate...harmless error analysis extremely speculative or impossible.'); *see also Johnson v. Nevada* , 59 P.3d 450 (Nev. 2002) (as applied to Nevada law, *Ring...* requires [a] jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).

Id. Accordingly, the Court held that, even were the presence of a statutory aggravator conceded or not contested, resentencing would be required unless the court found that the failure of the jury to make these factual findings was harmless on the particular facts of the case. ***Id.*** This was a necessary result of applying ***Ring's*** holding that "[c]apital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." ***Ring*, 536 U.S. at 589**.

Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute, so that, as in Colorado, the jury is told to find whether there are mitigating and aggravating circumstances and to weigh them to decide whether the defendant is eligible for the death penalty. These three steps are also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law. As in those states, these three steps require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible.

State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo. 2003)

(footnote omitted).

The three steps in Florida's statute, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible.

Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death.[13] Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to

---

[13]Significantly, a second step is missing in the capital schemes in Indiana, Alabama and Delaware as construed by the state supreme courts in those states.

outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the ultimate determination of whether or not to impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

In Florida, as in Missouri and the other states discussed in Whitfield, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The question which Ring v. Arizona decided was what facts constitute "elements" in capital sentencing proceedings.

Following the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), Mr. Ring raised an Apprendi challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in Walton v. Arizona, 497 U.S. 639 (1990), was incorrect and provided the correct construction of the scheme. Ring, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then determined that Walton "cannot survive the reasoning of Apprendi." Ring, 122 S. Ct. at 2440.

The bulk of the Ring opinion addresses how to determine whether a fact is an "element" of a crime. See Ring, 122 S. Ct. at 2437-43. The question in Ring was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in Apprendi:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be

> tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).
>
> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt).

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at

issue in a case--here, Winship and the right to trial by jury." Id. at 2368.

The essence of criminal law is the definition of the offense. Jones v. United States, 526 U.S. 227 (1999), construed the federal statute at issue in that case, and stated that facts which increase the maximum punishment for an offense are elements of the offense. Apprendi applied the well-established rule that elements must be found by a jury and determined that the sentencing factor identified by the New Jersey legislature was in fact an element. Ring merely held that based upon the clarification of the Arizona statute provided by the Arizona Supreme Court, aggravating circumstances in Arizona were elements subject to the Sixth Amendment right to a jury trial.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b (1628)." Jones, 526 U.S. at 247. Walton did not contravene those principles but simply misread the Arizona statute. The Ring decision merely rejuvenated the longstanding rule which Walton temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

Just as Justice Thomas explained in Apprendi, there was no question in Ring that the jury trial right applies to elements. The dispute in Ring involved what was an element. Thus, the question in Ring is akin to a statutory construction issue, and "retroactivity is not at issue." Fiore v. White, 531 U.S. 225, 226 (2001); Bunkley v. Florida, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right. Mr.

Kokal was entitled to this Sixth Amendment protection at the time of his trial. The Sixth Amendment guarantees not only the right to a jury trial, but also the right of confrontation. Ring simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to the Sixth Amendment guarantees that are applicable to the states.

The ruling in Ring concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2243 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder. As explained above, Ring did not decide a procedural question (i.e., whether the Sixth Amendment requires that juries decide elements), but a substantive question (what is an element). Thus, retroactive application is required under Bousley v. United States, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

The post-Ring jurisprudence from other courts demonstrates that the circuit court has erroneously denied Mr. Kokal's arguments that he was deprived of his Sixth Amendment rights at his penalty phase and that his death sentence was unconstitutionally imposed. Relief is proper.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, GREGORY ALAN KOKAL, urges this Court to reverse the lower court's order and grant Mr. Kokal Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 1, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

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

____

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172
Attorney for Appellant

Copies furnished to:

Curtis French
Assistant Attorney General
Department of Legal Affairs
The Capitol, PL-01
Tallahassee, Florida 32399