**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC-01-882**

**LOWER TRIBUNAL No. 83-8975**

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**GREGORY ALAN KOKAL,**

**Appellant,**

**v.**

**STATE OF FLORIDA**

**Appellee.**

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

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# SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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### 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.**

Appellee, the State, argues that Mr. Kokal's due process claim must be rejected because the claim was not raised in the circuit court (Answer Brief at 24, 25-26)(hereinafter AB). Initially, Mr. Kokal notes that this Court relinquished jurisdiction in Mr. Kokal's case in order to determine whether or not Mr. Kokal would be allowed to conduct DNA testing on his tennis shoes, which were introduced at his capital trial, by the State, and used as inculpate Mr. Kokal because there was a small area of blood on the shoes which matched the victim's blood type. Mr. Kokal was found guilty of first degree murder. Mr. Kokal's violation of due process claim arose once the lower court found that any physical comparison evidence no longer existed and therefore, could not be submitted to test along with the tennis shoes. In fact, relying on a Florida Department of Law Enforcement report and postconviction counsel's representations, the circuit court found that the physical evidence obtained from the homicide victim, Mr. Russell did exist, however, at the time Mr. Kokal

[1]Mr. Kokal will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Kokal stands on the arguments presented in his Supplemental Initial Brief.

requested testing no longer existed or had degraded:

> 1. The victim's blood sample from which the Defendant requests testing has degraded to such a condition that DNA testing upon it is not possible. In addition, an oral swab of the victim's saliva, taken from him near the time of his death, no longer exists. It was last known to have been in the possession of the Florida Department of Law Enforcement on May 1, 1984. Thus, there is no physical evidence that may contain the victim's DNA still in existence.

(PC-R4. 81-82).

Thus, the circuit court's order established a basis for Mr. Kokal's claim and it was properly brought to this Court for resolution since it arose from the limited remand on the DNA issue.

However, should this Court believe that Mr. Kokal has not properly brought his due process claim based on the destruction of physical evidence by State actors, there is still time for him to return to the circuit court to litigate the issue as the State seems to suggest is the appropriate course of action. Mr. Kokal does not object to remanding this issue to the circuit court for further proceedings.

The State also argues that Mr. Kokal has failed to demonstrate that the physical evidence obtained from the victim has been destroyed due to State action. (AB at 26). In fact, the State argues that perhaps the evidence in question never even existed. (AB at 26).

The State's position that the evidence in question may have never existed is disingenuous, at best. It was the State

of Florida that obtained the victim's blood and saliva samples at the time of the homicide investigation and those actions were documented by the Florida Department of Law Enforcement(FDLE). See Defense Exhibits 1 and 2 (PC-R4. 72-79). The FDLE reports were submitted to the circuit court as evidence and were relied upon by the court in finding that the evidence no longer existed.[2]

Likewise, the circuit court also found that the victim's blood sample existed and had been maintained by the Clerk's office. The State's argument that there has been no proof that the sample was in the custody of the Duval County Clerk's Office is specious. The blood sample was introduced at Mr. Kokal's capital trial as State's Exhibit 29 as FDLE Analyst Doleman testified to the testing he conducted on the sample and is therefore, reflected in the record on appeal to this Court after Mr. Kokal's capital trial. See T. 630-641. Certainly the sample existed if it was tested. Additionally, as the State conceded they inquired with the clerk as to the maintenance of the blood sample and acknowledged that it was in the custody of the clerk (PC-R4 153). In fact, the circuit court relied on the representations by the State and defense counsel in ordering the release of the blood sample for DNA

[2]In finding that the evidence no longer existed, the circuit court implicitly found that the evidence did exist and specifically so found by referring to the May 1, 1984, FDLE lab report.

testing (PC-R4. 22-23).[3] The State's assertion that there is no evidence that the blood sample existed or that it was maintained by the Duval County Clerk of Court is belied by the record.

Furthermore, and perhaps most importantly, the State never contested the facts that it now says were unfounded when Mr. Kokal's claims were presented to the circuit court. For example, Mr. Kokal's counsel informed the Court and opposing counsel about her conversation with FDLE Analyst Sherie Enfinger and the fact that the blood sample was too degraded to test (PC-R4. 25-26). It was the conversation with Analyst Enfinger that led the circuit court to order the Jacksonville Sheriff's Office to submit any physical evidence to FDLE.[4] The circuit court made a finding of fact that the blood sample was too degraded to test. The State never contested the fact and did not raise any concerns about the court's finding of fact. Likewise, the State never presented any evidence that the sample was not degraded or was properly preserved.

As to the saliva sample, the State never presented any

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[3]If the State was correct and the blood sample had not been maintained and in the custody of the clerk, then the representations made to the circuit court by the State and the subsequent actions taken, i.e., sending an exhibit that was not the blood sample to FDLE and FDLE's receipt from the clerk would appear to create a pattern of State misconduct.

[4]It appears that the circuit court's order was not included in the record. However, the State should have received a copy of this Order during the proceedings. Undersigned plans to supplement the record with the order.

evidence that the saliva sample did not exist, to the contrary the evidence, i.e. the FDLE report, demonstrates that the sample did in fact exist and it no longer exists. Thus, at a minimum, the sample was destroyed at some point by the State.[5] And the only reason that there is no documentation of the sheriff's obtaining or destroying the evidence is due to the shoddy record keeping and destruction of records by the State. Indeed, following the evidentiary hearing, FDLE Assistant General Counsel James Martin, informed undersigned that records reflected that the Jacksonville Sheriff's Office did obtain possession of the saliva sample in 1984.[6]

Again, the State failed to present any evidence that Analyst Enfinger was incorrect when she informed counsel that the saliva sample would be adequate for testing. The circuit court accepted counsel's representations when he ordered the Jacksonville Sheriff's Office to release the sample to FDLE.

As to Mr. Kokal's shoes, the State asserts that their representatives never agreed that there was a sufficient blood sample for DNA testing. (AB at 31). However, the State never presented any evidence to the contrary at the evidentiary

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[5]Unless of course the State would believe that the sample was released from State custody at some point. If so, the State would be equally responsible for the destruction of evidence.

[6]The State objects to Mr. Kokal's reliance upon Mr. Martin's letter and even suggests that the letter was manufactured (AB at fn. 5). However, the FDLE reports themselves reflect that the sample was picked up by a representative of the Jacksonville Sheriff's Office.

hearing.

The State also suggests that they may not have been enough blood to conduct DNA testing and relies on the circuit court's comment that it recalled that there was not enough blood to conduct the testing. However, a review of the proceedings demonstrates that the circuit court's recollection was in error. The reason Mr. Kokal abandoned his initial attempt to conduct DNA testing was due to the fact that the State informed postconviction counsel and the court that the blood sample had been destroyed;[7] Mr. Kokal never asserted that the samples from his shoes were inadequate for testing. See PC-R3. 332.

While addressing Ms. Starrett's misrepresentation to the court and postconviction counsel that the blood sample did not exist, the State suggests that Ms. Starrett "misspoke" and did not act in bad faith. (AB at 33). The State suggests that Ms. Starrett relied upon someone else's false information, and even contends that the false information may have come from defense counsel, who may have advertently misled the State.[8]

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[7]In its statement of facts, the State misleadingly suggests that Ms. Starrett characterized her proclamation that the blood sample had been destroyed by including an "if" in her statement to the court. However, the State was direct and clear when Mr. Kokal attempted to obtain DNA testing previously and emphatically informed the court that the blood sample no longer existed.

[8]The State appears to have some animosity to Mr. Kokal's defense counsel, because it has no good faith basis to make such a false contention. Undoubtedly, the State could have

However, under the State's ridiculous theory of how Ms. Starrett possibly relied upon defense counsel in making the misrepresentation the State now misrepresents facts to this Court. Ms. Starrett made the misrepresentation about the nonexistence of the blood sample to the court and defense counsel prior to the examination of evidence by defense counsel, her expert and a state representative.[9]

The State asserts that it is defense counsel's burden to explain why the State misrepresented itself to the circuit court
and opposing counsel. The State's assertion makes no sense. Certainly, it is not Mr. Kokal's responsibility to explain why the State misrepresented an important fact to the court and defense counsel. Rather, the fact remains that the State did misrepresent itself and the court and defense counsel relied upon the misrepresentation.[10]

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explained to the circuit court why it had misrepresented information to the court and opposing counsel rather than speculate at this point, but choose not to do so.

[9]Additionally, since a state representative was present when the evidence was examined in December, 2000, the State is well aware that when defense counsel informed the court that the parties had "missed" the blood sample, that the focus of the examination was to determine whether the tennis shoes were suitable for testing, and in doing so all of the parties "missed" the tube of blood which was in an envelope along with the other evidence.

[10]The State argues that defense counsel should not have relied upon Ms. Starrett's representations. (AB at 35). The parties should certainly be allowed to rely on statements made to the Court by opposing counsel, particularly since counsel

The State also argues that Arizona v. Youngblood, only applies to criminal cases where evidence was lost or destroyed pre-trial. And because the loss or destruction of Mr. Kokal's case occurred post-trial, he is not guaranteed the due process concerns outlined in Youngblood. (AB at 36). The State's position has not been accepted by this Court, which has reviewed claims of lost and destroyed evidence in postconviction in accordance with Youngblood. See Guzman v. State, 2003 Fla. LEXIS 1993 (Fla. Nov. 20, 2003); King v. State, 808 So. 2d 1237 (Fla. 2002).

Finally, the State argues that even if the physical evidence was destroyed, Mr. Kokal cannot show that the DNA test results, if favorable, "might exonerate" him. (AB at 37). However, as Mr. Kokal has previously stated, 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. See T. 634-637; T. 777-778; 818-819;PC-R3. 238-239. Favorable test results, which Mr. Kokal expected or he certainly would not have requested testing, would have assisted his defense and undermined the witnesses who testified against him and supported his testimony at trial.

Mr. Kokal was entitled to test the evidence and because the State seeks to execute Mr. Kokal, the State was obligated

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is obligated as officers of the court to be truthful and candid in his or her representations to the court.

to have adequately maintained the evidence used to convict him and sentence him to death. Mr. Kokal is entitled to relief.

## 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.**

The State argues that the circuit court was correct in finding that Mr. Kokal's Ring claim was procedurally barred and meritless. (AB at 41). And though not found by the circuit court, the State also argues that Ring v. Arizona, is not retroactively applicable to Mr. Kokal. (AB at 41).

First, this Court has never found that a petitioner's claim, premised on Ring, was procedurally barred because it was not raised in the years pre-dating and following Walton v. Arizona, 497 U.S. 639 (1990). To the contrary, this Court has addressed cases raising Ring error on the merits. See Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002). The merits of Mr. Kokal's case require that relief be granted.

Appellee's assertion that Ring v. Arizona should not be retroactively applied is in error. The circuit court did not make such a finding, despite the State's non-retroactivity argument that was advanced below.

Further, under Witt v. State, 387 So. 2d 922 (1980), a change in law supports postconviction relief in a capital case

when “the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and ©) constitutes a development of fundamental significance.” Id. at 931. The first two criteria are met here. In elaborating what “constitutes a development of fundamental significance,” the Witt opinion includes in that category “changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967)] and Linkletter [v. Walker, 381 U.S. 618 (1965)],” adding that “Gideon v. Wainwright . . . is the prime example of a law change included within this category.” See Witt, 387 So. 2d at 929.

This three-fold test considers “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and ©) the effect on the administration of justice of a retroactive application of the new rule.” See id. at 926. It is not an easy test to use, because there is a tension at the heart of it. Any change of law which “constitutes a development of fundamental significance” is bound to have a broadly unsettling “effect on the administration of justice” and to upset a goodly measure of “reliance on the old rule.” The example of Gideon – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious. How the tension is resolved ordinarily depends mostly on the first prong of the Stovall-Linkletter test – the purpose to be served by the new rule – and whether an analysis of that

purpose reflects that the new rule is a “fundamental and constitutional law change[] which cast[s] serious doubt on the

veracity or integrity of the original trial proceeding." See Witt, 387 So. 2d at 929.

Two considerations call for recognizing that the Apprendi-Ring rule is such a fundamental constitutional change: First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect [ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. In Johnson v. Zerbst, 304 U.S. 458 (1938) – which was the taproot of Gideon v. Wainwright, the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court", see Johnson, 304 U.S. 458; and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in Johnson is literally true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under Apprendi and Ring: the constitutionally requisite tribunal was simply not all there; and such a radical defect necessarily "cast[s] serious doubt on the veracity or

integrity of the . . . trial proceeding." See Witt, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," Duncan v. Louisiana, 391 U.S. 145, 156 (1968) – including, under Apprendi and Ring, guilt or innocence of the factual accusations "necessary for the imposition of the death penalty." See Ring, 122 S. Ct. at 2443; Apprendi, 530 U.S. at 494-95. The right to a jury determination of factual accusations has long been the central bastion of the Anglo-American legal system's defenses against injustice.

The United States Supreme Court's retraction of Hildwin v. Florida, 490 U.S. 638 (1989) and Walton v. Arizona, 490 U.S. 639 (1990) in Ring restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy." Mr. Kokal should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right. Mr. Kokal is entitled to relief.

## CONCLUSION

The circuit court erred in denying Mr. Kokal's motion for DNA testing and successive Rule 3.850 motion. Mr. Kokal requests that this Court grant him the relief to which he is entitled.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Curtis French, Senior Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida 32399, on January 30, 2004.

## CERTIFICATION OF TYPE SIZE AND STYLE

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