IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2428

JOHNNY SHANE KORMONDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Kormondy 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. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). 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. Kormondy, through counsel, accordingly urges that the Court permit oral argument.

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order summarily denying Kormondy's successive Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

"R1." - record on direct appeal;

"TT1." - transcript of trial proceedings;

"R2." - record on resentencing direct appeal;

"TT2." - transcript of resentencing proceedings;

"SR." - supplemental record on resentencing direct appeal;

"PC-R." - postconviction record on appeal;

"PC-T." - transcript of postconviction evidentiary hearing;

"PC-R2." - record on appeal following the summary denial of successive postconviction motion.

"HT." -transcript of trial proceedings in the James Hazen case.

INTRODUCTION

The recurring issue in this tragic case has revolved around the identity of the shooter amongst three co-defendants, Johnny Kormondy, Curtis Buffkin and James Hazen. Kormondy has always maintained that it was Buffkin who the shot the victim, Gary McAdams. Buffkin, on the other hand, testified at Hazen's trial, in exchange for a deal from the State, that Kormondy was the shooter.[1] Hazen at the time of his trial denied being present for the crime.[2]

Buffkin was able to avoid the death penalty on the basis that he wasn't the shooter and that he testify truthfully at Hazen's trial. Hazen was able to avoid the death penalty based on this Court's finding that he was less culpable than Buffkin. Kormondy, on the other hand, received the death penalty on the basis that the evidence in existence at the time tended to demonstrate that he was the shooter.

As it stands today, the notion that Kormondy was the shooter is no longer reliable. Buffkin, Hazen and Kormondy have all acknowledged that it was in fact Buffkin who shot Gary McAdams. Buffkin was angry at Kormondy for talking about the crime and for

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[1]Buffkin initially went to trial and the State repeatedly asserted that he was the leader of the group (SR. 373, 376, 393). A plea agreement was reached while the jury was trying to reach a verdict.

[2]Hazen did, however, testify at his trial that Buffkin confessed to the shooting ("Darrell comes around the car first and I hear him. He stops by the front and he says well, if I didn't do it like that, I was going to have to shoot him anyhow.")(SR. 428).

causing the three defendants to be caught. Thus, in order to avoid the death penalty, he chose Kormondy to take the fall.

While Buffkin testified to the contrary at Hazen's trial, he has consistently told numerous individuals over the past twenty years that it was he who shot Gary McAdams. Buffkin does not deny making these statements, nor does he dispute their veracity. Kormondy did not shoot Gary McAdams, and as a result, his death sentence must be vacated.

STATEMENT OF THE CASE

On July 27, 1993, a grand jury indicted Johnny Kormondy, Curtis Buffkin and James Hazen with identical charges of one count of first-degree murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault and intent to commit a theft, and one count of armed robbery.

Kormondy proceeded to trial on July 5, 1994 and was found guilty on all charges. Following a penalty phase, the jury recommended death by a vote of 8 to 4. On October 7, 1994, the trial court sentenced Kormondy to death.[3]

On direct appeal, this Court affirmed Kormondy's convictions, but reversed and remanded for a new sentencing proceeding. Kormondy v. State, 703 So. 2d 454 (Fla. 1997). At

[3]Buffkin, who was offered a plea bargain by the State in return for assistance in the prosecution of Kormondy and Hazen, received a life sentence. Buffkin's plea bargain was provided on the basis that he wasn't the shooter (HT. 946-47, 1017). Hazen was originally sentenced to death following his trial, but his sentence was subsequently reduced to life imprisonment by this Court. See Hazen v. State, 700 So. 2d 1207, 1214 (Fla. 1997).

the conclusion of the resentencing, the jury again recommended death by a vote of 8 to 4, and the trial court sentenced Kormondy to death on July 7, 1999.

On direct appeal, this Court affirmed Kormondy's sentence. Kormondy v. State, 845 So. 2d 41 (Fla. 2003). Certiorari was denied by the United States Supreme Court on October 23, 2003. Kormondy v. Florida, 540 U.S. 950 (2003).

On August 30, 2004, Kormondy filed a postconviction motion in the state circuit court. After an evidentiary hearing, the court denied relief on June 20, 2005. Following Kormondy's appeal, this Court affirmed the denial of relief on October 11, 2007. Kormondy v. State, 983 So. 2d 418 (Fla. 2007).

On July 24, 2008, Kormondy filed a federal habeas corpus petition in the Northern District of Florida. The petition was denied on September 29, 2011.

On July 31, 2012, subsequent to briefing and oral argument, the Eleventh Circuit Court of Appeals issued an opinion affirming the denial of Kormondy's federal habeas petition. Kormondy v. Secretary, 688 F.3d 1244 (2012). Certiorari was denied by the United States Supreme Court on December 3, 2012. Kormondy v. Tucker, 133 S.Ct. 764 (2012).

On November 24, 2014, the Governor of Florida signed a warrant scheduling Kormondy's execution. Kormondy filed a Rule 3.851 postconviction motion on December 4, 2014. Amendments to the motion were filed on December 7 and December 9, 2014. The circuit court denied relief on December 15, 2014. This appeal

follows.

STATEMENT OF THE FACTS

A. TRIAL

The facts of the crime as set out by this Court are as follows:

> The victim Gary McAdams was murdered, with a single gunshot wound to the back of his head, in the early morning of July 11, 1993. He and his wife, Cecilia McAdams, had returned home from Mrs. McAdams' twenty-year high-school reunion. They heard a knock at the door. When Mr. McAdams opened the door, Curtis Buffkin was there holding a gun. He forced himself into the house. He ordered the couple to get on the kitchen floor and keep their heads down. James Hazen and Johnny Kormondy then entered the house. They both had socks on their hands. The three intruders took personal valuables from the couple. The blinds were closed and phone cords disconnected.
>
> At this point, one of the intruders took Mrs. McAdams to a bedroom in the back. He forced her to remove her dress. He then forced her to perform oral sex on him. She was being held at gun point.
>
> Another of the intruders then entered the room. He was described as having sandy-colored hair that hung down to the collarbone. This intruder proceeded to rape Mrs. McAdams while the first intruder again forced her to perform oral sex on him.
>
> She was taken back to the kitchen, naked, and placed with her husband. Subsequently, one of the intruders took Mrs. McAdams to the bedroom and raped her. While he was raping her, a gunshot was fired in the front of the house. Mrs. McAdams heard someone yell for "Bubba" or "Buff" and the man stopped raping her and ran from the bedroom. Mrs. McAdams then left the bedroom and was going towards the front of the house when she heard a gunshot come from the bedroom. When she arrived at the kitchen, she found her husband on the floor with blood coming from the back of his head. The medical examiner testified that Mr. McAdams' death was caused by a contact gunshot wound. This means

> that the barrel of the gun was held to Mr. McAdams' head.
>
> Kormondy was married to Valerie Kormondy. They have one child. After the murder, Mrs. Kormondy asked Kormondy to leave the family home. He left and stayed with Willie Long. Kormondy told Long about the murder and admitted that he had shot Mr. McAdams. He explained, though, that the gun had gone off accidentally. Long went to the police because of the $50,000 reward for information.
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> Kormondy v. State, 703 So.2d 454, 456-57 (Fla.1997)(footnote omitted).

We also noted the following factual dispute between Kormondy's account of the crime and that of accomplice Hazen:

> Kormondy, in this case, and Hazen, in Hazen v. State, 700 So.2d 1207 (Fla. 1997), present different factual scenarios. The trial records are inconsistent as to the locations of Hazen and Buffkin at the time of the fatal shot. During Kormondy's trial, Mrs. McAdams testified that Buffkin was with her in the back of the house when she heard a shot fired. Officer Hall testified that Kormondy told him in an unrecorded statement that Buffkin fired the fatal shot and Hazen was in the back of the house with Mrs. McAdams. In a tape-recorded confession played for the jury, Kormondy again said that Buffkin shot the victim. During Hazen's trial, Buffkin testified that Kormondy killed the victim and Hazen was in the back room with Mrs. McAdams. Hazen testified that he was not present at the scene when the crimes against the McAdamses were committed.

Id. at 456 n. 1.

Kormondy, 845 So. 2d at 45-46.

B. FIRST POSTCONVICTION PROCEEDING

During Kormondy's postconviction evidentiary hearing in 2005, testimony was presented in support of the argument that Kormondy did not shoot Gary McAdams. Curtis Buffkin testified

that it was he, and not Kormondy, who accidentally shot Gary McAdams (PC-T. Vol. I, 71, 85). Buffkin, who had a .44 pistol, testified that he planned to rob an occupied home, and although he discussed this plan with Hazen, he did not discuss it with Kormondy (PC-T. Vol. I, 77, 78). However, Buffkin knew Kormondy would participate because they had already committed one burglary together. And, Buffkin also threatened Kormondy to keep quiet and if he said anything, "something is going to go on, man" (PC-T. Vol. I, 80).[4]

Buffkin stated he lied previously because he didn't want to get the death penalty and "I figured since [K]ormondy was going to run his mouth, I'm going to put him where he's got to face the death penalty, not me" (PC-T. Vol. I, 85). Buffkin testified that he and Hazen raped Mrs. McAdams (PC-T. Vol. I, 86).[5]

After entering the house, Buffkin told Kormondy and Hazen to pull the blinds and the phone cords (PC-T. Vol. I, 87). Kormondy and Hazen also began searching the house, and Hazen found a .38 in the bedroom (PC-T. Vol. I, 87). Buffkin took the .38 and gave Kormondy the .44 and stated to Gary McAdams, "What are you going to do with this…?" (PC-T. Vol. I, 87). Buffkin and Hazen took Mrs. McAdams to the back room while Kormondy stayed with Gary McAdams (PC-T. Vol. I, 87). Buffkin took the .38 so that Gary

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[4]Buffkin thought he might have to shoot Kormondy and Hazen if they did not go with him (PC-T. Vol. I, 77).

[5]When asked if Kormondy raped Mrs. McAdams, Buffkin stated he didn't see Kormondy rape her and Kormondy didn't tell him that he had (PC-T. Vol. I, 86).

McAdams would see the .44 pointed at him by Kormondy (PC-T. Vol. I, 88). Buffkin brought Mrs. McAdams back to Gary McAdams, naked. Kormondy went back in the bedroom and Buffkin still had the .38 (PC-T. Vol. I, 88).

Buffkin testified that when Mrs. McAdams was brought back to Gary McAdams, he (Buffkin) gave him a beer. According to Buffkin, Hazen then stated he wasn't through with Mrs. McAdams, and he took her back to the bedroom and Kormondy followed. Kormondy came back to the kitchen while Hazen stayed in the bedroom (PC-T. Vol. I, 95). Kormondy then began to look through Mrs. McAdams' purse (PC-T. Vol. I, 95). When asked why he killed Gary McAdams, Buffkin stated, "I told him to keep his fucking head down, and at that time when I bumped him in the head, the gun fired off. I couldn't – there wasn't nothing I could do to save him. If I could bring the man back, I would love to bring him back" (PC-T. Vol. I, 97).

After Gary McAdams fell back, Buffkin told Kormondy, "Man, let's get this stuff and let's go."… "Call back there and holler, Bubba, let's go" (PC-T. Vol. I, 97-98). Buffkin further stated, "At the time, I figured he killed Mrs. McAdams at that time because I heard the gunshot go off back there when I was getting ready to go out the door. If I had known that she was not dead, I would have turned around, since Gary was already dead, I would have went back there and killed her" (PC-T. Vol. I, 98).

James Hazen testified at the evidentiary hearing that he saw Buffkin holding a gun to Gary McAdams' head (PC-T. Vol. I, 108).

Hazen did not see Buffkin shoot Gary McAdams, but he did see Buffkin holding the victim's pistol to his head (PC-T. Vol. I, 109).[6] Buffkin later told Hazen, "If it didn't happen like that, I was going to have to shoot him anyhow." (PC-T. Vol. I, 110).

Hazen testified that he was the one who shot the gun in the bedroom where Mrs. McAdams was when Gary McAdams was killed (PC-T. Vol. I, 113). Hazen was on the floor with Mrs. McAdams in the bedroom when he accidentally fired the gun (PC-T. Vol. I, 114).

In its order denying postconviction relief, the trial court found Buffkin's testimony to be incredible on the basis that he manufactured his testimony in order to give himself the opportunity to escape from custody:

> It is apparent to the Court, from the contradictions in Buffkin's evidentiary hearing testimony, along with the other testimony provided at evidentiary hearing, that the sole reason Buffkin claimed that he shot Mr. McAdams was to afford Buffkin an opportunity to come to court and to escape. Buffkin has escaped from custody in the past; in fact, he was an escapee from prison when he participated in the events at the McAdamses's home. The Court finds that Buffkin fabricated his most recent statement in an attempt to escape again. The Court also notes that Buffkin admitted at the evidentiary hearing that he had lied to "everybody," including the Court. The Court finds it difficult to believe that Buffkin, who obviously had an ulterior motive in fabricating his most recent statement, is now testifying to the truth concerning the events that occurred at the McAdamses's house.

(PC-R. 990).[7]

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[6]Hazen had the .44 caliber weapon, which was the one Buffkin brought into the house (PC-T. Vol. I, 110)

[7]The trial court also rejected Hazen's testimony.

In affirming the trial court's denial of relief, this Court stated:

> Based on the evidence presented at the hearing, the evidence presented at trial, and the circumstances presented, the trial court properly found that Buffkin's recent statement was not credible and it would not have changed the outcome of Kormondy's trial or penalty phase. Accordingly, the trial court properly denied relief on this claim.

Kormondy, 983 So. 2d at 440.

C. SUCCESSIVE POSTCONVICTION PROCEEDING

In his successive postconviction motion and its two subsequent amendments, Kormondy alleged newly discovered evidence supporting the fact that Buffkin was indeed the shooter.

According to Enoch Hall, who was in jail with Buffkin in 1993,[8] Buffkin stated that he was going to try to escape. Buffkin further stated that he had no problem shooting people in order to escape as he had just "blew McAdams mother f***ing brains out." (PC-R2. Vol I, 51-52).

Christopher Lee Michelson stated in an affidavit that he was incarcerated at Everglades Correction Institution between 1996 and 1998 (PC-R2. Vol I, 77). It was there that Michelson met Buffkin, who admitted to being the shooter:

> While at Everglades together Buffy {Buffkin} told me the circumstances of his murder conviction. Buffy stated that he had two co-defendants, one of which was

[8]Hall had been arrested on April 8, 1993 for numerous charges and he was sentenced to life in December, 1993. Hall was in the Escambia County jail during this time. Buffkin was arrested on July 11, 1993 and was also in the Escambia County jail (PC-R2. Vol I, 52).

> Johnny Kormondy who was sentenced to death. Buffy told me that he was the one that shot and killed the victim. He stated that he put the shooting on Kormondy because he knew if he didn't put it on one of his co-defendants he was going to be sentenced to death. He chose to put in on Kormondy because he blamed Kormondy for the threesome getting caught. Buffy stated that if Kormondy kept his mouth shut none of them would have been apprehended.

(PC-R2. Vol I, 77).

Russell Binstead heard Buffkin's confession to being the shooter in 2011. In his affidavit, Binstead stated:

> 2. I met Curtis Buffkin while incarcerated at Union Correctional Institution in approximately 2011. We were in the same dorm. Buffkin and I were tight.
>
> 3. On multiple occasions between the time we met in 2011 and the time he was transported to FSP he discussed his murder case with me.
>
> 4. Buffkin told me that it was he who should be on death row. He further stated he was the person who killed the victim in his case. He explained to me that he had two co-defendants one of which has a life sentence and one who received a death sentence.
>
> 5. Buffkin told me that he felt guilty that one of his co-defendants had a death sentence for a murder he committed.

(PC-R2. Vol I, 78-79).

Additionally, according to Roger Livingston, Buffkin stated in 2012 that Kormondy did not kill the victim. In his affidavit, Livingston stated:

> 2. I'm from the Pensacola area. I have been aware of the McAdams murder for years. I have known Curtis Buffkin's Uncle Joe for years. I was as Century CI when Buffkin's co-defendants were tried. I read about the case in the paper.
>
> 3. In around 2012 I met Curtis Buffkin at UCI. I knew who he was but I stayed away from him. Eventually we ended up in the same dorm.

4. Eventually Buffkin approached me because he knew I was from Pensacola also. We talked about his case.

5. I do not know Johnny Kormondy. I did however know that Buffkin had co-defendants and that one was on death row.

6. Buffkin told me that his co-defendant who was on death row was not the one that killed the victim. He told me that he was going to try to free the man and that one day he would end up on death row himself.

7. I am in no way a friend of Buffkins. I don't like nor do I respect him. I find the crime he and his co-defendants were convicted of as the lowest of the low.

(PC-R2. Vol I, 80-81).

Finally, John Turner also had a similar experience upon encountering Buffkin in 2012. According to Turner's affidavit:

1. My name is John Turner. I am currently incarcerated at UCI. In 2012 I was incarcerated in the same dorm as Buffkin at this camp.

2. At one point in 2012 I was asked to deliver a transcript to Buffkin by another inmate. I read the transcript while it was in my possession.

3. When I gave the transcript to Buffkin he told me that he put his co-defendant on death row and felt bad about it. He told me he was the ring leader and responsible for the murder. He stated that his co-defendant who was on death row was there wrongfully.

(PC-R2. Vol I, 129-30).

SUMMARY OF THE ARGUMENT

1. The circuit erred in summarily denying Kormondy's claim of newly discovered evidence. Further, the circuit court erred in its findings as to diligence and as to whether the newly discovered evidence would probably result in a sentence of less

than death.

2. Undersigned counsel failed to adequately raise critical issues regarding constitutional violations of Strickland and/or Brady/Giglio. In accordance with the United States Supreme Court's decisions in Martinez v. Ryan and Trevino v. Thaler, as well as this Court's equitable powers, Kormondy is entitled to equitable relief and consideration of the merits.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court denied an evidentiary hearing, and therefore, the facts alleged by the Appellant must be accepted as true for purposes of this appeal in order to determine whether the Appellant is entitled to an opportunity to present evidence in support of his factual allegations. Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The circuit court's legal analysis is subject to *de novo* review by the Court.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT KORMONDY'S DEATH SENTENCE IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION

In Jones v. State, 591 So. 2d 911 (Fla. 1991), this Court adopted the standard for evaluating claims of newly discovered evidence. A court must first determine that the "asserted facts 'must have been unknown by the trial court, by the party, by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Id. at 916 (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). Next, a court must determine that "[t]he newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Id. at 915. The newly discovered evidence standard is the same whether it pertains to guilt/innocence or penalty phase. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Thus, the issue as to the death sentence is whether the new evidence would probably result in a sentence of life rather than death.

B. DILIGENCE

Following Enoch Hall's 1993 encounter with Buffkin, Hall was later convicted and sentenced to death in another case in 2010. In August, 2014, he encountered Kormondy in prison and informed him of Buffkin's statement.

Kormondy proceeded to contact undersigned counsel by

letter, informing him that he had something important to discuss. Undersigned counsel met with Kormondy in August, 2014, and counsel's investigator met with Kormondy in October, 2014. Thereafter, undersigned counsel contacted Hall's attorney on November 5 and 7th, 2014, to discuss the possibility of interviewing Hall (PC-R2. Vol. 1, 69-70, Att. A). Hall's attorney informed undersigned counsel that she would discuss the matter with Hall (PC-R2. Vol. 1, 69-70, Att. A). Thereafter, Kormondy's warrant was signed on November 24, 2014. On December 2, 2014, Hall's attorney contacted undersigned and informed him that Hall was willing to meet with him.

Undersigned counsel interviewed Hall on December 3, 2014. In that interview, Hall confirmed his statements to Kormondy regarding what Buffkin said. In addition, Hall provided counsel with other names of individuals who may have overhead Buffkin confessing to being the shooter.

Additionally, on December 3, 2004, undersigned counsel interviewed Buffkin, who confirmed his statements to Hall.[9] Buffkin also stated that he previously told numerous other inmates that he was the shooter. These inmates included Christopher Michelson, Michael Griffin, Gerald Gallager, Russell Binstead and an individual with the last name of Livingston.

Undersigned counsel's investigator proceeded to locate, interview, and obtain affidavits on December 5, 2014, from

[9]Buffkin recognized Hall upon being shown a photo of him.

Michelson, Binstead and Livingston. From Binstead, undersigned counsel learned of another individual with pertinent knowledge of Buffkin's admissions, John Turner. Undersigned counsel's investigator thereafter interviewed and obtained an affidavit from Turner on December 9, 2014.

The asserted facts were unknown by the trial court, by Kormondy, or by counsel at the time of trial. Further, Kormondy or his counsel could not have known them by the use of diligence. Undersigned counsel first learned of Enoch Hall in August of this year. He was in the process of investigating this information for the purpose of filing a successive postconviction motion prior to the death warrant being signed. Undersigned counsel ultimately filed a successive motion and two amendments on December 4, 7, and 9th, 2014, well within one year of being alerted to this information. See Clark v. State, 35 So. 3d 880, 892 (Fla. 2010)("Claims of newly discovered evidence must be raised within one year of the time of discovery.").

C. THE NEW EVIDENCE WOULD PROBABLY RESULT IN A LIFE SENTENCE

The newly discovered evidence would probably result in a life sentence. Buffkin, who was offered a plea bargain by the State in return for assistance in the prosecution of Kormondy and Hazen, received a life sentence.[10] This Court subsequently set aside Hazen's death sentence on the ground that he was less culpable than Buffkin. Hazen v. State, 700 So. 2d 1207, 1214

[10]Buffkin's plea bargain was provided on the basis that he wasn't the shooter (HT. 946-47, 1016).

(Fla. 1997). Conversely, in upholding Kormondy's death sentence, this Court stated that "[t]he evidence from trial and the resentencing demonstrates that Kormondy committed the homicide and is more culpable than his codefendants; therefore, his sentence of death is not disproportional on this basis." Kormondy, 845 So. 2d at 47.

The aforementioned newly discovered evidence establishes that Kormondy was not more culpable than Buffkin or Hazen, and it provides credibility to Buffkin's evidentiary hearing testimony that he was in fact the shooter. Further, the newly discovered evidence establishes that the trial court's basis for the denial of relief was erroneous. Buffkin's admission that he was the shooter as far back as 1993 defies the notion that he manufactured his testimony more than a decade later in order to effectuate an escape.[11]

The degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision. Craig v. State, 510 So. 2d 269 (Fla. 1987). Where a defendant is guilty of murder but not the actual killer, and his codefendant receive a sentence of life, these circumstances justify a jury's

[11]Indeed, the newly discovered evidence establishes that Buffkin maintained that he was the shooter not only years before his 2005 evidentiary hearing testimony, but years later as well.

recommendation of life in prison. Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The law provides that an equally culpable codefendant's life sentence constitutes newly discovered evidence sufficient to grant postconviction relief. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Surely newly discovered evidence of Buffkin's admission as being the shooter justifies that Kormondy receive a life sentence.

Indeed, in State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court affirmed the lower court's grant of relief based on newly discovered evidence concerning the true culpability of those individuals involved in the crime. The newly discovered evidence consisted of the testimony of an inmate who had been incarcerated with Mills' co-defendant, Ashley, in 1980 and obtained a confession from Ashley. Id. at 250. Mills' attorneys did not know that Ashley had confessed to an inmate that he had been incarcerated with until twenty years after the confession occurred. Based upon the co-defendant's confession that he was the one who had killed, Mills was granted relief. Id. The result in Kormondy's case must be the same.

D. THE CIRCUIT COURT'S ORDER

Initially, it must be pointed out that the circuit court denied an evidentiary hearing as to this issue. Ignoring well settled law attendant to the granting of an evidentiary hearing in a postconviction proceeding, the circuit court in conclusory fashion stated that after hearing arguments, the successive

motion and the amendments did not require an evidentiary hearing for proper resolution (PC-R2. Vol. III, 183).

"Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). *Accord* Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995).[12] Factual allegations as

[12]Successive Rule 3.850 petitioners have received evidentiary hearings based on newly discovered evidence and merits consideration. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(the Florida Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances

to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). In Kormondy's case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Kormondy's diligence in attempting to unearth the new evidence.

Without the benefit of a hearing, the circuit court provided several procedural possibilities on which Kormondy's claim could be denied.[13] The circuit court first "questioned" whether Kormondy's claim qualifies as newly discovered evidence (PC-R2. Vol. III, 187). Citing to this Court's decisions in Marek v. State, 14 So. 3d 985, 989 (Fla. 2009) and Sireci v. State, 773 So. 2d 34, 40 n10 (Fla. 2000), the circuit court stated that Kormondy's claim "appears" to be procedurally barred (PC-R2. Vol. III, 188). According to the court's reasoning, "The claim is nothing more than Defendant's attempt to go behind the

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sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

[13]The circuit court's order is rather ambiguous as to whether it was actually denying Kormondy's claim on the procedural grounds cited, or whether it was citing these grounds merely as possible reasons for a denial.

previous credibility finding regarding Mr. Buffkin's 2005 testimony and relitigate the prior claim that Mr. Buffkin was the murder, and because Mr. Buffkin is sentenced to life, Defendant should be sentenced to life too." (PC-R2. 188).

Contrary to the circuit court's determination, this Court's decisions in Marek and Sireci do not prohibit a defendant from presenting new factual evidence that may call into question a court's prior determination. Indeed, in Marek, this Court did not deny Marek's claims regarded his co-defendant's inculpatory statements as being procedurally barred. Rather, unlike in Kormondy's case, Marek was afforded an evidentiary hearing. Marek 14 So. 3d at 988-89. Based on a consideration of those facts developed at the evidentiary hearing, this Court determined that Marek was not entitled to relief. Id. at 992-98.

The circuit court's reliance on Sireci is likewise misplaced. There, this Court explained in a footnote that claims raised on direct appeal are procedurally barred in postconviction when the defendant uses a different argument to relitigate the same issue. Sireci, 773 So. 2d at 40, n10. Here, unlike in Sireci, Kormondy is not couching his claim based on a different argument with regard to a set of facts that have already been litigated before the court. Rather, he is presenting newly discovered factual evidence in support of his entitlement to relief. The circuit court in its order failed to recognize that the question here is whether the newly discovered factual evidence "weakens the case against [Kormondy] so as to give rise

to a reasonable doubt as to his culpability." Johnston v. State, 27 So. 3d 11, 18-19 (Fla. 2010)(citation omitted).

The circuit court also implies that a portion of Kormondy's claim "could very well be considered procedurally barred" based on a lack of diligence (PC-R2. Vol. III, 189). Citing to Buffkin's testimony at the 2005 evidentiary hearing that he told other inmates that he was the one who had shot and killed the victim (PC-R2. Vol. III, 188), the circuit court claims that "counsel could have previously asked Mr. Buffkin to identify the names of the other inmates to whom he had confessed." (PC-R2. Vol. III, 189). Thus, according to the circuit court, "As Mr. Buffkin confessed to both Mr. Hall and Mr. Michelson before 2005, counsel could have discovered this information much sooner than 2014 if diligence had been employed." (PC-R2. Vol. III, 189).

The circuit court in its order never addresses diligence as to Livingston, Turner and Binstead, each of whom encountered Buffkin after 2005. Presumably then, the circuit court takes no issue as to Kormondy's assertion of diligence as to these three individuals. And with regard to Hall and Michelson, Kormondy's assertion of diligence is not rebutted by the record. While the circuit court refers to one portion of Buffkin's 2005 testimony indicating that he told other individuals that he was the triggerman, the court wholly ignores a later portion of Buffkin's testimony in which it was clarified that he either didn't tell or couldn't identify other individuals that he informed he was the triggerman:

Q. The only person you can identify at this point in time that you discussed this with that you were the triggerman, the only person you can actually identify is the investigator sitting here in court, the investigator for the defendant; is that correct?

A. Not - - I can say he came down to FSP and he asked me what happened, and I basically told him on my own free will.

MR. EDGAR: Your Honor, he is not being responsive. I asked him is that the only person you can identify.

THE COURT: Answer that question. He's asking you **is this investigator here the only person that you've told that you were the one that killed Mr. McAdams.**

THE WITNESS: **Yes, sir, it was.**

THE COURT: Next question.

(PC-R.2 Vol. III, 304-05)(emphasis added). Certainly, it would not be unreasonable for Kormondy's counsel not to follow up with Buffkin after he told the court that he could not identify or did not tell other individuals. The fact is that the only reason the issue came to light was because counsel learned from another party, Enoch Hall, that Buffkin had made statements. The circuit court never actually addresses the issue at hand, whether counsel was diligent in pursuing the information provided by Hall through Kormondy.

Next, the circuit court claims that the statements from the five inmates would not have been admissible at trial (PC-R2. Vol. III, 189). According to the circuit court, the proposed newly discovered evidence is merely composed of hearsay statements that would not have fallen under any hearsay exception to become

admissible as substantive evidence or for impeachment purposes PC-R2. Vol. III, 190).

Here, the circuit court's order is erroneous as a matter of law. As this Court explained in Marek, these statements would have been admissible at Kormondy's penalty phase:

> Section 921.141(1), Florida Statutes (2008), expressly provides for the admission of hearsay testimony in the penalty phase of a death case:
>
> > In the [penalty phase] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]. *Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.* However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.
>
> (Emphasis added.) This statute provides "wide latitude ... in admitting penalty-phase evidence." *Rutherford v. State*, 727 So.2d 216, 221 (Fla.1998). The admissibility of hearsay, however, is not unlimited. The statute clearly conditions the admission of hearsay by the State on whether the defendant has a fair opportunity to rebut it. Further, we have held that the same condition applies to the admission of hearsay evidence presented by the defendant. *Blackwood v. State*, 777 So.2d 399, 411-12 (Fla.2000) ("[T]he statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible.... This rule applies to the State as well."); *see Hitchcock v. State*, 578 So.2d 685, 690 (Fla.1990) (While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded. We find no merit to Hitchcock's claim that the state must abide by the rules but that defendants need not do so."). Accordingly, because in this case we assume that the due diligence prong was

> met, Wigley's statements to the six witnesses would be admissible in a new penalty phase only if the State would have a fair opportunity to rebut the evidence. As explained below, the State has ample, admissible rebuttal evidence; thus, Wigley's statements would be admissible.

Marek v. State, 14 So. 3d 985, 996 (Fla. 2009). Contrary to the circuit court's determination, Buffkin's statements to the five witnesses would be admissible in a new penalty phase.[14] Moreover, if Buffkin testified as he did in 2005 and the State contended that he fabricated his testimony, as it did in 2005, then the statements would be admissible as prior consistent statements. See section 90.801(2)(b), Fla. Stat. (2008). Further, because Buffkin's plea deal was contingent on him testifying truthfully (HT. 1017), these statements would also be admissible as statements against interest. See section 90.804(2)(2), Fla. Stat. (2008).

The circuit court also found in its order that the hearsay statements would be cumulative to Kormondy's oral and recorded statements presented at trial indicating that Buffkin was the person who killed Mr. McAdams, as well as to Buffkin's and Hazen's prior testimony (PC-R2. Vol. III, 190). The circuit court's order is again erroneous as these witnesses would be testifying to admissions give by Buffkin at different times and under different circumstances over a number of years. Hall would testify to an incident in 1993; Michelson to an incident between

[14]Certainly, the State would have a fair opportunity to rebut these statements.

1996 and 1998; Binstead to an incident in 2011; Livingston to an incident in 2012; and Turner to a separate incident in 2012. Buffkin did not previously testify to any of these incidents, and neither Kormondy nor Hazen were even present for any of them.

The circuit court in its order also found, alternatively, that the results of the trial and sentence would not have been different (PC-R2. Vol. III, 190-91). In arriving at this determination, the circuit court relied primarily on the testimony of two witnesses, Mrs. McAdams, who testified that Buffkin was the person with her in the bedroom when her husband was shot in the kitchen (PC-R2. Vol. III, 192); and William Long, who testified that Kormondy confessed to killing Mr. McAdams (PC-R2. Vol. III, 192).[15] The circuit court concluded that "[t]he newly discovered evidence, when weighed with the evidence adduced at trial, and the previously submitted newly discovered evidence considered at the 2005 evidentiary hearing, would not have produced an acquittal or yielded a less severe sentence for Defendant." (PC-R2. Vol. III, 193)(fn omitted).

In arriving at its determination, the circuit court ignored the fact that all three defendants in the case, Buffkin, Kormondy and Hazen, have indicated that Buffkin was the shooter. Further, the circuit court ignored the fact that Buffkin has consistently told numerous individuals over the course of approximately twenty

[15]According to the circuit court, "Mr. Long's testimony established that he and Defendant shared a close friendship, making his testimony regarding Defendant's confession of great relevance and strength." (PC-R2. Vol. III, 192).

years that he was the shooter and that he pointed the finger at Kormondy in order to avoid a death sentence. And, the circuit court ignored the fact that the basis for which Buffkin had previously been found incredible, that he concocted his testimony in 2005 in order to effectuate an escape, is no longer true.

Additionally, the circuit court in its order ignored the suspect nature of William Long's testimony. Long admitted at trial that before he heard Kormondy say he was the shooter, Long had smoked crack and drunk six pitchers of beer (TT1. 1192). Further, Long acknowledged that when he heard Mr. Kormondy say he was the shooter, he was on the run from the law for violating probation (TT1. 1194-97). Additionally, Long was motivated to turn in Kormondy on the basis of a $25,000 reward he expected to receive for his testimony (TT1. 1197). Further, as detailed in Argument II, Long in his deposition testimony did not state that Kormondy identified himself as the shooter. And as detailed in Argument II, Long testified falsely to that he received no other benefit for his testimony when in fact the State talked to the judge about his charges and he received six months' community control (PC-T. Vol. I, 60-61).

As to Mrs. McAdams, in light of the extensive evidence establishing that Buffkin was the shooter, the circuit court failed to consider that in light of the harrowing circumstances she endured, her testimony was understandably inaccurate. Even when Buffkin was testifying as a State witness at Hazen's trial, he stated that it was Hazen who was upstairs when Kormondy shot

Mr. McAdams. See Hazen, 700 So. 2d at 1213-14. Moreover, contrary to Mrs. McAdams testimony that there was one perpetrator with her, Buffkin, at the time of the gunshot, she had previously indicated otherwise. Deputy Scherer who was the first law enforcement officer at the scene and who questioned Mrs. McAdams at that time, testified in his deposition that Mrs. McAdams stated that there were two assailants in the bedroom when the gunshot was fired (PC-R. Vol. V, 860). As the federal district court explained in its order during Kormondy's habeas proceeding:

> If Mrs. McAdams really said two assailants were with her when the shot was fired, it would cast at least some doubt on her ability to recall what happened. This, in turn, would cast some doubt on her statement that Mr. Buffkin was with her when the shot was fired.

Kormondy v. Tucker, No. 3:08-cv-00316-RH, at 40-41 (N.D. Fla. 2011).[16]

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[16]The federal district court made this statement in regard to a claim brought in Kormondy's federal habeas proceeding asserting that trial counsel was ineffective for failing to impeach Mrs. McAdams with this information. The federal district court found that "[i]f failing to do so was not ineffective assistance, it was close." Id. at 41. The federal district court took issue with this Court's determination that counsel was not ineffective, finding that "[a]s an original matter, one might reasonably find prejudice":

> The Florida Supreme Court focused on the second and third points and held that there was no prejudice. The analysis was reasonable but hardly conclusive. The court noted correctly that Mrs. McAdams consistently identified Mr. Buffkin as being with her when the shot was fired. But impeaching her—undermining confidence in her account—would have been the whole point of introducing the two-assailant statement. The court said Mr. Long testified that Mr. Kormondy admitted that he was the shooter, but Mr. Long faced substantial credibility issues of his own. As an original matter,

E. CONCLUSION

Kormondy submits that he was diligent in presenting his claim of newly discovered evidence. Further, Kormondy submits that when a cumulative analysis of the new evidence, along with all prior claims and the complete record, is conducted, see State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitley, 115 S.Ct. 1555 (1995); Swafford v. State, 679 So. 2d 736 (Fla. 1996); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), this would probably result in a sentence of life.

At the very least, Kormondy submits that an evidentiary hearing is warranted as the records and files in this cause do not conclusively rebut his claim based on the newly discovered evidence.

ARGUMENT II

KORMONDY IS ENTITLED TO EQUITABLE RELIEF AND CONSIDERATION OF THE MERITS REGARDING HIS CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR THE STATE VIOLATED BRADY V. MARYLAND AND GIGLIO V. UNITED STATES.

When counsel for an initial collateral review proceeding is ineffective, and courts refuse to consider those claims that should have been raised in the initial collateral proceedings but

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> one might reasonably find prejudice, disagreeing with the Florida Supreme Court.

Id. at 42. Ultimately, however, in light of the stringent legal standards under the AEDPA, the federal district court was unable to say that this Court's ruling was contrary to or an unreasonable application of clearly established federal law. Id.

were not (e.g., ineffective assistance of trial counsel and claims under Giglio v. United States and Brady v. Maryland), the defendant suffers the inequitable result of having those constitutional claims procedurally barred and not subject to meaningful review. See Trevino v. Thaler, 133 S.Ct. 1911, 1921 (2013); Martinez v. Ryan, 132 S.Ct. 1309, 1316 (2012). "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." Martinez, 132 S.Ct. at 1316. The "failure to consider a lawyer's ineffectiveness during an initial-collateral proceeding as a potential cause for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." Trevino, 133 S.Ct. at 1921.

In the instant case, undersigned counsel failed to adequately raise critical issues regarding constitutional violations of Strickland and/or Brady/Giglio. These claims involved the State's critical witness, William Long. Subsequent to the crimes in question, Kormondy allegedly told Long, who was Kormondy's wife's cousin, about the murder and that it was he who had accidentally shot Mr. McAdams. Long relayed this comment to his friend, Chris Roberts. Because Long had an outstanding warrant for violation of probation and he didn't want to go to jail, he asked Roberts to report Kormondy to law enforcement so

they could split the reward (TT1. Vol. VII, 1188).[17] However, law enforcement eventually spoke to Long and convinced him to wear a wire in order to get a confession from Kormondy (PC-T. Vol. I, 56). In order to avoid jail, Long reluctantly wore a wire and spoke to Kormondy at Kormondy's place of employment (PC-T. Vol. I, 58).[18]

Long was arrested anyway, and was released on a $5,000 bond, which he did not pay (PC-T. Vol. I, 59-60; PC-R. Vol. IV, 580-81). At trial, Kormondy's counsel asked Long if law enforcement made him a deal so he wouldn't have to go to jail. Long stated that the only promise made to him was he wouldn't be locked up with Kormondy (TT1. Vol. VII, 1196). Long was also asked if anyone appeared on his behalf at his violation of probation hearing:

> Q. And no one spoke up on your behalf on any violation of probation.
>
> A. No.

(TT1. Vol. VII, 1197-98).

However, at the postconviction evidentiary hearing, Long testified differently:

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[17]A $50,000 reward for information had been offered by the police.

[18]In that conversation, Long said, "I told him that some cops had come by my house, and they were asking me about the murder and this, that and the other. And I asked him if he had told anybody else about him killing the dude. And he said, Man, I don't know what you're talking about, or something, and I said, Look, they know something. I said, I'm leaving town. And he said, Well, I'm leaving town, too." (TT2. Vol. IV, 391).

Q. Did you have conversation with Mr. Hall or Mr. Cotton regarding your prosecution or anything that it would do for you?

A. When it came up when they gave me the Public Defender's Office, I called and they figured out it was going to be a conflict of interest. They gave me Peter W. Mitchell as a court-appointed attorney. I went and met with him. He told me to pack my toothbrush I was going to jail for violation of probation.

I called Allen Cotton and he told me if I—

Q. I'm sorry?

A. I contacted **Allen Cotton**. He said if I ran or did not show up for court, that he would find me, which is understandable. He told me to go to court. I went to court. **He stood up beside me, he talked to the judge, and the judge put me on six months' community control**. And I completed it with flying colors. Never had any problems whatsoever.

(PC-T. Vol. I, 60-61)(emphasis added).

Additionally, during Kormondy's trial Long attributed the following two statements to him: "The only way they would catch the guy that shot Mr. McAdams was if they were walking right behind us" (TT1. Vol. VII, 1186); and "The only way they would catch the man that shot Mr. McAdams was if they were right behind us. Word for word, that's what he said" (TT1. Vol. VII, 1201). However, Long's deposition testimony was different. He stated, "Yeah, the only way they can catch the guy that they did this is if they were walking behind us right now" (Long deposition, page 8, on Dec. 7, 1993). According to Long's deposition testimony, Kormondy did not say, "**shot** Mr. McAdams"; rather he stated Kormondy said, "the guy that they **did this**."

Moreover, at the postconviction evidentiary hearing, Long

testified he was told that initially his bond was set at $20,000 (PC-T. Vol. I, 54), which the Warrant confirms, and later was reduced to $5,000 (PC-R. Vol. V, 848-50). Even though Long did not pay any of the bond (PC-R. Vol. IV, 580-81), he was still released (PC-T. Vol. I, 59-60). At the evidentiary hearing Long testified, "If I'm not mistaken, I got out on pretrial release. I went straight from the jailhouse across the street and signed up for it, I know" (PC-T. Vol. I, 59). At trial, Kormondy's counsel did not ask and Long did not mention he had a $5,000 bond that he did not have to pay to get out of jail. The State asked Long if he went to jail, and Long stated he did, but signed his own bond to get out (TT. Vol. VII, 1197). There was no mention of the unpaid $5,000 bond.

Trial counsel's failure to impeach Long with his prior deposition and to adequately investigate benefits he received from the State, fell below expected standards of reasonableness. Strickland. The State's failure to disclose benefits received by Long and to allow him to testify falsely likewise violated Kormondy's constitutional rights. See Brady v. Maryland; Giglio v. United States. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264

(1959).

Here, the credibility of the State's key witness, Long, was critical to the State's case against Kormondy. This is evident by the fact that in affirming Kormondy's death sentence and finding that it was not disproportionate to the life sentences of his two codefendants, this Court relied on Long's testimony that Kormondy was the triggerman. Kormondy, 845 So. 2d at 48. Had the jury been informed of the undisclosed benefit which Long received, this would have cast suspicion upon the veracity of the information about which Kormondy purportedly told Long. This, combined with the other impeachable evidence of Long, (under influence of drugs, felon, and reward), would likely have resulted in a rejection of Long's testimony that Kormondy admitted to being the shooter.

However, because undersigned counsel failed to properly raise Kormondy's claim, it was procedurally defaulted, and thus procedurally barred from subsequent consideration. In its opinion on postconviction appeal, this Court stated:

> First, Kormondy alleges trial counsel was ineffective for failing to impeach William Long regarding his prior felony conviction, the benefits he received from the State in exchange for his testimony against Kormondy, and the inconsistency between Long's deposition statements and his trial testimony. The only claim that is properly before this Court is the claim that trial counsel failed to impeach Long regarding his prior felony conviction.[4]
>
> fn4 With regard to the benefits Long received from the State and the inconsistency between Long's

> deposition statements and trial testimony, these arguments are not properly brought under this claim because they were not raised as ineffective assistance of trial counsel claims in the postconviction motion. As a result, the trial court did not address either of these issues. This Court has held that "an appellate court will not consider an issue unless it was presented to the lower court." *Steinhorst v. State,* 412 So.2d 332, 338 (Fla.1982).

Kormondy, 983 So. 2d at 432, fn4. Further, during Kormondy's federal habeas proceedings, the district court agreed with this Court's determination that the claim had not been raised below as an ineffective assistance claim and thus was procedurally barred:

> Mr. Long testified that Mr. Kormondy said he participated in these crimes and indeed was the shooter. Mr. Kormondy's attorney established on cross examination that at the critical time—when Mr. Long says he heard Mr. Kormondy admit being the shooter—Mr. Long was on the run for a probation violation and had used cocaine and drunk six *pitchers* of beer. The attorney also established that Mr. Long expected to receive a $25,000 reward for his testimony. Mr. Kormondy now says the attorney also should have established that Mr. Long had a felony conviction, falsely said nobody from the state appeared on his behalf at his probation hearing, gave inconsistent deposition testimony, and, in exchange for his trial testimony, was not detained or required to post a bond.
>
> The Florida Supreme Court rejected the felony-conviction claim for lack of prejudice and rejected the other claims because they had not been asserted below as ineffective-assistance claims. *Kormondy v. State*, 983 So. 2d 418, 432 & n.4 (Fla. 2007).
>
> The ruling on the felony-conviction claim was plainly correct. That Mr. Long was under a sentence for a crime of some sort was obvious from the fact that he was on the run for a probation violation. And the fact that he had a felony conviction would have added little to the substantial circumstances already shown:

> he was on the run, had used cocaine and drunk six pitchers of beer, and now expected a $25,000 reward.
>
> The ruling that Mr. Kormondy failed to raise the other claims about Mr. Long's impeachment was also correct. Mr. Kormondy thus procedurally defaulted those claims in state court and could obtain relief here only by showing "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrat[ing] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Mr. Kormondy has not demonstrated cause and prejudice or a fundamental miscarriage of justice. Indeed, Mr. Kormondy has shown no prejudice at all from the failure to impeach Mr. Long on the additional grounds now proposed.

Kormondy v. Tucker, No. 3:08-cv-00316-RH (N.D. Fla. 2011) (emphasis in original).

The United States Supreme Court held in Trevino v. Thaler, 133 S.Ct. 1911 (2013), that there exists an equitable right to effective collateral counsel in initial collateral proceedings as to constitutional claims that are not subject to adequate review on direct appeal. As a result, deficient performance by collateral counsel will constitute cause to overcome a procedural bar that arose as a result of collateral counsel's deficient performance in presenting constitutional claims that could not have been adequately reviewed on direct appeal.[19]

[19]Under Trevino, there is an equitable right to adequate representation during initial-review collateral proceedings regarding constitutional claims, including a claim regarding a violation under Strickland, in states such as Texas and Florida where there is no express rule requiring such non-record constitutional claims to be raised on direct appeal. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013).

The State of Florida took the position in an amicus brief filed with the United States Supreme Court in Trevino that Florida's scheme for raising a claim that required record development, such as trial counsel's performance, was more like the procedure used by Texas, which was at issue in Trevino. Both Florida and Texas argued in the United States Supreme Court that Martinez v. Ryan, 132 S.Ct. 1309 (2012), did not apply to cases in Florida or Texas because there was no express preclusion from raising non-record constitutional issues on direct appeal. See Trevino v. Thaler, United States Supreme Court Case No. 11-10189, *Brief for Amici Curiae Utah and 24 Other States in Support of Respondent*, January 22, 2013. The Supreme Court rejected the argument proposed by Florida and Texas. That is, the Supreme Court rejected the notion that Martinez did not apply in those states where a defendant was not categorically precluded from raising an ineffective assistance of counsel claim on direct

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> Unlike Arizona, Texas does not expressly require the defendant to raise a claim of ineffective assistance of trial counsel in an initial collateral review proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal. Does this difference matter? Two characteristics of the relevant Texas procedures lead us to conclude that it should not make a difference in respect to the application of *Martinez*.

Id.

appeal.[20]

In its order addressing this issue, the circuit court denied relief on the basis that this Court has expressly found that Martinez and Trevino only apply in federal habeas proceedings (PC-R2. Vol. III, 195). While Kormondy acknowledges this Court's precedent, he asks that this Court reconsider its previous rulings. It is clear from Trevino that there is an equitable right to effective collateral representation in Florida because constitutional ineffectiveness claims cannot be adequately raised on direct appeal. The United States Supreme Court explained:

> We have said that courts of equity "must be governed by rules and precedents no less than the courts of law." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (internal quotation marks omitted). But we have also made clear that often the "exercise of a court's equity powers ... must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946), **we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time,**

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[20]Although the constitutional issue in both Trevino and Martinez was an ineffective assistance of trial counsel, the logic applies equally to claims of prosecutorial misconduct raised under Brady v. Maryland and Giglio v. United States that require evidentiary development in collateral proceedings. Here, the inequitable effect of undersigned collateral counsel's ineffective assistance compounded the prosecution's violation of Brady v. Maryland and Giglio v. United States, as well as trial counsel's violation of Kormondy's constitutional right to effective representation under Strickland. See Trevino, 133 S.Ct. at 1921.

> **arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity,"** *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

Holland v. Florida, 130 S.Ct. 2549, 2563 (2010) (emphasis added).

This Court has recognized that it is a court of equity. See State v. Akins, 69 So. 3d 261, 268 (Fla. 2011). Akins explained that equitable principles warrant overriding a procedural bar in order to avoid manifest injustice:

> The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehlman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009)(alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous)(quoting *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004)); *see State v. J.P.*, 907 So. 2d 1101, 1121 (Fla. 2004)(same); *Parker v. State*, 873 So. 2d 270, 278(Fla. 2004)(same); *see also Fla. Dep't of Transp. V. Juliano*, 801 So. 2d 101, 106 (Fla. 2001)("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting *Strazulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965).

Akins, 69 So. 3d 261, 268 (Fla. 2011).

In Strazulla v. Hendrick, 177 So. 2d 1, 3-4 (Fla. 1965), the case relied upon by this Court in Akins, the Court discussed the same equitable principles that the United States Supreme Court outlined in Holland v. Florida:

> In 1953 the decision in *Beverly Beach Properties v.*

Nelson, supra, 68 So.2d 604, was rendered. In that case this court stated plainly that

> 'We may change 'the law of the case' at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.'

There can be no doubt that the *Beverly Beach Properties* decision and the line of cases following the McGregor decision, supra, are in conflict with the holding in *Family Loan Co. v. Smetal*, supra, and the line of cases cited above which are in accord with the decision in *McKinnon v. Johnson*, supra. The *Beverly Beach Properties* decision, as well as the McGregor and similar decisions, are, however, consistent with our decisions respecting the doctrine of *res judicata* and *stare decisis*, see *Wallace v. Luxmoore*, 156 Fla. 725, 24 So.2d 302, and with what appears to be the trend in other courts to recognize that the administration of justice requires some flexibility in the rule. See *Johnson v. Cadillac Motor Car Co.*, 261 F. 878, 8 A.L.R. 1623; *Union Light, H. & P. Company v. Blackwell's Adm'r.* (Ky.), 291 S.W.2d 539, 87 A.L.R.2d 264; *McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305, 67 A.L.R. 1381; *Mangold v. Bacon*, 237 Mo. 496, 141 S.W. 650, 654; *People v. Terry*, Cal.1964, 390 P.2d 381; cases collected in the annotation in 87 A.L.R.2d, pp. 299-317.

In view of the apparent conflict, it is clear that the *Beverly Beach Properties* decision must be held to have impliedly, if not expressly, modified the earlier holding in *Family Loan Co. v. Smetal*, *supra*, and similar decisions; and, **insofar as these earlier decisions may be construed as holding that an appellate court in this state is wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case', we hereby expressly recede therefrom**.

We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter

> of grace, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons-and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule. *Beverly Beach Properties v. Nelson*, supra.

Strazulla v. Hendrick, 177 So.2d 3-4(emphasis added).

As a court of equity, this Court should recognize that equitable principles (i.e. basic fairness) dictate that there must be an equitable right to effective collateral representation in an initial collateral review proceeding because those constitutional rights cannot be properly and fully vindicated in a direct appeal.

The United States Supreme Court recognized that equitable principles were necessary to permit procedural bars to be overcome. It is simply wrong to hold that Trevino does not govern in Florida state courts. The concept of fairness and the equitable principles discussed in Holland, Martinez and Trevino apply in Florida state courts. Under Trevino, this Court should recognize that a showing of collateral counsel's deficient performance under Strickland, while not warranting collateral relief all by itself, constitutes cause to overlook a procedural bar where the capital collateral defendant was prejudiced by that deficient performance.

The events of this case exhibited exactly the circumstances

contemplated – and deemed inequitable – by the Supreme Court in Martinez: "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default[,] no court will review the prisoner's claims."[21] Martinez, 132 S.Ct. 1309. This is a case in which "exceptional circumstances" exist such that "reliance on the previous decision would result in manifest injustice." Muehlman v. State, 3 So. 3d 1149, 1165 (Fla. 2009). To rectify the manifest injustice that Kormondy has experienced, this Court should invoke "[t]he 'flexibility' inherent in 'equitable procedure'" noted in Holland, 130 S. Ct. at 2563; and the merits of Kormondy's claim should be considered.

CONCLUSION

Based upon the record and his arguments, Kormondy respectfully urges the Court to reverse the lower court, order a resentencing, and/or impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

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[21]Specifically, the Supreme Court found that this equitable right to effective representation at the initial collateral review proceeding meant ineffective representation by collateral counsel in the initial collateral review proceeding constituted cause to overcome a procedural bar arising from either principles of *res adjudicata* or procedural default. In other words, a procedural bar precluding consideration of an ineffectiveness claim regarding the adequacy of trial counsel's representation may be defeated by cause where the procedural bar is due to an attorney's errors in the initial-review collateral proceeding. Martinez, 132 S. Ct. 1309.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission to opposing counsel on this 22nd day of December 2014.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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