IN THE

SUPREME COURT OF FLORIDA

CASE NO. *74,920*

RICKEY BERNARD ROBERTS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Robert's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. **3.850.** The circuit court summarily denied Mr. Roberts' claims, and this appeal followed.

The following symbols will be used to designate references to the record in the instant cause:

"R" -- Record on Direct Appeal to this Court;

"T" -- Record on Rule **3.850** motion.

All other citations will be self-explanatory or will be otherwise explained.

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INTRODUCTION

Mr. Roberts' reply brief specifically addresses Arguments I - VI. As to the remaining Arguments VII - XXIII, Mr. Roberts relies upon his initial brief wherein he stated with specificity why the State is in error in claiming "procedural bar." Where new case law develops which changes the law applied by this Court at the time of the direct appeal, no procedural bar can arise. Jackson v. Dunner, 547 So. 2d 1197 (Fla. 1989). The State fails in its brief to address the new cases relied upon by Mr. Roberts, and explain why these cases do not constitute a change in law in light of this Court's rulings in Jackson v. Dunner, supra, and Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Mr. Roberts does not waive any claim previously discussed. He relies upon the presentations in his initial brief regarding any claims not specifically addressed herein.

STATEMENT OF THE CASE

Mr. Roberts relies upon the Statement of the Case contained in his initial brief.

ARGUMENT

ARGUMENT I

OLDEN V. KENTUCKY IS NEW CASE LAW WHICH ESTABLISHES THAT THIS COURT ERRED ON DIRECT APPEAL AND THAT MR. ROBERTS WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED CROSS-EXAMINATION OF THE STATE'S WITNESSES REGARDING MICHELLE RIMONDI'S WORK AS A PROSTITUTE AND HOW HER WORK LED TO THE VICTIM'S DEATH.

The State in its brief maintains that no error under Olden v. Kentucky, 109 S. Ct. 480 (1988), occurred because "[h]ere the victim's alleged activities as a prostitute were totally irrelevant." State's brief at 9. However, Ms. Rimondi was with a man, George Napoles, who she had just met. They were partying together at approximately 3:00 a.m. on June 4, 1984. According to Ms. Rimondi's testimony, she met Mr. Napoles the day before (R. 1430). Defense counsel was precluded from asking if Mr. Napoles was a "trick", and whether it was his status as a "trick" that led to his murder by either Joe Ward or Manny Cebey. The defense could not discuss Ms. Rimondi's occupation as a prostitute, nor how her occupation led to Mr. Napoles death.[1] The defense's sanitized theory of defense appeared in the opening statement:

> Now, what happened as to Rimondi. Okay. by her own admission, she was a runaway at the time; 16 years old. She was living with--at the estimate, about 10 days before she ran away--she was living with a kind of rooming house with a woman by the name of Mickey McNeally. Rented a room.
>
> But on that weekend, Saturday and Sunday, she was living--wasn't actually living at the rooming house. Was living in the home that was owned by the boyfriend, the on-again, off-again, boyfriend of her sister, Kathy Rimondi, this guy, Joe Ward, and Ward had a very, very, very, very bad temper and very, very, very, very great inclination to like Michelle Rimondi.
>
> She was staying at that particular house and in this particular house, Ward's house, was another guy, Ian Riley.
>
> He's an English guy who had been related to Ward through marriage in a prior life. I guess prior time that he was staying there, but she was there for the weekend.

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[1] Also precluded was any questioning as to whether the presence of sperm in Ms. Rimondi was the result of her prostitution.

What happened was that particular Sunday, June 3rd. Rimondi went to the beach. Rimondi and Jammie Campbell and George Napoles go down to Key Biscayne, an area where they are drinking beers on the beach all day and they come back and they go down to Coconut Grove and spend the evening not with George--he goes to work at Domino's Pizza, but he wants to get together with Michelle later in the evening.

So after spending the day at Key Biscayne, Jammie Campbell and Rimondi go down to the grove and spend time with a friend of Jammie's, named Joe.

They got to the Grove and came back to Joe Ward's house. Late in the evening, late that Sunday evening, maybe a quarter to 12--12:00--11:00, George Napoles comes over. He picks them up a little before midnight or about midnight and they are going to buy wine and go down and drink wine and hang out.

We had, Campbell, Rimondi, and George Napoles in George Napoles' car, the little Dodge Omni, driving down to Key Biscayne.

They get down to the Key a little after midnight. They are on the Key drinking wine and in--the more logical explanation from the evidence--let me back up.

Back--early that day and the prior Saturday night, Michelle had a houseguest which was Manny Cebey; was her regular boyfriend for the prior month, month and a half and steady boyfriend.

Again, very fiery temper, jealous, had had sex with her that prior evening at the house and well aware that she was running off with somebody, not knowing it was George, but running off with somebody during the course of that next day at the beach.

What happened had to have happened that night as the evidence will lead you. You conclude that during the course of George Napoles, Campbell--Jammie Campbell and Michelle Rimondi being on the beach drinking wine, either the very bad tempered and very jealous man or the very bad tempered and desirous Joe Ward knew that they had gone to Key Biscayne and went down there. Either one of them confronted George Napoles which is really the innocent party in this whole thing--and jealously--whether it was Ward or Cebey. got in an argument with George and beat George Napoles to death.

We have a situation where Michelle Rimondi is not going to turn in--first of all, Joe Ward has got a horrible temper and is very violent. She is not going to turn in him and certainly because he's an on and off again boyfriend of her sister's. She's not about to turn him in.

She had been in love with Manny Cebey. She's not going to turn him in because this is to get out of it. She---

She leaves and starts to hitchhike then and unfortunately, Rick Roberts then comes along and unfortunately, he is the one that agrees to take her home and unfortunately, she has a 45 minute ride between

> Key Biscayne and her house in South Miami to conjure up the details of who she will pin this on and of course, she must have conversations on the phone with either Joe Ward or Cebey, the murderer and this was an agreement they had.

(R. 850-54).

However, defense counsel was precluded from presenting to the jury that in fact, Ms. Rimondi was a prostitute. He could not confront her with whether Mr. Napoles was a trick, whether Joe Ward and Manny Cebey were pimps or boyfriends jealous of her tricks, and whether she had told Mr. Roberts she was a prostitute as Mr. Roberts' claimed but was unable to tell the jury. **See** Argument II, infra. Ms. Rimondi's occupation as a prostitute was central to the defense's case as to what had transpired between Ms. Rimondi, Mr. Napoles, Joe Ward and Manny Cebey. It was also necessary to a full understanding of Ms. Rimondi's motivation for accusing Mr. Roberts. Contrary to the State's assertions, Ms. Rimondi's activities as a prostitute were very relevant.

The State also asserted in its brief that "[d]efense counsel was not restricted in any way from cross-examining Ward, Cebey, or [Ms. Rimondi] concerning their activities that evening or their relationships vis-a-vis each other." State's brief at 9. However, that is simply not true. Defense counsel could not inquire of Ms. Rimondi's activities as a prostitute. This barred questioning regarding Mr. Napoles being a "trick". This barred questioning regarding Mr. Ward providing protection for Ms. Rimondi's business. This barred questioning regarding Mr. Cebey's involvement in or awareness of Ms. Rimondi's activities as a prostitute. This barred questioning as to important facts which would have shed new light on the motives of Ms. Rimondi, Mr. Ward, and Mr. Cebey. Under Olden it is not just the ability to confront about physical whereabouts that is protected by the sixth amendment. Protection must be afforded the ability to confront a witness about facts which color the witnesses' motivation and credibility. "It is plain to us that '[a] reasonable

jury might have received a significantly different impression of [the witnesses'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Olden v. Kentucky, supra, 109 S. Ct. at 483. That is certainly true here. The facts which were off limits were crucial to understand motivation and credibility.

The State asserted "{d}efense counsel simply wanted to portray [Ms. Rimondi] as a slut low-life runaway, whose character demonstrated that she was unworthy of belief. That is precisely what the rape shield law was designed, properly, to prevent." State's brief at 9. What the State overlooked was that this was a murder case. If Ms. Rimondi had not been alleging rape, but merely testified exactly as she did regarding the homicide, the defense could have presented the evidence regarding Ms. Rimondi's prostitution and Mr. Ward's and Mr. Cebey's involvement in that prostitution. The rape shield law was not designed to prevent questions regarding a witness' credibility or motivation to lie in a murder case. The rape shield law by its application here limited Mr. Roberts' ability to defend against a murder charge. Certainly the State is in error in its claim that the rape shield law was designed to operate in such a fashion.

Olden v. Kentucky, 109 S. Ct. 480 (1989), establishes that this Court erred on direct appeal. In Olden, the Kentucky Court of Appeals concluded that a defendant's "right to effective cross-examination was outweighed by the danger that revealing [a witness'] interracial relationship would prejudice the jury against her." 109 S. Ct. at 483. The Supreme Court reversed because speculation as to the effect on the jurors' biases could not justify the limitation upon a defendant's right of confrontation. Here, on direct appeal, this Court similarly speculated that Ms. Rimondi's occupation as a prostitute was "highly prejudicial" and could justify the limitation upon the right of confrontation. However, insufficient consideration was given to the defense

need to explore Ms. Rimondi's prostitution as it affected the motives of Ms. Rimondi, Mr. Ward and Mr. Cebey, both on the right of the homicide and during Mr. Roberts' trial in the testimony they gave. Jurors would "have received a significantly different impression of [these witnesses'] credibility." Olden, 109 S. Ct. at 483. Just as Booth v. Maryland, 107 S. Ct. 2529 (1987), established this Court erred in Jackson v. State, 498 So. 2d 406 (Fla. 1986), see Jackson v. Dunner, 547 So. 2d 1197 (Fla. 1989), Olden etablishes that this Court erred in Mr. Roberts' direct appeal. Olden is new law which dictates that Mr. Roberts' conviction must be reversed and a new trial ordered.

ARGUMENT II

MR. ROBERTS WAS DENIED HIS RIGHT TO TESTIFY AND PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT HIS TESTIMONY AND PRECLUDE PRESENTATION TO THE JURY OF THE FACT THAT MS. RIMONDI TOLD HIM OF HER WORK AS A PROSTITUTE. THE DECISIONS IN TAYLOR V. ILLINOIS, 108 S. CT. 646 (1988); ROCK V. ARKANSAS, 107 S. CT. 2407 (1987); AND OLDEN V. KENTUCKY, 109 S. CT. 480 (1989), ESTABLISH THAT THIS COURT ERRED IN AFFIRMING MR. ROBERTS' CONVICTION DURING HIS DIRECT APPEAL.

At trial Ms. Rimondi testified that during her conversation with Mr. Roberts, he stated to her he was a professional hit man (R. 2202). When Mr. Roberts sought to testify that the topic of conversation was in fact Ms. Rimondi's life as a prostitute, the trial court ruled that the Rape Shield Law banned such testimony as unfairly prejudicial to Ms. Rimondi (R. 2779). Certainly it was far less prejudicial to Ms. Rimondi than her baseless allegation that Mr. Roberts was a hit man. In fact there was ample evidence that in fact Ms. Rimondi was a prostitute which would have corroborated Mr. Roberts' testimony that Ms. Rimondi confessed this fact to him. Since the trial amounted to Ms. Rimondi's word against Mr. Roberts' word, it was very important for Mr. Roberts to be able to defend by explaining fully why his testimony had the earmarkings of truth. Ms. Rimondi told him she was a prostitute because in fact she was.

The State in its brief contends that Taylor v. Illinois, 108 S. Ct. 646

(1988); Rock v. Arkansas, 107 S. Ct. 2704 (1987); and Olden v. Kentucky, 109 S. Ct. 480 (1988), are not significant and do not establish that this Court erred on direct appeal. However, what these cases establish is that states must respect and value the sixth amendment right to defend. Limitations upon the right to defend must be narrowly construed, and may not be applied arbitrarily or where legitimate interests are not served. Moreover, these cases establish that this Court erred on direct appeal.

This was a homicide case. The purposes of the Rape Shield Law do not apply and are not furthered. Ms. Rimondi was allowed to accuse Mr. Roberts of being a professional kiler despite the complete absence of any evidence to corroborate such an allegation. How much more prejudicial could an accusation be in a murder trial. Yet Mr. Roberts could not defend by saying "what we talked about while I was driving her home was her life as a prostitute." And in fact Mr. Roberts had ample evidence to establish that Ms. Rimondi was a prostitute and thereby gave credence to his story that she told him she was. In a case of her word against his, it was crucial for Mr. Roberts to present the whole story and the facts which showed he was telling the truth. Jurors may "have received a significantly different impression of [Ms. Rimondi's] credibility." Olden, 109 S. Ct. at 483.

This Court failed to apply the proper test under Taylor. Rock and Olden, and failed to accord the sixth amendment right to defend its proper weight. The sixth amendment required that the Rape Shield Law yield to Mr. Roberts' right to defend. A reversal is required, and a new trial must be ordered.

ARGUMENT III

AN EVIDENTIARY HEARING IS **REQUIRED** ON MR. ROBERTS' CLAIM THAT THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. ROBERTS' RIGHTS UNDER RULE 3.220 AND **UNDER** THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Reading the State's brief brings to mind the old law school adage: if you have the law on your side, pound the law; if you have the facts on your side pound the facts; if you have neither, pound the table. Classic lines such as "So what" (State's brief at 13), "it is downright silly" (Id.), "The really interesting question here, however, is how such an insanely ridiculous argument can appear in print" (Id. at 20), are clearly designed to obfuscate by pounding the proverbial table. Mr. Roberts instead relies on the law and the facts.

A. RULE 3.220

First, as to the law, in his initial brief Mr. Roberts relied extensively on Roman v. State, 528 So. 2d 1169 (Fla. 1988), for the proposition that here Rule 3.220 was violated. See Initial brief at 28. Mr. Roberts argued that Rule 3.220 was violated, and that a reversal was required under Roman unless the State proved the error was harmless beyond a reasonable doubt. Mr. Roberts noted that Roman established a different standard of review for error under Rule 3.220 than that established for error under Brady v. Maryland, 373 U.S. 83 (1963).[2]

The State in its brief did not list Roman in its Table of Citations. Roman did not appear anywhere in the discussion of this issue. See State's brief at 11-20. Rule 3.220 is not cited either. No discussion was contained about whether this rule was violated, nor was any recognition given to the fact error

[2]The State in its brief also misapplies the test for determining when Brady requires a reversal. Certainly here, the jury's twenty three hours of deliberation before convicting underscores how close the evidence was. It was a question of who to believe, Ms. Rimondi or Mr. Roberts. Certainly the impeachment and exculpatory evidence suppressed by the State creates a reasonable probability of a different outcome had the jury known of the evidence. Under Brady, a new trial is in fact required.

under Rule 3.220 must be harmless beyond a reasonable doubt, a fact the State conceded before the circuit court.

The State's silence in its brief must be compared to its argument before the circuit court:

> MR. BARREIRA: Your Honor, the Roman case is important because what does it tell us?
>
> It tell us if there is a violation of Florida discovery, the Florida Supreme Court comes down extremely hard, harder than the United State Supreme Court does, and they put a burden on the state of promissory [sic] beyond a reasonable doubt.
>
> * * *
>
> He says that we don't follow Bagley. Well, if you look up Bagley, you are going to see the Florida Supreme Court in pure Brady claims applied the Bagley standard okay.
>
> To discover violations of the Florida rules, it cracks down and applies a different standard, okay. So we are under Bagley and if you look at the front of his claim it's the Fourth, Fifth, Fourteenth amendments okay.
>
> He talks about rule 220, but this is not discoverable under 220 because it's work product.

(T. 449-51). Clearly the State hoped that if it ignored Roman in its brief, this Court would too. However, Roman requires a reversal of Mr. Roberts' conviction

B. DR. RAO

Dr. Rao, the physician who treated Ms. Rimondi after the alleged homicide and rape, gave a statement undisclosed to the defense that she did not believe Ms. Rimondi appeared upset enough to have witnessed a murder. The State's brief simply responded to the nondisclosure of this statement: "[n]or can it be said that Rao's opinion . . . was such as would probably have affected the outcome at trial." State's brief at 17. This is the standard for error under Brady;[3] it is not the proper standard for error under Roman. The State did not dispute

[3]The State, however, is in error in concluding that given the facts of this case, Dr. Rao's opinion that Ms. Rimondi's story was untrue does not undermine confidence in the outcome of the trial. In light of the closeness of the case there is a reasonable probability of a different outcome had the defense been advised of Dr. Rao's opinion and presented it to the jury.

that Dr. Rao's statement was not disclosed. The State simply concluded the nondisclosure was not reversible under Brady and did not discuss whether the nondisclosure of Dr. Rao's statement was reversible under Rule 3.220 and/or whether the nondisclosure could be found harmless beyond a reasonable doubt.

Though conceding Rule 3.220 and Roman established a stricter test for discovery violations, the State argued before the circuit court that Rule 3.220 did not apply. Apparently, a discussion of Roman and Rule 3.220 was dropped on appeal in favor of pounding the proverbial table because the State realized that Rule 3.220 did apply. The rule in effect at the time of Mr. Roberts' trial provided:

> Rule 3.220. Discovery
>
> (a) Prosecutor's Obligation.
>
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> * * *
>
> (x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(Emphasis added).

The rule in subsection (c) specifically addresses work product:

> (1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

The notes concerning Dr. Rao which are at issue appear in Mr. Roberts' proffer (T. 247). These notes are clearly a summary of a "statement" by Dr. Rao expressing her opinion, "didn't believe V's story." This was not an opinion, theory or conclusion of a prosecuting attorney or member of his legal staff, so it was not work product. Under Rule 3.220(a)(1)(x), it was discoverable.

Disclosure was required.

The State's argument in its brief -- that the error was defense counsel's because he did not ask the right question of Dr. Rao to elicit this unexpected response -- is not supported by law. Rule 3.220 does not contain such an exception. In fact, defense counsel generally deposes most witnesses listed by the prosecution and certainly the experts, whose reports and/or statements must nonetheless be disclosed. If the State's argument is right, Rule 3.220(a)(1)(x) is meaningless verbiage. According to the State no discovery is required once a witness' name is disclosed because the defense can depose the witness. That is simply contrary to what the rule says.

At trial, Dr. Rao was called by the State as an expert doctor in dealing with rape victims (R. 1830). Over defense counsel's objection she was qualified as such an expert (R. 1842). However, the State was very careful not to ask Dr. Rao's opinion as to whether Ms. Rimondi was raped. Dr. Rao's opinion that she did not believe Ms. Rimondi's story would have been admissible since the State qualified her as an expert in the field. Certainly, in a case where the only issue was whether to believe Ms. Rimondi or Mr. Roberts, the nondisclosure of Dr. Rao's opinion cannot be found to be harmless beyond a reasonable doubt. In this case, in fact, this nondisclosure undermines confidence in the outcome and creates a reasonable probability of a different outcome. A new trial should be ordered as to this specific claim since the State has not contested the nondisclosure of the expert's statement.

c. MONEY PAYMENTS TO MS. RIMONDI

The State similarly failed to consider either the law or the facts as to the other discovery violations contained in Argument III of the initial brief. To the evidence that the prosecutor was giving Michelle Rimondi money to testify, the State responded: "So what." State's brief at 13. However, the jury in this case was instructed:

WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidencenot reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory in answering the attorneys' questions?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness's testimony agree with the other testimony and other evidence in the case?

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

(R. 513)(emphasis added). Under the law of the case, Ms. Rimondi's receipt of money or other benefit was a factor the jury was specifically instructed to consider in determining whether to believe her or Mr. Roberts. Obviously it was an issue. The State's attempt to pass this discovery violation off with a "so what" response once is an effort to pound the proverbial table and divert attention from serious error on its part.

Before the circuit court, the State adamantly opposed an evidentiary hearing. The State contended that the files and records conclusively refuted Mr. Roberts' allegation as to the payment of money to Ms. Rimondi. However, Mr. Roberts proffered notes from the State Attorney's file supporting this allegation. The State in its brief did not deny money payments to Ms. Rimondi, but instead asserted that the money was for living expenses while Ms. Rimondi was in Miami waiting to testify. However, the records in this case do not

establish this. There is nothing in the record to show how much or how little money Ms. Rimondi received, let alone what expenses the money covered. The record does not establish when Ms. Rimondi was living in Florida and when she was living in Arizona. The State in its brief conceded that Ms. Rimondi was in Florida three weeks before Mr. Roberts' trial and was arrested for grand theft. State's brief at 14. According to Ms. Rimondi's testimony, she was deposed in January of 1985 and November of 1985 (R. 2237-40). These dates do not correspond to the date (August 14) that she was demanding money from Sam Rabin, an assistant state attorney (T. 271-72).

The record at this point establishes that Michelle Rimondi was demanding and receiving money from the State (T. 271-73). Mr. Roberts maintains that this fact was not disclosed as required by Rule 3.220 and Brady v. Maryland. The State has not even challenged this point. Instead, the State has argued "so what" and alleged that there were reasons, not contained in the record, that explain the payments. The jury was instructed money payments was a factor to consider in weighing witness credibility. Clearly whether the money payments were justifiable was an issue the jury should have heard, and considered in deciding whether to believe Ms. Rimondi. However, because of nondisclosure, the jury did have this information which the instructions highlighted as an important consideration. Since the State does not contest nondisclosure, and simply argues "so what," the only question before this Court as to the money payments is whether disclosure was required under Rule 3.220(a)(2), and/or under Brady. In light of the jury instructions highlighting the receipt of money by witnesses, disclosure had to occur. In light of the closeness of the case, a new trial is required, as to this specific claim as well.

D. MS. RIMONDI'S PRIOR ENCOUNTERS WITH THE LAW

In its brief, the State addressed the letter from the State Attorney's Office to Ms. Rimondi's father, and concluded "it is nothing." State's brief at

14 (emphasis added). Two pages later in its brief, the State asserts:

> The bottom line here is that the defendant's allegations at page 24 of its brief are blatant misrepresentations which are positively refuted by the record. In addition, the defendant's statement there that "in spite of a substantial criminal history, Ms. Rimondi received pretrial intervention" ...(emphasis added) is most interesting, and perhaps at oral argument defendant's counsel can explain the emphasized term, because as far as the State is aware, the grand theft charge was Michelle's first brush with the law. In sum, the factual basis for this claim is nonexistent.

(State's brief at 16).

The factual basis can be found in the letter which the State described as "nothing" and which was a basis of Mr. Roberts' assertion of a discovery violation.

> Dear Mr. Rimondi:
>
> It was a pleasure speaking to you today regarding our mutual concern, Michelle. After you and I had an opportunity to speak, I again reiterated my demands upon Michelle that she attend school regularly, live with the Welshs, seek to obtain a job, maintain contact with the undersigned Assistant State Attorney twice weekly and contact you once a week.
>
> Michelle has agreed to abide by these conditions and I trust that she will live up to her commitment. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action.

(T. 277)(emphasis added).

Certainly, prosecutors in Dade County do not routinely notify the parents of teenagers living there that if the teenagers do not abide by certain conditions the prosecutors will "take further action." Exactly what criminal activity Ms. Rimondi engaged in to warrant this letter is unclear. However, obviously her criminal history had already warranted some action because "further action" was being threatened. There was, and is, no question that Ms. Rimondi was supporting herself at the time of Mr. Napoles death through prostitution and that she was actively trying to recruit other teenage girls to the business (R. 670). She also testified at trial that she was engaged in the use of illegal drugs (R. 2238-44). Certainly this established a substantial

criminal history for a sixteen year old. Yet despite Mr. Rabin's warning in his letter "to take further action" if Ms. Rimondi did not maintain contact with him twice weekly and otherwise abide by his conditions, when Ms. Rimondi was charged with grand theft, she simply received pretrial intervention.

Certainly Mr. Rabin's letter to Ms. Rimondi's parents contained information, i.e., threats "to take further action," which would have been useful to defense counsel in cross-examining Ms. Rimondi. The pendency of juvenile charges and the right to cross-examine concerning those charges, was the basis for the reversal in Davis v. Alaska, 415 U.S. 308 (1974). Here, the State did not disclose its threats to Ms. Rimondi. Defense counsel could not confront Ms. Rimondi with this information because he did not know about it.

Moreover, in light of the threat contained in the letter, Ms. Rimondi would have had reason to worry about criminal prosecution. Her one trump card was her testimony against Mr. Roberts. When she was arrested for grand theft, she immediately wanted to talk to Mr. Roberts' prosecuting attorney. Whatever the prosecutor's mental state as to his intent to help her, the important thing was what she wanted. She wanted to use her trump. She wanted help in her criminal case, and she viewed the prosecutor in Mr. Roberts' case as a person to help her. Yet defense counsel did not know of her statement when she was arrested that she wanted "to talk to Glick" (T. 263).

Under Davis v. Alaska, defense counsel has a right to inquire of matters which might give a witness a motive to lie. Fifteen months before trial, Ms. Rimondi was threatened with "further action." She was in essence on probation. Her one weapon to keep the State at bay, from her point of view, was her testimony against Mr. Roberts. Three weeks before trial when she was arrested for grand theft, her first thought was to get help from the prosecutor in Mr. Roberts' case. This was a specific example of her willingness to use her testimony to help herself. This information along with Mr. Rabin's letter would

have been important for the jury to know in analyzing Ms. Rimondi's motivations and credibility. Yet the jury did not have the benefit of this because the State suppressed it and defense did not know about it.

The State in its brief seemed to assume that the question before this Court is whether the prosecutor in fact gave Ms. Rimondi pretrial intervention in return for her testimony. However, in fact, under Davis v. Alaska, the right of confrontation is the right to expose a witness' motivation. Here the key is the suppression of the prosecutor's threat "to take further action" and Ms. Rimondi's efforts at the first sign of trouble to get the intervention of Mr. Roberts' prosecutor on her behalf. Ms. Rimondi obviously thought her testimony was a valuable commodity. Yet the jury did not have the benefit of cross-examination regarding the prosecutor's threat "to take further action" or Ms. Rimondi's efforts to barter her testimony for favorable treatment.

This non-disclosure violated Rule 3.220(a)(1)(i) and (2) and Brady. Even under the Brady test for reversal, in light of the pivotal role of Ms. Rimondi's testimony, there is a reasonable probability of a different outcome had disclosure occurred.[4]

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[4]The State in its brief goes to great lengths to try to explain the notes in Mr. Roberts' proffer which appear at T. 263. The State, after opposing an evidentiary hearing in the circuit court, made non-record claims in its brief that these notes were authored by Alex Miculescu. That allegation, besides not being supported by the record, makes no sense. Midway through the note appears the name "Alex Miculescu." In context, it appears the author of the note was identifying who was prosecuting the grand theft case. Certainly Alex Miculescu would not have to make a note to himself, identifying himself as the prosecutor. Moreover, the note was contained in the Rickey Roberts' file which Alex Miculescu, according to the State, was not involved in or even aware of. More importantly, the State's idle speculation about the note misses the point. Ms. Rimondi made a statement when she was arrested on grand theft charges that she wanted "to talk to Glick," the person prosecuting Mr. Roberts. That statement was undisclosed. Also undisclosed was the fact that Glick was in fact contacted pursuant to Ms. Rimondi's request and contrary to Mr. Miculescu's testimony as the undisclosed notations indicate: "Glick said to handle routinely." (T. 263).

E. STATE'S ALLEGATION AS TO MEANING AND ORIGIN OF NOTES CONTAINED IN MR. ROBERTS' PROFFER

Mr. Roberts pled in his Rule 3.850 motion a number of discovery violations. His bases for his allegations arose from inspection of the State Attorney's file wherein numerous notes containing exculpatory evidence were found. In the circuit court, Mr. Roberts proffered these notes as establishing the need for an evidentiary hearing. The State was adamant in its opposition to an evidentiary hearing saying that the files and records conclusively established that the notes did not contain undisclosed exculpatory evidence. The circuit court ruled "that there was no discovery violation here." (T. 452).

Now in its brief to this Court, the State alleges with absolutely no record support that as to many of the proffered notes, they "are from the prosecutor's deposition of Defense Witnesses (see defense witness list, T.R. 237)." State's brief at 16 (emphasis in original). See also State's brief at 19, 20.

The notes referred to by the State do not in any way indicate that they were produced or resulted from a formal deposition (R. 240-41, 258-60, 245, 243). The State has not offerred or cited a transcript of a deposition to support its allegation. The notes do not indicate who made them or when they were made. All that is clear is that the notes were in the State Attorney's file. The notes contained exculpatory evidence not disclosed to defense counsel. Since no evidentiary hearing was held, the allegations concerning the notes must be accepted. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). The State's efforts to make allegations not contained in the record and not supported by the record, should not be allowed to divert attention. The information contained in these notes in the State's possession was exculpatory. Under Lightbourne, an evidentiary hearing is required.

In its brief the State asserted "The State would bet dollars to donuts that the state witnesses who possessed this information, Gary Mendus and Kevin Brown,

were deposed by the defendant's counsel." State's brief at 20. This is not the place for betting "dollars to donuts." Either the record conclusively establishes that Mr. Roberts is entitled to no relief, or an evidentiary hearing is required. Demps v. State, 416 So. 2d 808 (Fla. 1982). Here an evidentiary hearing is required. The State's willingness to bet what the record would show if it contained more information, clearly demonstrates the record does not conclusively establish that Mr. Roberts is entitled to no relief.

ARGUMENT IV

PENNSYLVANIA V. RITCHIE IS NEW CASE LAW WHICH ESTABLISHED THAT MR. ROBERTS' RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN THE RAPE TREATMENT COUNSELOR, WHO HAD TREATED MICHELLE RIMONDI AND WHO WAS AN EMPLOYEE OF THE STATE ATTORNEY'S OFFICE, INVOKED PRIVILEGE AND REFUSED TO DISCLOSE WHETHER IN HER CONVERSATIONS WITH MS. RIMONDI SHE HAD LEARNED OF ANY EXCULPATORY INFORMATION.

The State in its brief argued that Pennsylvania v. Ritchie, 480 U.S. 39 (1987). did not significantly alter Florida law, and thus this claim is not cognizable in Rule 3.850 proceedings. The State asserted that Ritchie was a straightforward application of Brady v. Maryland, 373 U.S. 83 (1963). The State is in error

Florida law at the time of Mr. Roberts' direct appeal appeared in James v. State, 453 So. 2d 786 (Fla. 1984). There, on direct appeal, James raised an alleged discovery violation. He claimed that the State had failed to disclose the contents of a tape recording, This Court rejected the claim saying, "there was no showing that the tape recording existed, was suppressed, was material, or was exculpatory." 453 So. 2d at 790. The Court also noted "[p]rejeudice is the key question in any alleged discovery violation." Id. at 790 n.3. Clearly at the time of Mr. Roberts' direct appeal, in order to raise a discovery violation under Florida law, the defendant had to know specifically what had not been disclosed. This was necessary to show prejudice. Here, Mr. Roberts did not know what Ms. Rimondi had told her rape treatment counselor, and thus he had no

basis for presenting the claim on appeal.[5]

Pennsylvania v. Ritchie, however, overturned Florida's interpretation of Brady. Prejudice is not a component of a discovery violation where the defendant has no means for learning of the nature of the undisclosed information because the State has made it confidential. In such circumstances, the trial court must conduct an in camera inspection. Here, no such in camera inspection has ever occurred. Under Ritchie, this was error.

Ritchie is a change in law. It establishes that this Court had previously read Brady too narrowly. As a result, Mr. Roberts' claim pursuant to Ritchie is cognizable in Rule 3.850 proceedings. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

ARGUMENT V

RICKEY ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS,

The State in its brief argues that in determining whether counsel was ineffective at the penalty phase, "the first, and most critical question, is what mitigating evidence was presented." State's brief at 23. However, no authority is provided for this statement. In fact, Kennedy v. State, 547 So. 2d 912 (Fla. 1989), a case relied upon by the State, indicated that the question is whether the defendant has "identif[ied] particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." 547 So. 2d at 913.

Here, Mr. Roberts has alleged that his trial counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings.

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[5]It is interesting to note that after successfully precluding discovery of the content of the discussions between Ms. Rimondi and Denise Moon, the rape treatment counselor, the State sought to introduce the fact that Ms. Rimondi was treated by Denise Moon (R. 2353). Not knowing the content of these discussions, defense counsel was forced to object to the questioning, and his objection was sustained (R. 2353-58).

Specifically, trial counsel did not contact Mr. Roberts' family members and learn of the history of abuse and neglect. **See** Affidavits of Gertrude McKinney, Less McCullars, Mamie Douglas, Leon Roberts, Shirley Roberts (T. 285-311). Trial counsel did not contact Mr. Roberts' family, and thus did not know of the information they possessed or what they could testify to.

The Eleventh Circuit in discussing Strickland v. Washington, 466 U.S. 668 (1984), recently explained:

> An attorney is not obligated to present mitigation evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good. Smith v. Dugger, 840 F.2d 787, 795 (11th Cir.1988). Moreover, the attorney is not necessarily required to investigate every evidentiary lead; an attorney's decision to limit his or her investigation may be reasonable under the circumstances. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. However, such decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect.

Harris v. Dugger, 874 F.2d 756, 761 (11th Cir. 1989).

Moreover, as the State noted in its brief, trial counsel knew of the existence of these family members. State's brief at 30. These family members had been listed by Mr. Roberts' prior **counsel.**[6] Yet despite the fact that these family members were listed as witnesses, counsel did not contact them in order to ascertain what information they possessed. Under the Strickland standard, this was deficient performance.

Counsel not only failed to investigate, he failed to provide the mental health experts with the available documentation that this Court found wanting on direct appeal. There this Court stated:

> The Court rejects these opinions [of Mr. Roberts' mental health experts] and points out that the defendant gave **no** information to these witnesses as to:
>
> (a) Whether he was using drugs during or before the commission of this crime;
>
> (b) Whether he was using alcohol during or before the crime was

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[6]**Prior** counsel was Thomas Scott who withdrew on the grounds of conflict since he would need to be a witness as to a State's witness's conflicting statements. **See** Argument XX.

committed;

(c) His mental state prior to, during, or after the event.

There is no testimony in this record, from any witness, that the defendant was exhibiting any of the behavioral characteristics at the time of the murder, which would support or corroborate the bald assertions of the existence of extreme emotional or mental disturbance.

Roberts v. State, 510 So. 2d 885, 895 (Fla. 1987).

However, evidence was available to establish Mr. Roberts' drug usage. Kevin Brown could have testified that on the night of Mr. Napoles death Mr. Roberts claimed to have some coke (T. 199). Other witnesses were available to testify he was using coke that night (T. 192). In fact, according to Greg Mendus, it was "obvious that [Mr. Roberts was] coked" (T. 228). Rhonda Haines could have testified that in the twelve hours before Mr. Napoles death, Mr. Roberts in her presence drank five (5) cans of beer and "snorted a couple of bumps" of cocaine (T. 210, 216). Yet despite this wealth of evidence documenting Mr. Roberts drug and alcohol usage at the time of Mr. Napoles' death, the information was not investigated, developed or presented. As a result, the testimony of the mental health experts was found not supported by any evidence. Counsel's performance in this regard was unreasonable. It was deficient. An adversarial testing did not occur.

The State in its brief speculated that counsel may have had a strategic reason for his failure to investigate. The State said "[c]ounsel may well have concluded . . . ." State's brief at 30. However, this is not the place to speculate. If the record does not establish conclusively that Mr. Roberts is entitled to no relief, an evidentiary hearing is required. Here, an evidentiary hearing is required.

ARGUMENT VI

RICKEY ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State asserted in its brief that Mr. Roberts did not allege with sufficient specificity the acts or omissions which constituted the deficient performance of trial counsel. However, Mr. Roberts has argued that trial counsel failed to adequately cross-examine Michelle Rimondi concerning her pending criminal charges. Contrary to the State's assertion, adequate cross-examination did not occur because she was not asked about the pending criminal charges against her and for which she received pretrial intervention. Manny Cebey, Joe Ward, and Jamie Campbell were not cross-examined about their exposure to criminal charges. Thomas Scott was not called to give the impeaching testimony against Rhonda Haines which required his withdrawal from the case.

The State once again speculated in its brief that trial counsel may have had reasons for his actions, State's brief at *34*. But again, speculation can not be used to deny relief. If speculation as to counsel's strategic choices is necessary to deny relief, then an evidentiary hearing is warranted.

CONCLUSION

No claim or aspect of a claim which, given the time constraints, has not been fully briefed herein is waived or abandoned. Mr. Roberts' lower court submission and initial brief are all incorporated hereby, and presented for this Honorable Court's review.

Mr. Roberts respectfully requests that this Honorable Court remand this cause for an evidentiary hearing, and that the Court vacate his unconstitutional capital conviction and sentence of death for all of the reasons presented to this Court in this brief and in petitioner/appellant's prior submissions.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by first class, United States Mail, postage prepaid to Ralph Barreira, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, this 8th day of January, 1990.

_____
Attorney