IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,072

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hoffman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R." -- record on direct appeal to this Court;

"T." -- transcript of trial proceedings;

"PC-R." -- record on appeal from initial denial of postconviction relief;

"PC-R2." -- record on appeal from the second denial of postconviction relief;

"PC-R3." -- record on appeal from the third denial of postconviction relief;

"PC-T." -- transcript of evidentiary hearing held on July 15-16, 1997;

"Supp. R." -- supplemental record on appeal materials.

CERTIFICATION OF TYPE SIZE AND STYLE

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ARGUMENT I

As this Court noted in the opinion requiring the lower court to hold an evidentiary hearing regarding Mr. Hoffman's Brady[1] allegations: "At argument, the state conceded that such a claim, if valid, would require relief under *Brady v. Maryland*, 373 U.S. 83 (1963)". *Hoffman v. State*, 571 So. 2d 449, 450 (Fla. 1990). Mr. Hoffman proved at his evidentiary hearing that the State withheld material, exculpatory evidence, yet Appellee has retreated from this concession and rather than concede error now makes the impossible argument that Mr. Hoffman's claims have no merit.

Mr. Hoffman's conviction and sentence are seriously undermined by the reports and memoranda that the prosecution withheld in his case in violation of *Brady v. Maryland*. As in *Kyles*, "[b]ecause the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested", thus the withheld evidence undermined confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 429 (1995). In Mr. Hoffman's case the withheld evidence would have severely damaged the prosecution's case against Mr. Hoffman in several ways including, supporting his contentions regarding the involuntariness of his confession and his alibi defense, assisting his attorney in impeaching key state witnesses who testified to Mr. Hoffman's alleged statements and limiting Mr.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Hoffman's culpability in the crime. As in *Young*, Appellee "does not dispute the existence and contents of documents that are the subject" of Mr. Hoffman's *Brady* claim. *Young v. State*, 739 So. 2d 553, 561 (Fla. 1999). Instead, Appellee misapprehends Mr. Hoffman's claims and misstates the facts in order to argue that Mr. Hoffman's issues should be denied.

Recently, in *Thompson v. State*, this Court identified the three elements of a *Brady* claim: "[1] The evidence at issue must be favorable to the accused; either because it is exculpatory or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued". Slip op. at 21-22 (April 13, 2000), *quoting Strickler v. Greene*, 119 S. Ct. 1936, 1948 (1999). At his evidentiary hearing, Mr. Hoffman proved that the State suppressed reports and memoranda with information regarding the physical evidence found at the crime scene, other suspects and deals with state witnesses. Had trial counsel been aware of this favorable information and presented it to the jury it would have made a difference.

Appellee suggests that the evidence comprising Mr. Hoffman's *Brady* claim was equally accessible to the defense (Answer Brief at 6)(hereinafter AB). However, as Mr. Hoffman proved at the evidentiary hearing, Mr. Nichols, the attorney who represented Mr. Hoffman initially, filed a Demand for Discovery (R. 12). Additionally, after Mr. Nichols was discharged and Mr. Harris appointed, the State agreed to comply with Mr. Harris' subsequent

discovery request (T. 142-144). The State knew Mr. Harris was interested in: "[r]eports of statements of experts . . . including results of physical or mental examinations and scientific tests, experiments or comparisons" (R. 101), yet the State failed to turn over evidence which even the Assistant State Attorney characterized as "significant" to Mr. Hoffman's case (PC-T. 295). At the evidentiary hearing Mr. Hoffman's trial counsel remembered that he requested discovery and exculpatory material (PC-T. 235). Despite his request he did not recall receiving any of the *Brady* material regarding hair evidence (PC-T. 240, 265-266), other suspects (PC-T. 238-239, 248), or Mr. Marshall's deal with the State (PC-T. 249). Clearly, Mr. Hoffman's trial counsel attempted to access the *Brady* evidence and the State thwarted his attempt by failing to provide the information he requested.

Furthermore, the cases Appellee cites to support its contention are distinct from Mr. Hoffman's case. In *Provenzano*, the evidence at issue consisted of a mental health report which the court found the original defense attorney to possess because he had made a specific motion to seal the report. *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993). This Court indicated that the subsequent attorney certainly could have obtained a copy of the report. *Id*. In Mr. Hoffman's case, his trial attorney, Mr. Harris, did not have the same access to the police reports and state attorneys' memoranda that the trial attorney in *Provenzano* had to a mental health report regarding his client

that was subject to a motion to seal in the court file. In fact, Mr. Harris had no ability to obtain the memorandum located in the State Attorney files or the police and Florida Department of Law Enforcement (FDLE), reports unless the agencies were willing to turn them over to him. Since they did not provide him the *Brady* evidence, despite his request, he had no other way to obtain the evidence.

Similarly, Appellee's reliance on *James v. State* is also misplaced. 453 So. 2d 786 (Fla. 1984). In *James*, the evidence at issue consisted of a photograph of a juvenile used in a photo array, including the defendant's photo. However, Mr. James conceded that he was aware of the possible existence of the photograph. *James*, 453 So. 2d at 790. Thus, *James* has no applicability to Mr. Hoffman's case because in Mr. Hoffman's case, his trial attorney was not aware of the *Brady* evidence regarding the physical evidence, other suspects and Marshall's deal with the State.

Specifically, as to the hair evidence, Appellee argues that Mr. Hoffman knew about the hair evidence because the State filed a motion to compel hair samples from Mr. Hoffman and the State responded to Mr. Hoffman's Demand for Discovery by indicating that reports on the autopsies, fingerprinting and blood and hair analysis existed. (AB at 7).

Mr. Hoffman made a demand for all discovery, including *Brady* material, on November 5, 1981 (R. 12). On the same day, the State filed its initial discovery response (R. 14-15). However,

no test results were attached to the State's discovery response (R. 14-15). The State filed six supplemental discovery responses dated after February 11, 1982, the date FDLE issued its report excluding Mr. Hoffman as the source of the hair (Exhibit 8). None of the six supplements to discovery gave any indication that FDLE conducted tests or issued exculpatory conclusions. Not only was FDLE's report neither mentioned nor attached to these supplemental discovery responses, but the State even went so far as to hide the identity of the FDLE Crime Laboratory Microanalyst (Patricia Lasko) who eliminated Mr. Hoffman as the source of the hairs found clutched in the hands of both victims. The State never listed Patricia Lasko as a witness with "material information within the State's possession or control which **tends to negate the guilt of the accused** as to the offense charged" (R. 12 - *Defendant's Demand for Discovery*, filed November 5, 1981, paragraph twelve).

The State, after receiving this exculpatory report in February, failed to turn the report over to Mr. Hoffman, despite two specific requests made on behalf of Mr. Hoffman for all reports and testing. *Brady* and its progeny mandate the disclosure of exactly this type of exculpatory testing, especially in light of the multiple requests for all reports and analysis. The State failed to turn this exculpatory report over to Mr. Hoffman, despite his original request for discovery and a subsequent request filed by Mr. Harris (R. 83-84), and granted by the circuit court (T. 142-144).

Secondly, Appellee argues that because Mr. Harris questioned the FDLE **serologist**[2] about hairs collected at the crime scene Mr. Harris knew about the results of the hair analysis (AB at 8). Appellee stated: "he elicited the fact that hairs had been collected from the murder scene (ROA VII 581) **and that the witness could not state with certainty that Hoffman had ever been in the motel room where the victims were murdered**." (AB at 8)(emphasis added). Thus, Appellee's own brief and the record make clear that Mr. Harris did not know about the testing or results of the hair analysis because if he did know the results he would not have asked questions regarding the possibility of Mr. Hoffman having been in the motel room before the crime -- he would not have had to suggest the possibility that Mr. Hoffman had previously deposited the hairs in the motel room.

Furthermore, Appellee misinforms this Court by stating that Mr. Harris testified at the evidentiary hearing that he knew about the hair evidence (AB at 8). Appellee's assertion is patently false. Mr. Harris maintained throughout the evidentiary hearing that he did not know about the FDLE report excluding Mr. Hoffman from being the person who struggled with the victim. Mr. Harris stated:

> **[T]he existence of Caucasian hair under one of the victim's fingernails that was not Barry Hoffman's would have been a highly**

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[2] Appellee never asserts that Mr. Hoffman was given the opportunity to question the FDLE Crime Laboratory Microanalyst, because the State only provided the name of the serologist.

> **exculpatory fact. I'm sure it's one that I would not have overlooked.**

(PC-T. 240)(emphasis added). Later Mr. Harris testified: "**I think I can state categorically that I was never aware of the results of any scientific tests involving (the hair evidence)**" (PC-T. 265-266)(emphasis added). Clearly, the State did not turn over the FDLE reports regarding the hair analysis to Mr. Hoffman.

Appellee admits that the circuit court misstated the evidence regarding the hairs found in the victims' hands in its order denying Mr. Hoffman's claims (AB at 9).[3] However, Appellee then attempts to advance, just as the lower court did, the ludicrous idea that the "Hair from **clutch** of left hand of Body #1 (Parrish)" (Exhibit 4, 31)(emphasis added), came from somewhere in the motel room and accidentally found its way into the victim's hands after she was attacked (AB at 9). The circuit court's conclusion and Appellee's argument make no sense and the exhibits and testimony contradict them.

Finally, what Appellee seems to misunderstand regarding the hair evidence is: while Mr. Hoffman may have known that hair was found in the victims' hands (AB at 8), he did not know that FDLE tested and determined that the hair in the victims' hands did not match his. The State violated *Brady* when it failed to provide

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[3] Curiously, two pages later Appellee then adopts the circuit court's position when stating: "it should surprise no one that stray, unidentifiable hairs might be found in a motel room." (Answer Brief at 10). Again, this statement belies all of the crime scene and autopsy reports which clearly prove that the hair was found grasped in the hand of Ms. Parrish and could not have been random hairs, unrelated to the crime.

Mr. Hoffman with the FDLE report excluding Mr. Hoffman from depositing the hair found in the victims' hands. The testing and results of the hair analysis and not the existence of the hair constitutes the State's *Brady* violation.

The State also violated *Brady* in failing to inform Mr. Hoffman of the entire deal between the State and Rocco Marshall. The truth of a witnesses' testimony and a witnesses' motive for testifying are material questions of fact for the jury; thus, the improper withholding of information regarding a witnesses' credibility is just as violative of the dictates of *Brady* as the withholding of information regarding a defendant's innocence. *United States v. Bagley*, 473 U.S. 667 (1985). *See also Moore v. State*, 623 So. 2d 608, 609 (4th DCA 1993)("The failure to **fully** inform the jury of an agreement between a state witness and the state constitutes a denial of due process if the jury is misled as to the facts bearing on the credibility of the witness")(emphasis added), *citing Armstrong v. State*, 399 So. 2d 953, 960 (Fla. 1981).

Appellee's assertion that "Hoffman's claim of a *Brady* violation is mere speculation" (AB at 11), is refuted by the exhibits and testimony elicited at the evidentiary hearing. Mr. Hoffman introduced exhibits that proved Marshall was promised much more than Mr. Hoffman or the jury ever knew (Exhibit 45). At the evidentiary hearing, Mr. Hoffman proved that the State failed to disclose the extent of the deal with Marshall in which Marshall agreed to tell "all he knew" of the drug operation and

in exchange Marshall's debt to Provost was cancelled and Marshall was allowed to keep the band equipment given to him by Mazzara (Exhibit 45). Marshall also agreed to provide the state with "all knowledge of the Provost organization he ha[d] prior to and after the homicides" (Exhibit 45). At the evidentiary hearing, trial counsel testified that the State had not informed him of the full extent of the deal Marshall received (PC-T. 249).

Appellee suggests that Mr. Hoffman cross-examined Marshall about some of the benefits he would receive for his testimony (AB at 11).[4] However, just because the jury was aware of some of the benefits Marshall received in exchange for his testimony does not mean that the State did not suppress evidence that would have assisted Mr. Hoffman's defense. The test is not whether the State produced some information regarding its deal with a witness, but whether the State produced all information regarding its deal with a witness. Appellee suggests that as long as the State discloses a portion of its deal, it is then free to suppress the more favorable terms. Such an interpretation would eviscerate the underpinnings of *Bagley*, and would reward prosecutors for hiding information from the defense. *United States v. Bagley*, 473 U.S. 667 (1985).

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[4] Appellee avers: "In cross-examining Dorn, Harris established that Marshall was not truthful in his statements to the authorities until he was given immunity" (AB at 11). Mr. Hoffman notes that scenario is more accurately described as: Marshall did not compose the statements he testified to at trial until after he was given immunity.

As to Mr. Hoffman's specific allegations about the suppression of information regarding other suspects, the State's responsibility to produce this *Brady* evidence is not diminished by the fact that much of the information regarding the other suspects was contained in Jacksonville Beach Sheriff reports. *See Arango v. State*, 467 So. 2d 692, 693 (Fla. 1985)("Although the prosecutor did not personally suppress the evidence, the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor"); *Garcia v. State*, 622 So. 2d 1325, 1330 (Fla. 1993)(holding that it makes no difference whether the prosecutor or police withhold evidence).

Appellee argues that Mr. Hoffman knew that there were other suspects in this case (AB at 13). Appellee reaches this erroneous conclusion because Mr. Hoffman's trial attorney asked Marshall and Detective Dorn a few questions about Mr. Hoffman's relationship with "Bones" Merrill (AB at 13). While Mr. Hoffman's trial attorney may have known that Merrill was involved with the Provost organization and worked with Mr. Hoffman in a lawn care business, this information is a far cry from knowing that Merrill had confessed to being involved in the crime.

Had the State provided Mr. Hoffman with the true information about Merrill the jury would have heard: 1) Merrill confessed to being involved in the crime; 2) Detectives Dorn and Maxwell interviewed Merrill and Merrill offered an alibi for the morning of the crime; 3) Merrill's alibi relied on Bubba Jackson, another prominent suspect in the homicides; 4) No reports reflect that

the detectives confirmed Merrill's alibi; 5) Five days after the initial meeting, Merrill entered into a deal with the police wherein he would provide the police with information regarding the Provost organization, and the homicides and in exchange the police would pay Merrill's living expenses; 6) Merrill later implicated Bubba Jackson (even though he previously claimed him as an alibi), in the homicides and not Barry Hoffman. (Exhibits 37-39). Had trial counsel known about Merrill's confession and the benefits he received from the police certainly he would have presented it to the jury and it would have made a difference in the outcome of the case (PC-T 248).

Similarly, the State withheld material information pertaining to Bubba Jackson. Jackson, a known drug dealer in the Provost organization, not only confessed to the crime, but he knew details of the crime that only the actual killer would know. (Exhibit 34-35). The State relied on Jackson's confessions to obtain a search warrant and compel blood and hair samples (Exhibit 34-35). The State failed to reveal any of the information concerning Jackson to Mr. Hoffman. At the evidentiary hearing, trial counsel testified that he would have used the information at trial (PC-T. 201-203).

After only addressing two of the "other suspects", Bones Merrill and Bubba Jackson, Appellee cites *Moore v. Illinois*, for the proposition that: "there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case". 408 U.S.

786, 795 (1972) (AB at 13). However, Appellee's reference to *Moore* is misleading. *Moore* and its progeny represent and explain the analysis of the prosecution's conduct in determining whether a defendant received a fair trial. The *Moore* Court explained:

> Important, then, are (a) suppression by the prosecution . . . (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. **There (sic) are the standards by which the prosecution's conduct in Moore's case is to be measured.**

Id. at 794-795 (emphasis added). Thus, *Moore* signifies that the suppressed evidence must be analyzed by its value to the defense. The suppressed evidence concerning the other suspect in *Moore* was not material to the issue of Moore's guilt. *Id* at 797. However, in Mr. Hoffman's case, the suppressed evidence about the "other suspects" was not merely "police investigatory work on a case" but it constituted valuable evidence that was material in several ways: it undermined Mr. Hoffman's confession and his culpability in the crime.

Moore is also distinguishable from Mr. Hoffman's case because the Supreme Court found that **the prosecution tendered Moore's entire file to the defense**. *Id*. at 795 (emphasis added). Mr. Hoffman's trial attorney did not have similar access to the State's files.

Additionally, many of the "other suspects" were not fully investigated in Mr. Hoffman's case. Clarence Robinson became a suspect when a confidential informant in Georgia reported that he was involved with Ms. Parrish in a plan to help two Florida death

row inmates escape (Exhibit 40). At the time Robinson was already wanted for murder (Exhibit 40). From Det. Dorn's report, dated October 7, 1980, Robinson was never fully investigated because Georgia law enforcement was unwilling to use their confidential informant to pursue the Jacksonville Beach homicides for fear that "it might possibly hurt an ongoing investigation" (Exhibit 40-41).

Also, a memorandum located in the State Attorney's prosecution file indicated that an individual named Sprinkle had threatened to kill the victim (Exhibit 49). The state attorney who authored the memorandum stated: "These cases were filed due to police observation of offense, defendant's prior records, and threats made to victim by defendant Sprinkle after arrest. Victim wanted to prosecute strongly" (Exhibit 49).

Det. Dorn also authored a report regarding Sprinkle (Exhibit 47). Det. Dorn was provided information days after the murder that Sprinkle had threatened to kill an individual in a bar "like [he] killed some people in Jacksonville" (Exhibit 47).

While Appellee attempts to convince this Court that the cases it cited, including *Moore*, stand for the proposition that information regarding other suspects does not ever have to be produced under *Brady*, this is not the case. To support its position, Appellee cites to *Moore*, *Medina*, *Spaziano*, *Melendez* and *Swafford*. Each of these cases addressed the **effect** of the prosecutor's **failure** to turn over exculpatory materials, not whether the prosecutor, at the time of the trial, was under a

duty to turn them over. *See Medina v. State*, 690 So. 2d 1241, 1249 (Fla. 1997); *Swafford v. State*, 569 So. 2d 1264, 1267 (1990); *Spaziano v. State*, 570 So. 2d 289, 291 (Fla. 1990). *Melendez v. State*, 498 So. 2d 1258, 1260 (Fla. 1986). Appellee confuses the two issues. It is irrefutable that when the State is in possession of confessions to the crime, the federal and Florida constitutions mandate its disclosure. "**Brady requires the prosecution to produce evidence that someone else may have committed the crime**". *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984)(emphasis added).

Under *Brady*, the State is required to disclose all favorable evidence to the accused, including evidence that negates guilt as well as evidence which affects witnesses' credibility. *United States v. Bagley*, 473 U.S. 667 (1985); *see also Waterhouse v. State*, 522 So. 2d 341, 342-343 (Fla. 1988). In *Briskin v. State*, this Court held: "[T]he critical factors are the character of the evidence and its materiality to the defendant's case." 341 So. 2d 780, 782 (Fla. 1977). The "other suspects" withheld from Mr. Hoffman were not merely ephemeral, were not fully investigated and were material to the determination of Mr. Hoffman's guilt. The reports and memorandum should have been disclosed to Mr. Hoffman. The State's failure to disclose this evidence undermines Mr. Hoffman's conviction and sentence.

Mr. Hoffman's case is similar to the scenario in *Sellers v. Estelle*, where the suppressed police reports indicated that another person admitted to committing the crime with which the

defendant was charged. 651 F.2d 1074 (5th Cir. 1981). Had the State produced its investigative work culminating in three separate confessions to the crime, Mr. Hoffman could have presented it to the jury to show that others had a motive to kill the victims, these individuals were not fully investigated and others had confessed to the crime and knew intimate details about the murders.

Appellee attempts to minimize the *Brady* evidence by arguing it would not have made a difference because of Mr. Hoffman's confession (AB at 10). Clearly that is not the case. The physical evidence, including the blood and hair evidence that did not match the victims, White or Mr. Hoffman destroys the credibility of Mr. Hoffman's statement.[5]

Appellee, like the lower court, addressed Mr. Hoffman's claims singularly and failed to acknowledge the Kyles mandate: a cumulative evaluation of the evidence must be performed. *Kyles*, 514 U.S. at 440-441. The United States Supreme Court in *Kyles* stated:

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the

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[5] Mr. Hoffman has consistently maintained that the statements he made when he was arrested in Michigan were coerced. FBI Agent Lupekas testified that after he arrested Mr. Hoffman, Mr. Hoffman made a phone call to James Provost (T. 207). Mr. Hoffman requested legal assistance from Provost (T. 207). Additionally, after ending his conversation with Provost, Mr. Hoffman commented that Provost was setting up Mr. Hoffman (T. 208).

> case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles.

Kyles, 514 U.S. at 449, n.19. *See also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)("It is the net effect of the evidence that must be assessed").

Not only did the lower court fail to conduct the *Kyles* cumulative analysis, in fact, the lower court failed to conduct any analysis regarding several items Mr. Hoffman proved the State withheld (PC-R3 351-357). Even singularly, the items the State withheld from Mr. Hoffman satisfied the *Brady* analysis, thus his conviction and sentence must be overturned.

The evidence at trial was that Barry Hoffman and James White, a black man, were the only two who actually went into the room. The jury would have learned, based on the hair evidence, that the State's theory and Mr. Hoffman's confession were not reliable. The male victim's head hair was not consistent with that found in Ms. Parrish's hand, ruling out the possibility that it was simply his hair found in her hand (Exhibit 33, 48). The undisclosed test results established the hair was not Mr. Hoffman's (Exhibit 8). James White is African-American, thus it was not his hair. Because the hair did not match Mr. Hoffman, Mr. White, or either victim, the undisclosed report seriously undermined the State's theory. The head hair was a vital piece of evidence that was never turned over to the defense. Had the State truly believed the report eliminating Mr. Hoffman as the

source of the hair was inconsequential, it surely would not have hidden FDLE's findings.

Furthermore, combined with the evidence of the "other suspects" the hair evidence is further exculpatory because it may have belonged to Robinson, Sprinkle or another suspect who confessed to the crime.

The State's suppression of the hair evidence, blood evidence, Marshall's favorable deal, and the other suspects (including three of whom confessed to committing the crime and one who confessed to being involved in the murder) resulted in a constitutionally deficient trial, severely undermining any confidence in the verdict and sentence. *Kyles v. Whitley*, 514 U.S. 419, 429 (1995). Relief is proper.

ARGUMENT II

Appellee submits that Mr. Hoffman's trial counsel provided effective assistance of counsel at the penalty phase of his capital trial (AB at 16-19). Mr. Harris's strategy at the penalty phase was to show that Mr. Hoffman was a "normal guy":

> **Judge, I will be arguing by extension that he was a normal guy up until the time he got involved with these conspirators and that his drug use began and drug dependence began about that time. He had been using drugs and selling drugs since earlier that year.**

(T. 1166)(emphasis added). Appellee argues that presenting any of the testimony regarding Mr. Hoffman's severe drug addiction which began when Mr. Hoffman was only a child and afflicted him throughout his entire life, the fact that he sought treatment for his addiction and his mental health problems, including organic

brain damage would not have been consistent with Mr. Harris' trial strategy (AB at 23-24).

However, Appellee overlooks the precedent which requires that trial counsel in capital sentencing proceedings has a duty to investigate avenues of mitigation which can be presented for the sentencers' consideration. *O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984); *State v. Michael*, 530 So. 2d 929 (Fla. 1988); *Blake v. Kemp*, 758 F.2d 523, 533-35 (11th Cir. 1985). Reasonably effective counsel must look into the available facts before deciding what to do. In Mr. Hoffman's case, trial counsel failed to investigate Mr. Hoffman's life history and thus his decision to present evidence that Mr. Hoffman was a "normal guy" did not "flow from an informed judgment." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989). Mr. Harris' "extensive consultation" (AB at 24) with his client is no substitute for a proper investigation.

Appellee also argues that presenting the testimony about Mr. Hoffman's mental health and his life long drug addiction would have been inconsistent with his argument that Mr. Hoffman was innocent of the crimes. However, trial counsel could have accepted the jury's verdict and still presented the testimony about Mr. Hoffman's life and mental health so that the jury would know who Barry Hoffman really was. In *Gregg*, the Court emphasized the importance of focusing attention on "the particularized characteristics of the individual defendant." *Id.* at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976);

Woodson v. North Carolina, 428 U.S. 280 (1976). If trial counsel and Appellee's logic prevailed anytime a capital defendant claimed he was innocent at trial he would have effectively waived his penalty phase. But a defendant is only before a jury once he has pleaded not guilty. Is Appellee asking this Court to abolish all penalty phase hearings whenever a defendant pleads not guilty to the crime?

Appellee also suggests that Mr. Hoffman, a brain damaged individual with no legal background, contributed and assented to this strategy because he testified at the penalty phase that he didn't "have a big list of character witnesses" (T. 1180). Trial counsel cannot rely on his client to determine an effective strategy for his case. Mr. Harris failed to know what information constituted mitigation thus he could not convey to his client what information would be valuable. Mr. Harris failed to investigate and present evidence that would have compelled the jury to impose a life sentence on Mr. Hoffman.

Appellee also defends trial counsel's strategy because Mr. Harris testified at the evidentiary hearing that Duval County was a pretty conservative community and he did not know if the community would accept drug use as a mitigating factor (AB at 25). This argument is unpersuasive in light of the circumstances surrounding Mr. Hoffman's drug addiction. Mr. Hoffman began to use codeine as a young child (PC-T. 125, 141-142, 149, 156, 161). The adults in his life noticed his behavior and did nothing to stop it. Also, Mr. Hoffman sought treatment for his addiction

(PC-T. 128). However, as Dr. Fox testified, very few drug addicts can overcome their addiction. Dr. Fox told the lower court that despite treatment "the number of individuals who would become clean from drugs is very, very low . . . it only occurs when the individual is incarcerated or placed in some other circumstances where they are unable to obtain drugs (PC-T. 66-67).

Furthermore, trial counsel's reason for failing to present the evidence of Mr. Hoffman's life long addiction to drugs because of Duval County's conservative appearance is unconvincing and unreasonable in light of the fact that in Florida, the trial judge is a co-sentencer and he would have been responsible for independently weighing the aggravation and mitigation. This Court has recognized that drug addiction is a mitigating factor. *Snipes v. State*, 733 So. 2d 1000, 1008 (Fla. 1999); *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992). Therefore, trial counsel's failure to place Mr. Hoffman's drug addiction in context and consider the judge's role in sentencing prove his deficient performance and the prejudice to Mr. Hoffman.

Additionally, Appellee's argument and Mr. Harris' testimony are not supported by the record. Mr. Hoffman's jury was well aware that he was a drug addict because he testified about his drug use regarding his confession and again in the penalty phase (T. 955-956). Certainly it would have only helped the jury understand how Mr. Hoffman became entangled with the Provost organization to know that his addiction dated back to childhood.

The witnesses who testified at the evidentiary hearing about Mr. Hoffman's debilitating drug addiction and childhood along with the mental health experts presented a compelling picture of Barry Hoffman's life. Mr. Sirodi, Mr. Hoffman's life long friend,[6] testified about Mr. Hoffman's battle with drugs and the difficulties of overcoming a drug addiction (PC-T. 122-136). Had the jury heard this evidence they would have imposed a life sentence.

Appellee also attempts to minimize the mental health testimony despite the fact that at the evidentiary hearing Mr. Harris testified that it would have beneficial to present mental health testimony (PC-T. 247).

The lower court failed to even address Dr. Gelbort's testimony, yet Appellee attacks Dr. Gelbort by suggesting that because the mental health testing was conducted several years after the crime, the results were less valid. However, at the evidentiary hearing the Department of Corrections documents were introduced in order to illustrate Mr. Hoffman had not suffered any significant injuries or been exposed to any further drug use or intoxicants that could have caused brain damage (Exhibit 1).[7]

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[6] In an effort to cast doubt on Mr. Sirodi's credibility, Appellee states: "Sirodi also admitted that he was still using drugs". This statement underscores the deception that has plagued Mr. Hoffman's case from its inception. Mr. Sirodi testified that he was using prescriptive medication under a doctor's care and he flatly denied using street drugs for over ten years (PC-T. 134).

[7] At the evidentiary hearing the State objected to the experts' testimony regarding the DOC records and the judge sustained the objection (PC-T. 69-73). Now, the Appellee argues

Dr. Gelbort provided valuable testimony about the effects of Mr. Hoffman's long term drug use. Dr. Gelbort's testimony also corroborated Dr. Fox's findings. Dr. Gelbort concluded that Mr. Hoffman had a "long and significant history of drug abuse" and that some of the drugs Mr. Hoffman abused produce psychoactive changes in a person, i.e. brain damage (PC-T. 316-317).

Dr. Gelbort informed the lower court that psychological testing was necessary in order to determine how the different parts of the brain are functioning (PC-T. 319). The results of Mr. Hoffman's tests indicated that his brain was "abnormal" (PC-T. 322). Based on his testing Dr. Gelbort concluded that Mr. Hoffman suffered from "cognitive dysfunction or brain dysfunction", i.e. organic brain syndrome (PC-T. 324-325).

Appellee's suggestion that Dr. Gelbort's testimony was somehow flawed is not supported by the record and was not even addressed by the circuit court.

Similarly, Dr. Fox's testimony was persuasive. Dr. Fox testified about Mr. Hoffman's debilitating battle with drug addiction and the difficulty in overcoming such an addiction. At

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that the experts' testing and testimony is less valid because the testing was conducted several years after the crime (AB at 25). As postconviction counsel proffered through Dr. Fox the DOC records support the conclusions the experts made because the experts were able to: "take into account any influence on medical conditions that occurred during [Mr. Hoffman's] incarceration" that might impact the evaluations (PC-T. 73). It was disingenuous of the State to claim at the evidentiary hearing that the DOC records had no relevance to the mental health evaluations and object to the testimony regarding them and to now argue that the mental health evaluations are less valid because of the time frame between the crime and the testing.

a minimum Dr. Fox provided effective non-statutory mitigation. In addition, Dr. Fox also credibly testified about statutory mitigation. Dr. Fox based his conclusions on Mr. Hoffman's longstanding addiction, testing and the circumstances surrounding the crime.

Trial counsel's failure to develop any facts on which to base his strategy to present Mr. Hoffman as simply a "normal guy" violated Mr. Hoffman's constitutional rights to "provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 529 U.S. ___ (April 18, 2000), slip op. at 29. Considering the wealth of mitigation available to trial counsel, it is more than probable that a different result would have been reached. *Strickland*, 466 U.S. 668 (1984).

ARGUMENT III

The lower court held a limited hearing on Mr. Hoffman's allegation that Mr. Harris was ineffective during Mr. Hoffman's trial because he did not present any mental health testimony or present other testimony regarding the issue of Mr. Hoffman's confession. Appellee argues that the record supports the lower courts finding that Mr. Harris performed effectively (AB at 30). Appellee suggests that because Mr. Harris mentioned that Mr. Hoffman was under the influence of drugs at the time he gave his statement to the FBI agents and Jacksonville Beach detectives and because he argued this again in his closing argument, he performed effectively (AB at 30). However, counsel could have

used expert testimony during the motion to suppress and then after failing to suppress the statement again during the trial to illustrate to the jury Mr. Hoffman's mental state when he was interrogated. Counsel's references to Mr. Hoffman's use of drugs at the time he was interrogated are not a substitute for providing the judge and jury a specific information about the effects those drugs would have had on Mr. Hoffman.

Additionally, Appellee also claims that "no reasonable attorney practicing in Jacksonville in 1982-83 would have failed to produce witnesses such as Fox and Golden on the suppression issue" (AB at 31). This argument disregards trial counsel's testimony at the evidentiary hearing in which he stated that had he had expert testimony regarding the circumstances of Mr. Hoffman's alleged statements to the police, he would have presented it (PC-T. 243). Obviously as Appellee indicates, trial counsel knew it was significant to inform the judge and the jury that Mr. Hoffman was under the influence of drugs at the time he gave a statement (AB at 30; T. 171-233, 1080-1081). Thus, at a minimum, a competent trial attorney would have discussed the issues with a mental health expert and presented corresponding testimony.

Appellee also takes issue with the fact that Mr. Hoffman argued in the alternative that trial counsel was ineffective for failing to present the exculpatory hair evidence to the jury and uncover the "other suspects" and deal with Marshall (AB at 32). Appellee states: "Moreover, Harris cross-examined Marshall

extensively and knew about the hairs and other suspects" (AB at 32). At the evidentiary hearing, trial counsel emphatically denied knowledge of any of this exculpatory information (PC-T. 238-239, 240, 248, 249, 265-266). There is no doubt that the hair and blood evidence, "other suspects" and Marshall's deal undermine all confidence in Mr. Hoffman's conviction. Appellee cannot have it both ways: Either the State withheld the evidence from trial counsel or trial counsel was ineffective for failing to uncover it.

Furthermore, since the Assistant State Attorney who presented Mr. Hoffman's case to the jury characterized this evidence as "significant" (PC-T. 295), Appellee's argument that it would not have made a difference to the jury is ridiculous.

CONCLUSION

The State hid significant exculpatory evidence from Mr. Hoffman. There is absolutely no question the prosecutor was under a constitutional obligation to provide Mr. Hoffman's counsel with the FDLE reports, the deals, and the information regarding the other suspects and their confessions. The State insured its victory by manipulating the playing field, resulting in a violation of Mr. Hoffman's rights to a fair trial and due process of law. Relief is warranted.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 19, 2000.

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