IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,227

MILO A. ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Rose'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;

"PC-R1." -- record on appeal from initial denial of postconviction relief;

"PC-R2." -- record on appeal in the instant proceeding;

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

CERTIFICATION OF TYPE SIZE AND STYLE

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REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

On October 26, 1982, Milo A. Rose was indicted by a Pinellas County Grand Jury for the first degree murder of Robert "Butch" Richardson (R. 1070-1071). Trial counsel, Darryl Rouson, was appointed on March 31, 1983 (R. 164).

Mr. Rose's trial commenced on June 28, 1983. On June 30th, a jury found Mr. Rose guilty of first degree murder (R. 293).

Penalty proceedings were conducted on July 5, 1983, so that trial counsel could begin to prepare for the penalty phase over the holiday weekend (R. 1102-1107). The jury recommended a sentence of death by a vote of nine to three (R. 310-311).

The trial court sentenced Mr. Rose to death on July 8, 1983. The trial court found three aggravating circumstances: previously convicted of a violent felony, the murder was committed while under a sentence of imprisonment and cold, calculated and premeditated (R. 329-336). The trial court did not find that the murder was heinous, atrocious and cruel, despite the jury's consideration of this factor (R. 332-333).

On direct appeal this Court affirmed the conviction and sentence of death. Rose v. State, 472 So. 2d 1155 (Fla. 1985).

On October 2, 1987, after his death warrant was signed and his execution scheduled, Mr. Rose filed his Motion to Vacate Judgement of Conviction and Sentence (PC-R1. 5-80). An amendment was filed on August 2, 1988 (PC-R1. 466-508). The trial court summarily denied most of Mr. Rose's Rule 3.850 claims and ordered a limited evidentiary hearing as to those claims concerning

ineffective assistance of counsel in penalty phase, and a claim relating to Caldwell v. Mississippi, 472 U.S. 320 (1985) (PC-R1. 750, 753). The hearing and argument were conducted on September 7-9 and 12, 1988. The trial court denied all relief on January 25, 1990.

On appeal, this Court denied all relief. Rose v. State, 617 So. 2d 291 (Fla. 1993).

After instituting federal habeas corpus proceedings, Mr. Rose learned that critical State witnesses, Becky Borton and Mark Poole, made a deal with the State to receive lenient treatment in exchange for their testimony against Mr. Rose. In December, 1996, Mr. Rose filed a Rule 3.850 motion based on this information (PC-R2. 1-25). Mr. Rose filed an Amended Motion to Vacate Judgment of Conviction and Sentence on September 4, 1998 (PC-R2. 187-234).

The lower court held a Huff[1] hearing on December 17, 1998. At the conclusion of the Huff hearing the lower court announced her summary denial of all relief (PC-R2. 770-771). On February 22, 1999, the lower court adopted the State's proposed order and summarily denied all relief (PC-R2. 843-846). Thereafter, notice of appeal was timely filed (PC-R2. 919-920).

STATEMENT OF FACTS

A. INTRODUCTION

Mr. Rose was convicted and sentenced to death for the murder of Robert "Butch" Richardson. At trial, the State presented the

[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

testimony of three witnesses who identified Mr. Rose as being the individual who killed Mr. Richardson (R. 701-781). The State also presented the testimony of Becky Borton and Mark Poole. Both of these individuals testified that they had seen Mr. Rose hitchhiking in the vicinity of the murder and that they had given him a ride to his home, where they were also staying (R. 865, 888). Both witnesses testified that Mr. Rose had confessed that he had killed Butch (R. 865-866, 890). The State also presented evidence that Mr. Rose had blood on him when he was arrested that night (R. 959).

Evidence was discovered since Mr. Rose's trial indicating that Poole and Borton had an ongoing relationship with the State whereby they received benefits for their testimony. Borton was promised assistance on her pending charges in exchange for her cooperation. The State failed to disclose material exculpatory evidence.

The State withheld material exculpatory evidence regarding the benefits received by Poole and Borton that would have enabled the defense to impeach their credibility by showing the jury why they were testifying against Mr. Rose. As a result of the State's misconduct, the jury that convicted Mr. Rose and sentenced him to death was misled by false testimony and deprived relevant impeachment evidence that would have explained these witnesses' true motivation for testifying against Mr. Rose.

B. THE TRIAL RECORD

Mr. Rose was "represented" at trial by Darryl Rouson, who was appointed on March 31, 1983 (R. 164). At the first hearing with Rouson, held on April 7, 1983, Rouson made an oral motion to withdraw as counsel, which was denied (R. 171a), after Rouson convinced Mr. Rose to accept his representation **and** waive his speedy trial rights upon Rouson's promise that he would fully prepare, investigate, and "work" the case, including the taking of depositions (R. 1211). Inexplicably, the lower court entered an order on May 25, 1983, continuing the trial to June 27, 1983 (R. 178).[2] Rouson conducted the depositions of Melissa A. Mastridge, Mark Poole, and Becky Borton on June 10, 1983 (R. 179-230). On June 23, 1983, just four days before trial commenced, Judge Parker, not Judge Schaeffer, entered an order appointing Dr. Slomin to evaluate Mr. Rose (R. 231).[3] Rouson provided Dr. Slomin with an "interview sheet" that was approximately five or six pages long that asked the defendant to self-report on information regarding the defendant's background (PC-R1. 846). The only other information Rouson provided was "the benefit of [his] discussions with the defendant in jail, [his] observations of him" (PC-R1. 846).

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[2] The Record on Appeal is silent as to whether the lower court *sua sponte* entered the continuance order, or whether a written motion was filed, or whether an oral motion was made at a hearing that is not included in the Record on Appeal.

[3] The Record on Appeal is again silent as to the events that transpired prior to the entering of the Order.

At 8:50 a.m. the morning of the first day of trial, Rouson deposed Catherine Bass, a critical State witness (R. 235-246). At 9:15 a.m. that morning, Rouson deposed Maryanne Hutton, a critical State witness (R. 247-259). Shortly after the depositions were concluded, the lower court called Mr. Rose's case for trial (R. 458). At this time, Rouson filed a Motion for Continuance (R. 262-263). Rouson informed the lower court that he was unprepared to go forward, as he still had investigations and preparations to complete (R. 460-464).[4] The lower court denied this request (R. 469-470).

Rouson then filed a Motion to Suppress Photo-Pak (R. 260-261). Due to the conclusory nature of the pleading, the lower court postponed the beginning of trial to take testimony (R. 472). At that hearing, Rouson admitted that it was the first time he saw the original photo-pak (R. 472). In addition, for no apparent reason, Rouson only called two of the four witnesses who claimed they could identify Mr. Rose.

At the hearing, Catherine Bass testified that she choose Mr. Rose's photo and rejected the four other photos that were contained in the photo-pak because the four photos did not match her description of the perpetrator:

> Q: (BY MR. ROUSON) Ms. Bass, let me show you these pictures again. Would you explain to me why you rejected number 1?

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[4] However, Mr. Rouson did not explain that co-counsel, Terry Cobb, had withdrawn from the case and that he felt "shorthanded" because he no longer had her assistance (PC-R1. 851).

A: Yes, sir, he is too stocky.

Q: Would you explain to me why you rejected number 3?

A: His hair is too long. He was not wearing an open-collared shirt. **He was wearing a T-shirt**.

Q: Would you explain to me why you rejected number 2?

A: Yes sir, he had dark hair, bushier than this, not layered like this at all.

Q: And would you explain why you rejected number 5?

A: Yes, sir, he had much longer hair than this and he did not have a full beard.

Q: Okay, you were able --

A: Not this full.

Q: You were able to distinguish those pictures readily, weren't you?

A; Yes, sir.

(R. 486-487).[5]

Melissa Mastridge also testified at the suppression hearing (R. 487-490). Mastridge maintained that she was unable to positively identify Mr. Rose and the only reason she could pick out his picture was because "out of these five pictures, he was the only one that it could be because of his description" (R.

[5] Ms. Bass' testimony reveals that she also eliminated the four pictures in the photo-pak to reach her conclusion that Mr. Rose's picture "matched" her descriptions of the perpetrator. Judge Schaeffer struck witness Mastridge's identification based on exactly the same grounds. Mr. Rose was severely prejudiced by Mr. Rouson's failure to argue this point to the judge at the suppression hearing and Judge Schaeffer improperly compounded the error by denying an evidentiary hearing on guilt phase ineffective assistance of counsel.

488). Mastridge also informed the court that there had been some discussion regarding the white lettering on the suspect's tee shirt, although she could not recall if that conversation between the witnesses occurred before they traveled to the police station or once they arrived there (R. 489). Mastridge was unable to identify Mr. Rose during the hearing.

After the hearing concluded, Judge Schaeffer suppressed Mastridge's out-of-court identification based on the fact that she eliminated the four (4) other photos rather than choosing Mr. Rose's photo based on his characteristics (R. 508-509). However, Judge Schaeffer found that Catherine Bass, Carl Hayword and Maryann Hutton would be allowed to testify about their out-of-court identifications (R. 507-509). Judge Schaeffer made this finding despite the fact that the photo-pak was not "as ideal as it might have been", (R. 507), and that Mr. Rose's photo did not "rise to **that much substantial** likelihood of irreparable mistaken identification" (R. 509)(emphasis added). Judge Schaeffer also based her decision on the fact that she did not hear any testimony that the witnesses had "seen writing" on the suspect's shirt (R. 507).

However, Judge Schaeffer ignored the testimony at the suppression hearing that the design and the "white lettering" on the suspect's tee shirt had been discussed between the witnesses (R. 489). During the trial this fact was further emphasized when Bass testified that the perpetrator was wearing a "black t-shirt with a white design on it, block lettering" (R. 710). Mr. Rose's

photo was the only photo with an individual wearing a black tee shirt with white lettering (R. 502-503).

After providing the lower court with only a single district court of appeal case, the lower court ruled, "this [photo-pack] isn't as ideal as it might have been" and, "I don't find the picture gives rise to that much substantial likelihood of irreparable mistaken identification" (R. 507-509). Nonetheless, the lower court allowed the identification of three of the four eyewitnesses to stand.

Jury selection began shortly after the conclusion of the Motion to Suppress hearing. After failing to challenge a single potential juror for cause and using only six peremptory challenges, the jury was seated (R. 611, 612-617, 661-664). Rouson's non-case specific opening statement consisted of only two transcribed pages (R. 696-698).

The State first called eyewitness Catherine Bass (R. 701). On cross examination, Rouson failed to question and impeach Bass with the evolving nature of her description of the suspect (R. 716-731). Rouson's one attempt to impeach Bass' recollection of her initial identification was over a feature that she did, in fact, tell the first officer on the scene (R. 727-728). Rouson failed to elicit that Bass added numerous descriptive terms to her initial identification, such as the suspect was dark complected, had a moustache and beard, unkempt hair, and dark eyes, etc. (R. 722-724). Rouson also failed to elicit that Bass, when selecting photograph number four from the array, was not

certain that the photograph she selected was the perpetrator (R. 730-731).

The State next called Melissa Mastridge (R. 734). Even though the lower court suppressed her identification of Mr. Rose, Rouson failed to limit her testimony and allowed the State to ask Mastridge several questions regarding her description of the perpetrator (R. 740). Rouson did not file a Motion in Limine to prevent the State from asking Mastridge these questions, nor did he object to this line of questioning (R. 740).

The State next called Maryann Hutton (R. 754). As with witness Bass, Rouson failed to impeach Hutton with the glaring inconsistencies between her initial description and her "remembrance" of her initial description at trial (R. 765-769). Hutton added numerous features to her initial description and Rouson failed to educate the jury to this fact.

Later in its case-in-chief, the State called Detective Luchen, who prepared the photo-pack (R. 782). Rouson moved to voir dire Luchen, in the presence of the jury, regarding his preparation of the photo-pack (R. 784). At the conclusion of the voir dire, Rouson, in open court in front of the jury, moved again to suppress the photo-pack (R. 787). The lower court immediately called Rouson to the bench, where the following exchange occurred:

> THE COURT: As you well know, when a Judge makes a ruling as a matter of law, it would be **foolish** for you to speak out and say something like that in front of a jury. But I have obviously ruled, and you know I have already ruled, and now I don't know what else

> to do but tell them I have already ruled on that point. Don't do that, just get yourself in a box, when the Court already made a ruling as a matter of law, then what you do is preserve your objection at the bench. You don't say something like that **in front of the jury**. **It isn't fair**. Did you think I was going to change my ruling? Did you really think I was going to change my ruling?
>
> * * *
>
> THE COURT: **You better do your preserving at the bench, and not in front of the jury. That is just as improper as it can be.**

(R. 788)(emphasis added). After this brief lecture on elementary trial procedures, the State immediately moved for the introduction of the photo-pack, capitalizing on the fact that Judge Schaeffer was forced by Rouson into validating the preparation and subsequent identifications of Mr. Rose from the photo-pack (R. 789).

During the State's examination of the Medical Examiner, Dr. Donna Brown, Rouson failed to object when the State misstated the substance of the prior testimony of the eyewitnesses as to the number of times the concrete block was thrown at the victim (R. 844). All of the eyewitnesses testified that the block was thrown no more than three times; however, the State asked whether the injuries were consistent with the block striking the victim five to six times (R. 844).[6]

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[6] Due to Rouson's failure to object to this blatant misstatement of prior testimony, the history of Mr. Rose's case is inaccurate. Judge Schaeffer not only relied on this misstatement, but took the liberty of increasing the number of throws to six to eight times to support her finding of the cold, calculated, and premeditated aggravating factor (R. 335).

The jury also heard testimony from Borton and Poole. These witnesses testified that Mr. Rose confessed to them (R. 865-866, 890).

Borton testified that on the night of the murder, after leaving Suzanne Duke's apartment, she and Poole saw Mr. Rose hitchhiking (R. 887-888). They stopped and picked him up (R. 888).[7] Borton told the jury: "when he first got in the truck, he told us that he just killed Butch" (R. 888). Borton also testified that Mr. Rose then asked them if he could use them as an alibi (R. 890). Finally, Borton testified that Mr. Rose did not appear to be drunk (R. 894).

During Borton's pre-trial deposition the following exchange occurred:

> Q: (By Mr. Rouson) Have you ever been convicted of a crime?
>
> A: (By Ms. Borton) Yes.
>
> Q: What kind or what kinds of crimes?
>
> A: Possession of marijuana and a DWI.
>
> Q: Okay.
>
> A: And I have another one, but it was withheld adjudification (sic).
>
> Q: Are you on probation?
>
> A: Yes.

Unfortunately, because Judge Schaeffer denied an evidentiary hearing on guilt phase ineffectiveness, this point has never been challenged.

[7] Inexplicably, the police did not examine the truck for traces of the victim's blood.

Q: How long?

A: Until March of '84.

Q: Is that for marijuana?

A: That was for my other one that they withheld adjudification (sic).

Q: What kind of case was that?

A: It was an aggravated assault.

Q: Did that occur here in Pinellas County?

A: Yes. It was Mark and I, we got in a fight and it was against Mark.

MR. YOUNG: **To prevent any problem later on, why don't you ask if the marijuana charge was a felony or a misdemeanor?**

Q: (By Mr. Rouson) **Was the possession of marijuana a felony or misdemeanor?**

A: **A misdemeanor.**

(R. 208-209)(emphasis added).

At Mr. Rose's trial, during cross examination of Borton, Mr. Rose's counsel did not ask a single question about Borton's prior record or any deals she made with the State (R. 896-900).

Poole testified that he and Borton left Ms. Duke's apartment at around 10:00 p.m. (R. 863-864). After driving for a few blocks he observed Mr. Rose hitchhiking (R. 864). Poole told the jury:

> Upon seeing Milo Rose, we stopped and he got into the truck. We picked him up because he lives below us. And as soon as he got into the truck and I made my righthand turn to go across the causeway, just as we started out, Milo spoke up and told Rebecca and I that he had just killed Butch, Butch Richardson.

(R. 865).

At trial Poole indicated that Mr. Rose told him that he was going to use Poole as an alibi (R. 867). However, Poole was never impeached with the inconsistent statement he gave during his deposition that Mr. Rose did not ask him to be an alibi witness (R. 228).

Poole also testified at trial that Mr. Rose was sober, (R. 872); however, during his deposition, when he asked if Mr. Rose had been drinking, he told counsel that he could "smell booze" (R. 222).

Again, the witness was not asked about any previous relationship he had with the State or any specific deals as to Mr. Rose's case (R. 874-882).

At the conclusion of Borton's testimony, Mr. Rose expressed his dissatisfaction with Rouson's lack of preparation and resultant poor performance (R. 901-903). Specifically, Mr. Rose was understandably upset that Rouson told Mr. Rose he had taken all necessary depositions when in fact Rouson had failed to take the deposition of one of the State's eyewitnesses (R. 903). Rouson responded to these complaints: "I cannot stand, in good faith, before this Court at this time and state that I can continue in the purest form of representation that he deserves and he is entitled to under the current law and under the Constitution" (R. 914). Thereupon, Judge Schaeffer and Rouson retired to chambers for an "in camera" discussion. Mr. Rose was excluded from these proceedings. During the in camera

discussion, Rouson told the judge he was not convinced Mr. Rose was innocent. ("He told me [Judge Schaeffer] that he was having a problem with whether or not he felt his client was still -- was innocent")(PC-R1. 812). Rouson was not sure whether this would inhibit his performance. After what "[s]ome people might think that was just subtle arm-twisting" by the judge, Rouson told the judge he could set aside his feelings and continue to represent Mr. Rose (PC-R1. 861). Judge Schaeffer recalled reminding Rouson of his "ethical oath" which would require "vigorous representation as you would if you thought he was innocent" (PC-R1. 813). After Judge Schaeffer's references to the "ethical oath," Rouson announced he would remain on the case.

Mr. Rose continued to express his concern that he was not being effectively represented by Rouson (R. 924). Judge Schaeffer, in an attempt to assuage Mr. Rose's fears, convinced Mr. Rose that all matters concerning Rouson's possible ineffectiveness would be addressed in later proceedings and she would ensure Mr. Rose had counsel to present these matters (R. 924).[8]

The final piece of evidence the State presented that implicated Mr. Rose in the crime was the presence of blood on him when he was arrested (R. 954). Detective Fire testified:

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[8] The fact that Judge Schaeffer summarily denied all guilt phase ineffective assistance of counsel claims undermines her trial statements to Mr. Rose that these issues would be examined at a later time.

> I asked him how many times he was punched.[9] He said once in the nose. I told him that there was blood all over his shirt, arms and legs, how could that be from a bloody nose? And he stated that he didn't know, he couldn't answer that.

(R. 959).

The State never introduced any scientific evidence which proved that the blood on Mr. Rose was that of the victim. However, the jury was carefully and improperly led to this conclusion. The State showed that there were extensive blood splatters caused by the manner of killing the victim (R. 1055). The State also claimed that the blood swabs taken from the person of Mr. Rose were "messed up" because they were "mixed":

> Q: Okay, do you also know, from your investigation, sir, whether any blood samples of the victim were taken along with the victim's hair samples?
>
> A: Yes, it was.
>
> Q: Okay, and can I -- what was the purpose of that?
>
> A: To compare, to see if any of the blood on the defendant's clothing could have been from the victim.
>
> * * *
>
> Q: Did Technician Bowers take blood samples from the defendant?
>
> A: He took blood samples, splatterings on his arms.
>
> Q: Yes.

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[9] Mr. Rose was in an altercation earlier in the evening, wherein Mr. Rose was punched in the nose while he was attempting to **assist** Mr. Richardson, the victim.

A: He used the same swab to take several blood samples from several parts of the body, and --

Q: Okay, just for what you're saying, is there a splot here, a splot here, a splot here, and he took the swab and went here, here and here?

A: Correct.

Q: Okay.

A: Each swab -- each -- there should have been a swab used for each time he took a sample.

Q: Okay, my next question would have been is that correct procedure?

A: His procedure was not correct, no.

Q: **So we have an effect of mixing the blood, is that correct?**[10]

A: **Correct.**

(R. 985-987)(emphasis added). The State improperly, and without proper objection, elicited this testimony from Detective Fire. Rouson objected to this line of questioning based on hearsay, which the lower court overruled. However, it is clear that Detective Fire did not have any expert qualifications which allowed him to testify to the procedures for collecting and testing blood samples. Rouson failed to object on these grounds.

Further exacerbating matters, Rouson failed to call the FDLE serologist who tested the blood evidence and whose own report concluded that the only blood found on Mr. Rose was his own. (See Attach. A, FDLE report, and see Attach. B, Affidavit of Dale Nute).

[10] Rouson failed to object to this clearly leading question.

Again, these matters were never explored due to Judge Schaeffer's summary denial of **all** guilt phase ineffective assistance of counsel claims.

Following Detective Fire's misleading and deceptive testimony, the State rested (R. 990).

Without challenging any of the State's evidence, the defense rested (R. 999).[11]

During the State's closing argument, the Assistant State Attorney vouched for his witnesses when he told the jury: "**I submit to you there would be no evidence that anybody has any interest other than that of the normal citizen**" (R. 1047)(emphasis added).

The jury returned a verdict of guilty (R. 293).

Following the guilty verdict, Rouson sought time to prepare for the penalty phase (R. 1102-1105). Rouson had never been involved in a capital case before (PC-R1. 831). The court delayed the proceedings from July 1, 1983, until July 5, 1983 so that counsel could prepare (R. 1102-1107). Rouson called an experienced criminal trial lawyer, Pat Doherty, and explained that he had no mitigation to present and had up to that point made no efforts to locate any (PC-R1. 928). Mr. Doherty indicated his willingness to assist and even be co-counsel (PC-R1. 930). Mr. Doherty did not again hear from Rouson until after the penalty phase concluded.

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[11] The "adversarial testing" to which Mr. Rose is constitutionally entitled occurred in less than 200 transcript pages. This brings new meaning to the adage: "Death is different."

During the penalty phase Mr. Rose's trial attorney presented the testimony of Dr. Vincent Slomin. Dr. Slomin testified regarding his diagnosis of Mr. Rose's personality disorder and possible treatment (R. 1275-1293). During his redirect, trial counsel inquired about the timeframes in which an alcohol induced blackout could occur (R. 1293). Dr. Slomin told the jury that blackouts could last from a moment to several hours or even weeks (R. 1293).

After hearing only scant testimony about Mr. Rose's characteristics, childhood and battle with alcoholism, the jury, by a vote of nine to three recommended that Mr. Rose be sentenced to death (R. 310-311).

At Mr. Rose's sentencing hearing, Judge Schaeffer found that the cold, calculated and premeditated aggravating factor was present (R. 335). She relied on the fact that:

> When you met your friends some few minutes later, you told them you had either killed or rendered your friend a vegetable.
> Thus, it would appear, Mr. Rose that even you knew what your actions were calculated to produce.

(R. 336). The Poole/Borton evidence provided strong evidence to support the CCP aggravating factor used to sentence Mr. Rose to death.

Furthermore, as to the mitigating circumstances the lower court made the following findings:

> Second, although the doctor and you testified you had a history of alcohol abuse, and **he suggested you might have had an alcoholic black-out, he stated this was not possible when a hypothetical was put to him regarding your telling your friends what you**

> **had done and trying to set up an alibi just minutes after the homicide.**
>
> **Third, your friends, Mark and Becky, said they saw you just after this happened and you were not intoxicated.**
>
> * * *
>
> This concludes the statutory mitigating circumstances and there are none.

(R. 337-339)(emphasis added). Again, the Poole/Borton testimony was relied upon to discount all of the mitigating circumstances. Judge Schaeffer sentenced Mr. Rose to death (R. 340).

C. THE 1987 3.850 PROCEEDINGS[12]

On September 15, 1987, Governor Martinez signed Mr. Rose's death warrant and Mr. Rose's execution was scheduled for November 16, 1987 (PC-R1. 2). At this time, Mr. Rose's counsel, the Office of the Capital Collateral Representative (CCR) was operating under the burden of litigating eight active death warrants (PC-R1. 654).

On October 2, 1987, Mr. Rose filed an Emergency Motion to Vacate Judgement and Sentence with Special Request for Leave to Amend and a Motion for Stay of Execution (PC-R1. 5).

On October 22, 1987, after granting Mr. Rose a limited evidentiary hearing, Judge Schaeffer stayed Mr. Rose's execution (PC-R1. 449). On August 2, 1988, Mr. Rose filed a Supplement to his Rule 3.850 motion (PC-R1. 466-508).

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[12] **These proceedings are discussed in some detail because the lower court relied on the Poole/Borton trial testimony in summarily denying Mr. Rose's guilt phase claims and in denying penalty phase relief. In light of the current 3.850 allegations, those ruling must be reconsidered.**

In Mr. Rose's original 3.850 motion and the supplement thereto, he alleged that his trial counsel was ineffective for failing to challenge the State's case.

The lower court granted Mr. Rose a hearing regarding the ineffective assistance his counsel provided during the penalty phase. In order to support his claim, Mr. Rose presented the testimony of Terry West Cobb, an attorney who shared office space with Rouson and who had agreed to "help out" (PC-R1. 935).[13] As the trial date neared, Ms. Cobb found that Rouson was "unavailable" and placing "responsibility" for Mr. Rose's case on her shoulders (PC-R1. 936). The weekend before the trial began, Ms. Cobb ceased her involvement in the case:

> I just was not at all prepared or competent or experienced enough to be representing anybody in a criminal case, much less a capital case, and I felt like I was being pushed into that direction more and more, and I was not interested in having that happen.

(PC-R1. 935-36).

At the evidentiary hearing, Mr. Rose also presented the testimony of mental health experts in order to illustrate trial counsel's failure to establish mitigation. One of those experts, Dr. Krop testified:

> Q. In evaluating Mr. Rose, what did you find?

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[13] Rouson was well aware that Ms. Cobb "had never tried a criminal case or had a jury trial" (PC-R1. 849). Despite this knowledge, Mr. Rouson relied on Ms. Cobb to act as co-counsel in his first and only capital case.

A. Well, in terms of just some descriptive data to summarize Mr. Rose's background, I would say that he derives from an extremely unstable background. He was not raised by his biological father, although in my discussion with Mr. Rose, it appears he didn't know that this person was not his biological father for quite a while.

It is clear from discussions with a number of family members and affidavits, that Mr. Rose's parents were alcoholics. There was considerable emotional abuse, some physical abuse, but I would say the abuse was more or less more of the emotional and verbal nature than physical, although I would expect that Mrs. Rose, the mother, would be viewed as a child abuser, at least by the current standards, in terms of the physical beatings she gave Mr. Rose.

He was viewed as different by his parents. Some of the comments they made -- they made some very derogatory comments. They talked about the color of his skin. They talked about him being their nigger. They talked about him being the black sheep of the family, and there was a tremendous amount of derogatory and critical statements about Mr. Rose when he was growing up.

That type of discrimination was also compounded by some peer and some self discrimination in that Mr. Rose, himself, viewed himself as different, and this would be expected based on the parents' perception of him and some of the verbal abuse he received.

He was a very sickly child. He was a produce [sic] of forceps delivery. The records, I understand, the various information I reviewed, suggests that it was a very difficult delivery. Mrs. Rose, apparently, was unconscious at the time of the birth, and it was a very difficult delivery to have, and, thus, forceps delivery was required.

He was sickly in terms of he had rheumatic fever. There was suspected polio when he was younger. He had a number of high

fevers. He had mumps when he was, I believe, seven or eight years old. He was in the hospital, I think, about nine or ten -- I'm sorry. He was in the hospital for a significant period of time. I believe the record suggests six months or longer in which he was running a high fever and had convulsions. The record shows that he had a 105 or 105 [sic] fever.

It is not clear how long he ran this fever, but he did have convulsions when he had fever.

When he was seven or eight years old, he had an incident in which a nail was driven into his skull.

* * *

It is not totally clear when he started drinking and using drugs, but it looks like from the records and his recall and talking to family members, that he began using drugs and sniffing glue around the age of 12, and drinking around that same age, and at that juncture he developed into a chronic pattern of drug abuse and alcohol abuse resulting in heroin addiction, shooting up.

He finally received some type of treatment in a drug abuse program in which, I believe, he was involved in a residential program for several months; I believe three months. At that time, they were treating heroin addiction by substituting it with methadone maintenance, and he became addicted to methadone and required in-patient or residential treatment, but from the record, I can't see any other drug treatment or alcohol treatment other than his participating on an intermittent basis in AA.

* * *

In conclusion, based on the findings of the neuro-psych testing I did, because he does well on motor perception ability, there is some evidence, in my opinion, of some degree of organic brain damage. It is difficult to determine exactly the nature of the brain damage. It is difficult to

determine the ideology of the brain damage, but certainly the evidence suggests there is minimal brain damage existing, most likely in the right temporal lobe area, but that would need to be documented further in neurological and objective types of testing.

In terms of ideology and terms of explanation as to why he is brain damaged, there are several possibilities. He was born with a forceps delivery, and there is always a high probability of brain damage with forceps delivery. This is a procedure which is rarely used any more.

There was a nail driven into his head. There was the time when he ran 104 or 105 degree fever with convulsions, which is also associated with temporary or permanent brain damage. Chronic alcohol or drug abuse, which can lead to brain damage, and he had an automobile accident about a year prior to the incident, itself, but I would say that that probably did not either result in brain damage. It is possible that it exacerbated the problem, but since these deficits were seen earlier than that, most likely the cause of the organic problem would have been one of the other things I mentioned.

In terms of final diagnosis, I would diagnose Mr. Rose, from the DSM-III or DSM-III-R, as chronic alcohol abuser, possibly a dependent personality disorder, but essentially the most primary diagnosis would be organic brain syndrome and, also, the chronic alcohol and drug abuse.

(PC-R1. 79-91).

In addition, Dr. Krop stated:

Q. I believe that you discussed, also, the relationship between the brain damage and the alcohol. Do they have an additive effect on each other?

A. I think the research shows that persons with brain damage are more susceptible to the effects of alcohol or drug abuse, just like a person who is, for example, taking psychotropic medication or

any other prescription medication, they are warned not to drink because of the unpredictable behaviors that might result.

* * *

Because of the nature of his particular brain damage, it is really difficult for me to say what the exact effect would be. I can only indicate again, generally, that persons with organic brain damage are more susceptible to an intoxicated state or, perhaps, the unpredictable effect of alcohol on that given individual. In this given case, I can't be any more specific than that.

Q. In terms of intoxication in this case, what did you find that indicated that Mr. Rose was intoxicated on the night of the offense?

A. Well, there were several indications that he was intoxicated. First of all, he reported from his ability to remember and going through the chronology of his behavior that -- I tried to add up as best I could in terms of the amount of alcohol he had, and it appears that from five o'clock on, which was the time, I believe, that he left the plasma center, he probably had about 20 beers. He can remember certain specific numbers and also sharing pitchers with other people at various bars, but from the time he first went to a bar, which was about after five, until the time he indicated he went home, he probably had about twenty beers. That is the best estimate I could come up with for the information I had.

I understand from reading the testimony from two of the witnesses, one of the individuals who claim that Mr. Rose wanted them to alibi for him, he indicated he was not intoxicated. However, the police reports indicated -- and that was several hours later when he was waked up and arrested for the first time -- the police indicated he had a strong smell of alcohol on his breath, and they had other indications in terms of that he was drinking. I don't think they concluded he was intoxicated, but I think they concluded he had been drinking heavily.

There were some other individuals who had watched him drinking and observed him drinking, from the testimony, and from the other information that I reviewed, apparently he was observed to be drinking throughout the night.

* * *

Q. In any case, besides mitigating factors there are aggravating circumstances. Were you able to review and reach any conclusions with reference to the cold, calculated premeditation?

A. I would say that I could not reach a conclusion. However, I can speak in terms of a person who is intoxicated, a person who suffers from brain damage in which poor judgment, irrational thinking and so forth exists, there is a less likelihood of an individual being able to form that particular intent and developing a behavior pattern which is cold and calculated.

I guess from the information I reviewed, it was very difficult for me to determine what the individual -- whether it was Milo or someone else. Of course, Milo is still denying his involvement in the offense. It is very difficult to determine the rationality of the actual behavior.

From what I can tell from the testimony of the three or four witnesses who observed the behavior, they indicated that the perpetrator said something like, "Get up, Pig. Get up." He got up and went out and found a brick and came back and hit the victim with the brick three, four, six times, depending on who was testifying.

There seems to be some inconsistency in terms of why an individual would be trying to get a person to get up and go and kill him. There seems to be an irrationality in terms of that conclusion, although there may be information I don't have in terms of that connection.

Also, in talking to Milo, from his camaraderie with the victim during the day,

> **helping him out during the day -- helping in terms of a fight and so forth -- I did not see the rationality of Milo at that point in time killing him.**
>
> So if, in fact, Milo is guilty of this crime, irrationality may be a subject of a function of his drinking, of the brain damage, and some of the other factors that I have referred to.

(PC-R1. 1103-08)(emphasis added).

Initially, Dr. Krop believed that Mr. Rose may have experienced a blackout during the commission of the crime (PC-R1. 1164-1165). However, he rescinded this conclusion when he was confronted by the alleged statement Mr. Rose made to Poole and Borton shortly after the crime (PC-R1. 1183). Dr. Krop determined that because "he spoke to these two people [Poole and Borton] in the truck, in my opinion, the black-out would not be substantiated" (PC-R1. 1183).

In addition to Dr. Krop, postconviction counsel also presented the testimony of a psychiatrist, Dr. Robert Fox, to discuss mental health mitigation (PC-R1. 1272-1401). Dr. Fox testified that Mr. Rose may have suffered an alcohol blackout (PC-R1. 1349-1350).

In addition to the testimony of the mental health experts, several family members also testified regarding the circumstances of Mr. Rose's childhood and alcohol problems (PC-R1. 998-1010, 1011-1041, 1041-1047).

Rouson testified at the evidentiary hearing (PC-R1. 828-904). In discussing Mr. Rose's allegations, Rouson told the lower court:

> You know there was an interesting theory that the -- Mr. McClain, in his motion, they accused me of learning the case as I tried the case. In one sense that is true. **Because in the middle of the trial I**

> **discovered that this crime very well could have been committed by Mark [Poole] and Becky [Borton].**[14] And that became part of my defense. After reviewing the depositions -- but the way they testified on the stand, which was different from their depositions, made this come to light.
>
> And Mark had dark hair, shaggy hair, beard, mustache, all these features that these eye witnesses had described, and they were in close proximity to the crime. They picked him up a couple of blocks away, alleged that he was hitchhiking and claimed that he made this statement.

(PC-R1. 891)(emphasis added).

Despite all of the evidence Mr. Rose produced at the evidentiary hearing, the lower denied relief (PC-R1. 560-565).

Prior to the hearing the lower court had **summarily** denied Mr. Rose's guilt phase claims of ineffective assistance of counsel.

Postconviction counsel was prepared to prove that one of the areas where trial counsel's performance was deficient was in failing to challenge the inference regarding the blood evidence at trial (PC-R1. 726-734). The fact that Mr. Rose had blood on his clothes and on his person became a prominent feature of the trial (R. 959). It was the only physical evidence used by the State to link Mr. Rose to the crime.

The repeated references to the blood on Mr. Rose combined with Detective Fire's unsubstantiated assertion that there was

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[14] **Despite Rouson's acknowledgment that he had an "epiphany" during the middle of the State's case-in-chief that Poole and Borton very well could have committed this crime, Rouson did absolutely nothing to develop or present this theory for the jury's consideration. (See Attach. C).**

too much blood present for the source to be a bloody nose, provided very strong inculpatory evidence. It appeared that the blood had to be from the victim, Mr. Richardson. No plausible explanation was offered by the defense.

In his initial postconviction proceedings, Mr. Rose explained the importance of the Tampa Regional Crime Laboratory report prepared by Crime Lab Analyst Kathy M. Guenther (PC-R1. 360-369). Mr. Rose asserted that the report contains incredible **exculpatory** evidence. The lab report prepared by Ms. Guenther indicated that all blood typed from Mr. Rose's person and items allegedly carried by him had one blood type, "O". The blood from Mr. Richardson, and from all exhibits from the scene which contained blood which was analyzed for type, were one blood type, "A".

When ABO type "O" blood is mixed with any other type, **the other type is detected**. Mr. Rose included an affidavit from a forensic scientist and former FDLE agent, Dale Nute, that included the following conclusions regarding the blood evidence:

> 6. While using one swab to take several samples from different parts of a suspect's body is not the best procedure, it **did not** result in any "mixing" of Mr. Rose's and Mr. Richardson's blood according to the analysis conducted by the Tampa Regional Crime Lab.
>
> 7. Assuming that the blood typing done at the Tampa Regional Crime Laboratory is correct, the results indicate that Mr. Robert Richardson had ABO blood type "A" (exhibit 1, liquid blood sample).
>
> 8. **All blood samples taken from Mr. Rose (cotton swab) and items he had on him (paper tissues and receipt from blood plasma bank) typed ABO type "O" when analyzed. No ABO**

> **type "A" blood was found anywhere on Mr. Rose or objects in his possession.**
>
> 9. When AB0 type O blood is mixed with any other type, the other type is detected, The absorption-elution, antigen-antibody testing system used in this case detects the blood group antigen factors of A, B and H. Detecting only the blood group factor H results in the conclusion that blood group O is present. If either the factor A or B were present, then the resulting conclusions would be that blood group A or B respectively was present. If both of the factors A and B were present, then the resulting conclusion would be that blood group AB was present.
>
> 10. From the evidence available to the State, there is no reasonable basis to believe that the blood swabbed from Mr. Rose's person was anything other than his own blood. "Mixing of blood" is apparently **disproven** by the physical evidence.

(PC-R1. 370-373)(emphasis added).

Postconviction counsel pled that trial counsel failed to challenge Detective Fire's blatantly incorrect statement of the value of the blood taken from Mr. Rose's arm. Because of trial counsel's lack of knowledge and preparation, the jury and the court never knew that the evidence was not "messed up"; that a crime lab serologist had examined the evidence; and that the lab results provided, in Rouson's reinforced words, "pretty strong evidence" (R. 1065). It is "pretty strong evidence", but of innocence, not guilt.

Postconviction counsel also alleged that Mr. Rose's trial counsel was ineffective for not properly presenting the evidence of Mr. Rose's intoxication on the night of the crime (PC-R1. 693-698). Alcoholism and alcohol intoxication is traditionally

relevant in first-degree murder cases. First-degree premeditated murder is a specific intent crime: the State must prove beyond a reasonable doubt that the accused premeditatedly intended to kill. Voluntary intoxication is a "defense" to any specific intent crime, including premeditated murder, because intoxication may prevent the formation of specific intent.

When intoxication is raised by the evidence during the trial of a specific intent crime, the jury must be instructed that intoxication can be considered a bar to conviction. At the time of Mr. Rose's trial in 1982, the law of Florida was clear that premeditated murder was a specific intent crime, and that an appropriate jury instruction was required when intoxication was raised.

An intoxication "defense" requires investigation efforts and preparation, with the assistance of a competent, independent defense mental health expert.

Witnesses as to intoxication the night of the murder could have been found with very little effort:

> 1. I, Paul Harvill, am an investigator employed by the State of Florida at the Office of the Capital Collateral Representative (CCR), 225 West Jefferson Street, Tallahassee, Florida 32301.
>
> 2. Calvin Plyler, according to Clearwater Police Department reports, saw Robert "Butch" Richardson and Milo Rose in Mano's Pub the evening of October 18, 1987. Mr. Plyler also identified the body of Mr. Richardson. I located Mr. Plyler by phone in the Kannapolis, North Carolina area.
>
> 3. Mr. Plyler stated to me that he used to work at Mano's Pub, although on the

> evening of October 18, 1982 he was not working and was at Mano's Pub and Angel's Place during the evening. He said that when he saw Robert (Butch) Richardson and Milo Rose at Mano's Pub, "they were really smashed and still drinking" when he left the bar about 9:00 to 9:30 pm. They had been "drinking all day". Butch and Milo were run out of Mano's Pub because they became too drunk.
>
> 4. Mr. Plyler did not talk with any attorneys concerning the case; he spoke only with a detective.

(PC-R1. 317-319).

Also, Barbara Richardson stated:

> 4. We just didn't have a lot of money. Maybe because of this, or for whatever reason, Milo was drinking a lot then. He had stopped going to AA about three weeks before.
>
> 5. October 18, 1982 seemed like any other day, until late that night, when I was told that Butch had been killed. I stayed home that day. Butch, Milo, Mark Poole and Becky Borton left the house that morning. That was the last time I saw Butch alive. I didn't see Milo again until later that evening. Mark and Becky came back about an hour after they left. They had been drinking. Mark and Becky left again a short time later. **They** came back with Milo later that night. Butch was not with them.
>
> 6. When **they** came back, I wondered where Butch was. **No one** seemed to know. I could tell that Milo had been drinking again. **He was very drunk**. Soon after coming home, Milo passed out on our bed with his clothes on. The only time that Milo went to bed with his clothes on is when he would pass out.

(PC-R1. 320-322)(emphasis added).

Mr. Rose's prior counsel was also provided with an affidavit detailing the abundance of voluntary intoxication evidence developed which Rouson did not pursue:

1. My name is Wayne Shipp. I am a member, in good standing, of the Florida Bar . . . .

* * *

3. Shortly after Mr. Rose was arrested for the October 18, 1982 homicide of Robert (A.K.A. Butch) Richardson, Jr., I became involved in his case. The Office of the Public Defender was appointed to represent Mr. Rose and Ron Eide and I were assigned the case. Ron and I were members of the six to eight person capital team organized by the Chief Assistant Public Defender, Tony Rondolino. While we did other types of cases, we specialized in capital cases. This group was organized to cope with the special knowledge and skills required to litigate capital cases.

4. I deposed several witnesses in Mr. Rose's case and was kept informed of the progress of the investigation conducted by the public defender investigators.

5. In January, 1983 the Office of the Public Defender withdrew because of a conflict of interest and private counsel was appointed to represent Mr. Rose. Mr. Rose was represented by two private attorneys who subsequently withdrew. Darryl Rouson was then appointed in the spring of 1983 and did represent Mr. Rose at trial.

6. Although I was lead counsel and had done or supervised the initial investigation of this case and Mr. Rouson wasn't appointed until about six months after the crime occurred, Mr. Rouson did not contact me to discuss the case in any detail. I did talk to Mr. Rouson as I used to see him fairly often, and we may have exchanged a passing word or two, but we never had any substantial discussion concerning this case. Our office had offered to assist Mr. Rouson as we knew he had never tried a capital case before. Mr. Rouson never availed himself of our offer.

7. I was able to watch part of the trial and remember wishing that Mr. Rouson

> had talked to me. In particular, two things stood out. **I know that we had documented from the witnesses we talked to that Mr. Rose had had at least twenty (20) beers the day of the crime. Intoxication could have been proven, not just allowed.**
>
> 8. I also was surprised and disappointed that Mr. Rouson put on a psychologist who was poorly prepared and made very damaging statements about Mr. Rose.

(PC-R1. 313-316)(emphasis added).

While trial counsel did belatedly seek a psychological evaluation of Mr. Rose, he testified that his primary interest was "Just knowing if he could stand trial and whether or not he could effectively or meaningfully assist me" (PC-R1. 844). This was the first time trial counsel had ever used a court-appointed mental health expert (PC-R1. 846). He did not give the psychologist any background material (PC-R1. 847). He failed to develop the evidence necessary for the expert to testify as to voluntary intoxication and its impact on Mr. Rose's ability to form specific intent.

Had counsel adequately represented Mr. Rose, he could have presented a mental health expert's opinion:

> Based on Mr. Rose's behavior and alcohol/drug consumption the day of the incident, it is this examiner's opinion that Mr. Rose was unable to control his conduct and most likely experienced a black-out at the time of the offense. He was likely extremely confused and in a severely intoxicated state, thus indicating that his judgment would have been significantly impaired. He was under considerable emotional strain and this most likely affected his judgment and actions at that time. In view of my testing and evaluation, it is certainly likely that if Mr. Rose committed this offense, he did so in a highly intoxicated condition, and he was not able to

> form the specific intent to kill. This is especially probable if Mr. Rose's history indicative of brain damage is accurate.

(PC-R1. 357-358).

At the Motion to Stay hearing, Mr. Rose's postconviction counsel argued why Mr. Rose was entitled to a hearing on his ineffective assistance of counsel claim regarding failure to properly present an intoxication defense. After the argument, Judge Schaeffer suggested that the defense would not have helped because:

> It is the fact that very soon thereafter he was picked up by a couple of his buddies and he said, "How about giving me an alibi for the night. I wasn't there. I just killed whatever the guy's name was. I either killed him or left him a vegetable."

(PC-R1. 696).

The State also argued against an evidentiary hearing and relied on the fact that Poole and Borton testified that Mr. Rose was not intoxicated (PC-R1. 699). The State also argued that Mr. Rose's attempt to establish an alibi negated trial counsel from being ineffective because that was inconsistent with an innocence defense (PC-R1. 702). However, this argument again relies on the statements made by Poole and Borton that Mr. Rose requested that they provide an alibi for him.

In summarily denying Mr. Rose's guilt phase ineffective assistance of counsel claim, Judge Schaeffer opined:

> I believe that, my recollection of the eyewitness testimony is Mr. Rouson made a lot of hay with it.[15] He made a lot of hay as to

[15] Judge Schaeffer relied on her recollection to conclude Rouson "made a lot of hay with it." The record speaks for itself

> discrepancies in their testimony of the various and sundry things. And you can make an awful lot of hay when you have three eye witnesses and they all say that may be, it may have been fifty feet, one hundred fifty feet or twenty feet. But all three say that is the guy. And you have two people who say he he (sic) jumped in the car and said he just killed Butch and left him a vegetable, and would they provide an alibi.
>
> I don't know whose blood it was is going to make too much different (sic). I don't think it is going to make any difference. And I don't think if we knew it was one hundred forty-two feet exactly, that would make any difference.

(PC-R1. 756-757).

In 1993, this Court affirmed the lower court's order denying postconviction relief. Rose v. State, 617 So. 2d 291 (1993), cert denied 510 U.S. 903 (1993).

D. THE 1996 3.850 PROCEEDINGS

After instituting federal habeas corpus proceedings, Mr. Rose learned that Borton and Poole had made a deal with the State to receive lenient treatment in exchange for their testimony against Mr. Rose. Mr. Rose informed his counsel that he had learned this through talking with Mr. Richard W. Rhodes, another death sentenced inmate, who told him that Borton had conceded the existence of a deal when she was deposed in the Rhodes case. Counsel investigated and discovered that Borton and Poole had an extensive relationship with the State. (PC-R2. 1-25, 187-234).

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that this recollection was inaccurate. Furthermore, had Judge Schaeffer granted an evidentiary hearing on guilt phase ineffectiveness, postconviction counsel could have brought to the court's attention trial counsel's severe deficient performance in his cross examination of the eyewitnesses.

On December 20, 1996, Mr. Rose filed a Rule 3.850 motion that included the newly discovered information regarding Becky Borton (PC-R2. 1-25).

Mr. Rose's Rule 3.850 motion included the relevant portion of Borton's deposition given in the Richard Rhodes capital murder prosecution:

> Q. Have you ever been arrested?
>
> A. Yes.
>
> Q. What for?
>
> A. DWI, two possessions and, well, I got a withheld adjudication on an aggravated assault that was against Mark. It was really just a quarrel, and I kind of got the bad end of it.
>
> Q. **The two possession charges were misdemeanors**?
>
> A. **Yeah, but -- well, one of them was fifty-two grams. And it was cut to a misdemeanor for my testimony in the Rhodes**[16] **[sic] trial.**
>
> Q. **Who'd you talk to**?
>
> A. **About what**?
>
> Q. **About getting your charges reduced.**
>
> A. **I guess Bruce Young did it.**
>
> Q. **You possessed fifty-two grams but reduced to a misdemeanor**?
>
> A. **Yeah**, it wasn't mine. It was Mark's. He asked me to put it in my purse.

---

[16] **A careful reading of the deposition reveals that here Borton was referring to the** Rose case. Furthermore, the State has conceded that Borton was referring to the Milo Rose case and the "court reporter mistook "Rose" for "Rhodes"" (PC-R2. 328).

Q. What happened to you as a result of that misdemeanor?

A. Well, I pleaded guilty to the aggravated assault, because I was living in Indiana, and having to drive back down here about three times. So I pled guilty, and I had eighteen months probation with that. So I got a year consecutive.

Q. A year consecutive probation?

A. Yeah, was altogether.

Q. **And you dealt with Mr. Young on that**?

A. **Uh-huh**.

Q. Are you still on probation now then?

A. Yeah. I have till August, and I have a hundred hours of community service left to do. And that's it.

Q. Did you have any of those other charges pending at that time? Was the DWI pending during that time?

A. I got a DWI in May of '83.

Q. So that was all over with?

A. I got it right before the trial started in June.

Q. On Rhodes [sic]?

A. Uh-huh, yeah, on Rhodes [sic].

Q. What happened on that DWI charge?

A. I got the minimum.

Q. $250 fine, six months revocation of license?

A. Yeah, but then I have three alcohol counts. I had to for extra counseling with -- I didn't need it, because I don't even drink.

Q. What happened to the other possession of marijuana charge?

A. That's my hundred hours community service, and I had five days in jail.

Q. When did that come up?

A. That was in August, I think it was -- I went to court for that.

Q. August of last year?

A. Uh-huh.

Q. Did Mr. Young help you out on that?

A. No. I still got a hundred hours community service.

Q. Did you ever tell him about that one?

A. No, I didn't tell him about that.

Q. They didn't violate your probation?

A. Yeah, but I didn't get violated really until like the day I was in court. They violated me for not having stuff done on my DWI. So within the time they violated me, I went to court and I went and got everything done. So they terminated my probation on the DWI right then. And the probation lady stood up and said I had been violated for a possession charge. So he extended my DWI probation for another year.

Q. You say he did. Who did?

A. The judge extended my DWI probation to run concurrent with my possession probation.

Q. Did you have an attorney representing you?

A. No.

Q. Did Mr. Young come to court or speak in your behalf?

A. (Shakes head.)

Q. You didn't let him know about that one?

A. **Well, yeah. I didn't really say -- I didn't threaten him, but I asked him if he would do something about it. He said he wouldn't do anything about it for me.**

Q. **You said you didn't really threaten him, but what were you going to do if he didn't help out?**

A. **I don't know. That's been awhile too. I didn't really say I wouldn't testify or anything, because he got mad at me and told me he would have a cop out where I work with a warrant for my arrest.**

Q. **If you didn't testify?**

A. **Uh-huh.**

Q. **Did you tell him your memory might get bad?**

A. **I think so. That's what I said.**

Q. **And he said he would send a policeman out to get you in an hour?**

A. **Yeah. He said he would have a cop out there with a warrant for my arrest in an hour.**

Q. **How many times did you ever talk to Young about the case or about your cases?**

A. **About Rhodes?**

Q. **Or about your cases, all of them?**

A. **I always cooperated with him on them.**

Q. **How many conversations did you have with him?**

A. **Quite a few. I can't really say, you know, because when we were in court and stuff I seen him almost every day for a week.**

Q. **That's the Milo Rhodes [sic] case?**[17]

A. **Uh-huh.**

Q. I'm talking about this case.

A. Just the one time he called me at work.

Q. Then you contacted him a couple of other times about your cases?

A. Tried to, yeah.

Q. But you had talked to him sometime obviously?

A. Yeah, a few times.

Q. **One of them was one time when you said you might forget or you might not testify**?

A. **Uh-huh. I think Mark got a warrant out for his arrest down here.**

Q. Down here?

A. Yeah, that's why he took off. He was going to come back.

(State of Florida v. Richard W. Rhodes, Case no. 84-03982, Transcript of Borton deposition)(emphasis added) (PC-R2. 3-8).

Mr. Rose's Rule 3.850 motion also included the text of an affidavit Borton provided Mr. Rose's collateral counsel, corroborating the testimony she gave in the Rhodes case:

I, Rebecca Borton, having been duly sworn,hereby depose and say:

1. My name is Rebecca Borton and I live in the state of Indiana. In March of 1985 I gave a deposition in the case of State of Florida v. Richard Rhodes. In my

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[17] Should read "Milo Rose." See also fn. 16.

> deposition I stated that in 1982 I was arrested and charged with two illegal drug possessions. One of the possessions was 52 grams of marijuana and this charge was dropped from a felony to a misdemeanor for my testimony in State of Florida v. Milo Rose. This was a true statement and I would have no reason to not tell the truth when I gave this statement. My memory would have been much better in 1985 about the 1982 event that it is now.

(PC-R2. 9).

Prior to amending his Rule 3.850 motion, Mr. Rose made several public records requests in order to determine the extent of the relationship between Poole, Borton and the Pinellas County State Attorney's Office. Following proceedings on Mr. Rose's Motion to Compel disclosure of the records of the Office of the State Attorney, which included an *ex parte in camera* inspection, held over counsel's objection, of materials claimed exempt by the State Attorney, the lower court ordered the disclosure of voluminous additional materials (PC-R2. 107-109).

On September 1, 1998, Mr. Rose amended his Rule 3.850 motion with information further demonstrating Poole's relationship with the Pinellas County State Attorney's Office (PC-R2. 187-317). A witness document which had been produced pursuant to the lower court's order included the following information[18]:

> **Mark Poole, also on probation, has called Porter and told Porter that he has an eye witness to all of this, but absent some deal or some money from the State, he is not going**

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[18] Mr. Rose was not provided the entire document, just a single page of what is obviously a larger document. Mr. Rose was also not provided any handwritten notes associated with the preparation of this document.

> **to reveal the source**. This assistant asked Becky Borton about that information and Becky Borton states that Mark did in fact, tell her that he did have such information, but he refused to tell her exactly what it was, stating that he would just tell the state and help you out. Becky says that Mark is in Illinois now, at home on a DUI, and also has infectious hepatitis, and consequently, will be out of circulation for a while.

(PC-R2. 190)(emphasis added).

The State responded on December 7, 1998 (PC-R2. 323-698). In its Response the State contended that the information regarding the deal Borton made was not newly discovered (PC-R2. 327-331). In addition, the State attempted to refute the evidence that Borton received a deal from the State in exchange for testimony in Mr. Rose's case (PC-R2. 332-336). In doing so, the State attached several exhibits, including portions of several trial witnesses' deposition testimony, orders from Mr. Rose's previous postconviction proceedings and court records concerning Borton (PC-R2. 339-698).

On December 17, 1998, the lower court held a Huff hearing (PC-R2. 702-807). Mr. Rose was not present for the hearing, despite his request that he be allowed to attend and counsel's attempts to secure his live or telephonic presence in some manner (PC-R2. 699-701).

At the Huff hearing, Mr. Rose's counsel reminded the court that the evidence used to convict Mr. Rose consisted of three components: eyewitness testimony, testimony that Mr. Rose had blood on him when he was arrested and the testimony of Poole and Borton that Mr. Rose had confessed to them (PC-R2. 711). Counsel

also reminded the court that "no evidentiary hearing has ever been conducted regarding post-conviction allegations attacking these three components" (PC-R2. 711).

While addressing the court regarding the information advanced in Mr. Rose's initial Rule 3.850 motion, postconviction counsel reminded the lower court that a cumulative error analysis was required under Gunsby v. State, 670 So. 2d 920 (Fla. 1996) (PC-R2. 714).

Firstly, postconviction counsel argued that Borton's conviction for aggravated assault was known to the State and could have been used to attack the credibility of Borton (PC-R2. 716). Even more egregiously, Borton's charge of possession of fifty-two grams of marijuana was "cut to a misdemeanor for [her] testimony in the Rose trial" (PC-R2. 716-717), and Mr. Rose was never informed about this deal.

Postconviction counsel told the lower court that Borton was arrested on September 27, 1982 (PC-R2. 718). According to the property receipt from her arrest, the amount of marijuana confiscated from Borton was fifty-two grams (PC-R2. 718). This amount supports Borton's deposition testimony that a deal was made since the amount does not reflect a proper disposition of the charge (PC-R2. 718). Furthermore, counsel pointed out that Borton was also on felony probation at the time of her arrest (PC-R2. 719). Counsel argued:

> It should be noted that Becky was arrested just weeks before the trial for DUI and her explanation of the DUI charge is extremely relevant. It's May of '83, and in

> her deposition she discusses, in fact, that this is when she and the prosecution really started tangling over her cooperation in the Rose case and whether or not she would, in fact, testify.
>
> * * *
>
> **The fact that she was on probation from a felony aggravated assault and was then arrested for possession and then arrested for the DWI raises a serious question as to why there was no violation on the ag assault which was a result from the previous charge.**

(PC-R2. 719-721)(emphasis added).

Counsel also argued that Poole had been threatened with arrest unless he testified (PC-R2. 722). In fact, Poole was arrested five (5) days before Mr. Rose's trial on making a false police report (PC-R2. 722).

The State's Response included thirty-four (34) exhibits, most of which were non-record material (PC-R2. 724). Therefore, counsel argued that the State's reliance on the non-record materials was a concession that a factual issue existed and an evidentiary hearing was required (PC-R2. 724).

During the discussion about Borton's arrest for possession of marijuana, the State informed the court that Borton was arrested on September 27, 1982 (PC-R2. 746). The FDLE report indicating possession of a felony amount of marijuana was signed on October 12, 1982 (PC-R2. 749). Mr. Richardson was killed on October 18, 1982 and Borton was charged with a misdemeanor on October 21, 1982 (PC-R2. 746-747).

As to these circumstances the lower court stated:

> I'm going to consider whether to grant or deny an evidentiary hearing -- particularly

> if I'm considering denying it -- that it would be appropriate to consider this in the light most favorable to the defendant, which would be -- **based on the affidavit, based on the document I have seen -- which would be that she was arrested for a misdemeanor prior to the murder and that subsequent to the murder she was charged with a misdemeanor consistent with her arrest while there was a possibility she could have been charged with a felony and it's possible that somebody told her that they would give her this break.**
>
> * * *
>
> So if anything, it seems to me -- now, I don't know -- you see, **it's very difficult for me to know without an evidentiary hearing whether Mr. Young explained that he was going to give her this agreement or not.**
>
> But, as I said, let's assume that all of this happened and Mr. Young said you've been cooperative so I'm going to let this be filed as a misdemeanor and you're on probation and this will go well for you. But we can't get around, and what no lawyer could have gotten around is all this information after all this impeachment -- certainly it should have and would have -- if I had had it, I would have used it if I had been the trial lawyer -- the problem is how could you get around the fact that on the night that this occurred, uh -- first of all, this lady would have believed that she was charged with a misdemeanor. That was what she was charged with.

(PC-R2. 751-753)(emphasis added).

The lower court suggested that the fact that Borton may have had a deal with the State and could have been impeached with that information would not have been significant to the jury (PC-R2. 756-758).

Furthermore, Judge Schaeffer mistakenly believed that Mr. Rose was not entitled to a hearing because Rouson could have

asked Borton about her pending charges during her deposition (PC-R2. 762). During the Huff hearing, Judge Schaeffer commented:

> . . . another point that the State makes here is that this was a bigger (inaudible) to Mr. Rouson.
>
> In other words, this charge was out there. He could have asked her, if he took a deposition, "Do you have any charges pending? What are they?" and checked into them.

(PC-R2. 762). However, the trial court ignored the fact that during Borton's deposition, Rouson was inquiring about Borton's prior convictions and pending charges when Mr. Young interjected, "why don't you ask if the marijuana charge is a felony or a misdemeanor?" (PC-R2. 766). When Rouson asked that question, Borton claimed that the charge was a misdemeanor (R. 208-209). In addition, the trial court ignored that fact that Mr. Rose's original trial attorney filed a Demand for Discovery and Favorable Material on November 16, 1982 (R. 53-57). In that motion trial counsel requested:

> 21. The names of any persons who have been promised anything for their statements or testimony relating to this cause, including (but not limited to) offers or promises of: money, preferred treatment, reward, immunity, leniency, favorable recommendation, or other benefits, identified as such.
>
> 22. The names of persons who have inducements presented to them whether in the form of promise or otherwise, or who the State knows or has reason to believe may expect such inducement, identified as such.
>
> 23. The names of any witnesses herein who has been pressured or threatened with prosecution by the State, any of its agents, or other Law Enforcement agencies, identified as such.

(R. 55). The State never provided trial counsel with any information regarding the Demand. The State thwarted trial counsel's attempts to learn of Borton's deal. Despite all of the evidence, Judge Schaeffer determined: "I think I'm going to deny you an evidentiary hearing on this point" (PC-R2. 763).

On February 22, 1998, the lower court entered an order, prepared by the State[19], summarily denying Mr. Rose's Rule 3.850 motion (PC-R2. 843-847). The court found:

> Even assuming for purposes of this nonevidentiary hearing that the State gave Ms. Borton the deal of charging her only with misdemeanor possession for which she was arrested, it would not have affected the outcome of Defendant's trial because Poole and Borton gave the same information to the police on the night of the murder, October 18, 1982, as later given in deposition and at trial.

(PC-R2. 845). Attached to her order were several non-record documents regarding the arrests and charges of Poole and Borton (PC-R2. 848-866).

Following the entry of Judge Schaeffer's order, Mr. Rose filed a Pro se Attachment to Huff Hearing After Review of Hearing Transcript In Lieu of Prejudicial Effect Of Not Being Allowed Privilege of Attending in Order to Assist Attorney(s) with Evidence Requiring Court to Grant Evidentiary Hearing on Guilt/Innocence (PC-R2. 893-907). In essence, and albeit pro se,

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[19] Mr. Rose's counsel strenuously objected to the State's preparing the order denying relief (PC-R2. 801-806). Judge Schaeffer originally agreed to prepare the order herself, however later changed her mind and instructed the State, by letter, to prepare the order (PC-R2. 817-818).

Mr. Rose requested that Judge Schaeffer conduct the cumulative error analysis to which he was entitled and she was required to perform.

In that motion, Mr. Rose requested that the court consider the claims that were raised in his initial postconviction motion, litigated while he was under an active death warrant (PC-R2. 893-907).

On April 12 1999, the State filed a motion to strike Mr. Rose's pleading and failed to notice Mr. Rose. On April 18, 1999, the lower court entered an order striking Mr. Rose's pleading without providing any reason for doing so.

Notice of appeal was timely filed.

SUMMARY OF ARGUMENT

Mr. Rose was denied an adversarial testing at his capital trial. Mr. Rose's defense counsel was woefully inexperienced and ineffective but the lower court precluded an evidentiary hearing on guilt phase ineffectiveness of counsel.

The lower court's failure to conduct an evidentiary hearing on Rouson's ineffectiveness regarding his failure to impeach the eyewitnesses and failure to challenge the State's false and misleading testimony regarding the blood found on Mr. Rose is compounded in light on the newly discovered Brady evidence.

Borton and Poole received deals from the State in exchange for their testimony. The substance of these deals was not disclosed to defense counsel. Defense counsel failed to uncover

the existence of the deals. Had defense counsel been aware of these deals, he could have impeached these two critical State's witnesses and presented their true motivation for testifying against Mr. Rose.

The lower court summarily dismissed this claim, arguing that based on the strength of the eyewitness testimony and the blood evidence, this newly discovered Brady evidence "would not have affected the outcome of Defendant's trial. . ." When the lower court denied the initial 3.850 guilt phase issues, it relied on the strength of the Poole/Borton testimony to reach its conclusion that attacking the blood and eyewitness evidence would not have made a difference. The lower court now relies on the "integrity" of that evidence to bolster its conclusion that a hearing is unwarranted on the Poole/Borton evidence. The lower court can no longer stack inference upon inference to protect the illusion that Mr. Rose received a fair, constitutional trial.

Due to the lower court's repeated denials of an evidentiary hearing on guilt phase errors, neither this Court nor the lower court can conduct a full, fair, and proper cumulative error analysis. This Court must remand for a full evidentiary hearing in which Mr. Rose will finally be given the opportunity to challenge the evidence used to convict and sentence him to death.

ARGUMENT I

THE CIRCUIT COURT'S NUMEROUS ERRONEOUS RULINGS DENIED MR. ROSE DUE PROCESS AND THE RIGHT TO A FULL AND FAIR HEARING.

A. THE CIRCUIT COURT VIOLATED MR. ROSE'S DUE PROCESS RIGHT TO A FULL AND FAIR HEARING WHEN IT APPLIED AN IMPROPER STANDARD TO DENY MR. ROSE AN EVIDENTIARY HEARING.

In Lemon, this Court held that a capital postconviction defendant "is entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief'." Lemon v. State, 498 So. 2d 923 (Fla. 1986). At the Huff hearing, the court's desire to expedite Mr. Rose's proceedings led to it's erroneous analysis of Mr. Rose's issues. Judge Schaeffer made assumptions and relied on non-record evidence to analyze Mr. Rose's claim. In effect, the court held a non-evidentiary, evidentiary hearing and analyzed Mr. Rose's claims based on assumption and counsel's argument.

The lower court was required to accept Mr. Rose's allegations as true. Scott v. State, 657 So. 2d 1129 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). Judge Schaeffer conceded:

> If, in fact, Mr. Young had made her an offer, I do wish that he would have disclosed it and had told the defense that I told her if she testified truthfully we'd allow this, which apparently could now be a felony, could be a misdemeanor. But at this juncture we don't even know that.
> **But I have to assume that.**

PC-R2. 763)(emphasis added). Although Judge Schaeffer acknowledged that she must take Mr. Rose's allegations as true and that there was nothing in the record to dispute them she still denied him an evidentiary hearing.

Moreover, allegations of fact regarding due diligence must also be accepted as true. Swafford v. State, 679 So. 2d 736 (Fla. 1996); Card v. State, 652 So. 2d 344 (Fla. 1995). In Swafford, this Court held:

> We accept as sufficient for the purpose of demonstrating that an evidentiary hearing is required, Swafford's claim that Lestz's statement amounts to newly discovered evidence. Our acceptance is based in part on the State's failure to assert, with regard to this issue, anything more than an allegation that defense counsel had years to find Lestz.

679 So. 2d at 739. As in Swafford, in Mr. Rose's case, the State argued that the evidence was not newly discovered because it could have been found before (PC-R2. 328). Thereafter, Judge Schaeffer, without requesting any evidence or giving Mr. Rose the opportunity to present evidence, determined that "it has become clear . . . that this could have been discovered as a Brady claim. It could have been discovered using due diligence." (PC-R2. 769). Judge Schaeffer's assumptions were improper and not in accordance with this Court's precedent. See Lightbourne, Swafford, Card; Scott. Under this Court's precedent Mr. Rose is entitled to an evidentiary hearing.

B. THE CIRCUIT COURT ERRED WHEN IT RELIED ON NON-RECORD DOCUMENTS TO DENY MR. ROSE AN EVIDENTIARY HEARING.

Mr. Rose's Rule 3.850 motion included a Brady claim based on an affidavit from one of the State's key witnesses, Becky Borton. Borton revealed that she had received benefits from the State in

exchange for her testimony (PC-R2. 3-9, 190). Nothing in the record refuted Mr. Rose's claim and he was therefore entitled to an evidentiary hearing.

Moreover, the State, in it's Response, attached several non-record documents, including police reports regarding Borton's prior arrests (PC-R2. 339-698). The lower court improperly relied on these records to deny Mr. Rose an evidentiary hearing.[20] The State's reliance on non-record evidence to refute Mr. Rose's Brady claim was a concession that the files and records did not refute Mr. Rose's claims. Mr. Rose is entitled to an evidentiary hearing on his Rule 3.850 motion.

C. THE CIRCUIT COURT ERRED IN DENYING MR. ROSE'S PRO SE MOTION.

Mr. Rose requested that he be allowed to be present for his Huff hearing. The lower court would not allow Mr. Rose to be physically present. In addition, the lower court was unable to arrange a phone call with Mr. Rose for the Huff hearing.

Therefore, after the Huff hearing Mr. Rose filed a pro se motion requesting that the lower court reconsider the issues raised in Mr. Rose's original 3.850 motion. Mr. Rose stated:

> 1. Should the State object to this pro se proceeding. The Court is reminded defendant's attorney(s) raised ineffectiveness Claim III in Amended 3.850 and in the best interest of Justice it is appropriate for this Court to take into consideration in lieu of defendant's denied presence at Huff Hearing, defendant's argument as to newly discovered evidence of Brady, found in the Borton revelation

[20] The State prepared the court's Order denying relief. Attached to the Order were non-record documents.

> revealing escalating prosecutorial misconduct
> . . . .

(PC-R2. 893-894)(See Attach C).

The State objected to Mr. Rose's pleading and filed a Motion to Strike on April 12, 1998 (PC-R2. 916-917). The State did not serve Mr. Rose with a copy of the motion (PC-R2. 917). Less than a week later, the circuit court granted the State's Motion to Strike (PC-R2. 918).

The State's Motion to Strike was premised on the fact that Mr. Rose was represented by counsel (PC-R2. 916). However, Mr. Rose indicated in his motion that he did not believe the court fully considered the cumulative effects of the allegations regarding the Poole/Borton deals. Furthermore, he correctly pointed out that his counsel had claimed that they could not effectively represent him in his postconviction motion.

Mr. Rose's right to due process was denied when the court failed to consider his pro se pleading. This Court should remand Mr. Rose's case to the circuit court for an evidentiary hearing, (see Claim I, subsection A and B), and a cumulative error analysis in accordance with Gunsby (see Claim III).

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. ROSE AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING MR. ROSE'S CAPITAL TRIAL. MR. ROSE WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND

CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE.

A. INTRODUCTION

After instituting federal habeas corpus proceedings, Mr. Rose learned that Borton and Poole made a deal with the State to receive lenient treatment in exchange for their testimony against Mr. Rose. Mr. Rose informed his counsel that he learned this through talking with Mr. Richard W. Rhodes, another death sentenced inmate, who told him that Borton had conceded the existence of a deal when she was deposed in the Rhodes case. Borton's deposition was taken on March 21, 1985. Mr. Rhodes case became final in 1994, after this Court remanded his case for a resentencing. Mr. Rose has exercised due diligence in investigating and presenting this issue. Judge Schaeffer's finding is not supported by competent and substantial evidence.

Despite due diligence, Mr. Rose's collateral counsel did not learn of the suppression of Borton's relationship with the prosecution and the fact that Borton received favorable treatment from the State in exchange for her testimony against Mr. Rose until 1996. Mr. Rose requested and then sought to compel disclosure of any documents pertaining to Borton and Poole from various agencies. The State sought to withhold additional evidence of State misconduct. However, the lower court ordered disclosure of some of those exempted materials while permitting some of those materials to continue to be withheld. Included in the most recently disclosed material was additional evidence

supporting Mr. Rose's allegations about State misconduct. The Brady material mentioned in subpart C of this claim was never provided to defense counsel.

The lower court erred in denying Mr. Rose an evidentiary hearing. Mr. Rose is entitled under Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (1989) and Scott v. Singletary, 657 So. 2d 1129 (Fla. 1995) to an evidentiary hearing in this case. The manner in which the State has failed to disclose exculpatory evidence affirmatively prevented a detailed thorough analysis of this case by Mr. Rose's counsel.[21] The State should not be allowed to profit from its own wrongdoing. Accordingly, Mr. Rose requests that he be given an evidentiary hearing on this issue and that the requested relief be granted.

The lower court was obligated to take Mr. Rose's allegations as true. The affidavits of Becky Borton must be accepted as true. All other allegations submitted herein must be accepted as true under Lightbourne v. Dugger, 549 So. 2d at 1365; Scott v. State, 657 So. 2d 1129 (Fla. 1995). The claim presented here could not have been presented earlier. The State never disclosed its relationship with Borton and Poole. An evidentiary hearing

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[21] To the extent that the State argues that somehow counsel's unawareness of this witness' cooperation with the prosecution was due to his lack of diligence, then Mr. Rose received ineffective assistance of counsel. Mr. Rose is entitled to effective assistance of counsel in trial and during his post-conviction proceedings. Strickland v. Washington, 466 U.S. 668, 685 (1984); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).

is required. Walker v. State, 661 So. 2d 945 (4th DCA 1995).

B. APPLICATION OF THE WRONG STANDARD

In its post hearing order denying relief, the circuit court applied the wrong standard to Mr. Rose's claims. The court considered Mr. Rose's Brady/Giglio evidence as newly discovered evidence of innocence to be analyzed under the standard established by this Court in Jones v. State, 591 So. 2d 911 (Fla. 1991) (PC-R2. 843-847).

The circuit court's misunderstanding of the standard by which to judge Mr. Rose's claim is evident from the order denying relief:

> The court finds that this is not newly discovered evidence but was always information available on due diligence. Even assuming for purposes of this nonevidentiary hearing that the State gave Ms. Borton the deal of charging her only with misdemeanor possession for which she was arrested, it would not have affected the outcome of Defendant's trial because Poole and Borton gave the same information to police on the night of the murder, October 18, 1982, as later given in deposition and at trial

> . . . .[22] Poole and Borton were not among the four eyewitnesses[23] to the crime but testified to Defendant's admissions to them that he had just murdered the victim as they gave him a ride home.

(PC-R2. 845).[24] Mr. Rose's claim is a Brady claim, not a newly discovered evidence of innocence claim. Judge Schaeffer improperly analyzed Mr. Rose's evidence under the standard established by this Court in Jones v. State which imposes a greater burden on a defendant seeking a new trial.

In Kyles v. Whitley, the Supreme Court explained the appropriate standard of review of a Brady claim:

> 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 case would have complemented, and have been

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[22] The prejudice from Judge Schaeffer's summary denial of all guilt phase issues is exemplified by this statement. Poole and Borton did testify at trial that when they first spoke to the officer at their home, they denied any knowledge of the crime. They both continued by explaining that Barbara Richardson, the victim's mother, was standing with the police officer and they did not want to discuss the case in front of her (R. 881, 899). Again, Rouson was ineffective for failing to bring this out during cross examination of Poole and Borton. Had Judge Schaeffer granted an evidentiary hearing on guilt phase IAC, collateral counsel would have brought out that reports written by the officers contradicted Poole and Borton's "explanation" for their initial denial of any knowledge.

[23] There were three eyewitnesses, not four, who testified at trial.

[24] Judge Schaeffer confused a newly discovered evidence of innocence claim with a Brady claim established through newly discovered evidence; although this mistake is understandable, it resulted in the application of the wrong legal standard to Mr. Rose's evidence and the denial of the claims that entitle him to relief.

> complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend". On each of these points, Burn's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner", had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.
>
> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burn's credibility at the time of Kyles's trials.

115 S. Ct. 1555, 1573 n.19 (1995)(citations omitted). Judge Schaeffer failed to apply the appropriate legal standard to Mr. Rose's Brady claim.

Because the circuit court apparently misunderstood the nature of Mr. Rose's claims, its order denying relief improperly

evaluated the evidence. While the newly discovered evidence standard requires the reviewing court to weigh both the new evidence and that introduced at trial, Jones, 591 So. 2d at 916, the materiality standard that establishes a Brady violation focuses on the effect that the suppressed evidence would have had on the jury at the trial. When a defendant establishes that the State withheld material exculpatory evidence, the court must order a new trial if there is "a reasonable probability that . . . the result of the proceeding would have been different". United States v. Bagley, 473 U.S. 667, 682 (1985). And if the State knowingly used false evidence, the court must order a new trial if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". United States v. Agurs, 478 U.S. 97, 103 (1976). In Agurs, the Supreme Court explained why newly discovered evidence claims place a greater burden on the defendant that claims arising from State misconduct:

> [T]he fact that such [exculpatory] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

427 U.S. at 111. Because the circuit court applied the wrong standard to Mr. Rose's claims, its order denying relief cannot withstand this Court's review.

C. BRADY/GIGLIO

Evidence uncovered since the time of Mr. Rose's capital trial and initial post-conviction proceedings establishes that a relationship between the State and key State witnesses, Borton and Poole, a relationship material to their credibility, was not disclosed to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963); see also Strickler v. Greene, 119 S. Ct 1936 (1999). Consideration of this evidence is required, for it establishes that Mr. Rose's conviction and death sentence violate the Eighth and Fourteenth Amendments.

Borton's deposition testimony along with her affidavit evidence an unrefuted deal between Borton and the State. The files and records in this action by no means show that Mr. Rose is entitled to "no relief", and much less so "conclusively". See Lemon v. State, 498 So. 2d 923 (Fla. 1986). Thus, Mr. Rose is entitled to an evidentiary hearing on his claim.

In early 1996, undersigned counsel was informed by Mr. Rose that he had recently learned that two of the witnesses against him at trial, Borton and Poole, had made a deal with the State to receive lenient treatment in exchange for their testimony against Mr. Rose. He explained that he had learned this through talking with Mr. Richard Wallace Rhodes, another death sentenced inmate, who told him that Borton had conceded the existence of the deal

when she was deposed in the Rhodes case. Mr. Rose had borrowed a copy of the deposition to show undersigned counsel. Counsel investigated and discovered that during her deposition in Mr. Rhodes' case, Borton stated:

> Q. Have you ever been arrested?
>
> A. Yes.
>
> Q. What for?
>
> A. DWI, two possessions and, well, I got a withheld adjudication on an aggravated assault that was against Mark. It was really just a quarrel, and I kind of got the bad end of it.
>
> Q. **The two possession charges were misdemeanors**?
>
> A. **Yeah, but -- well, one of them was fifty-two grams. And it was cut to a misdemeanor for my testimony in the Rhodes**[25] **[sic] trial.**
>
> Q. **Who'd you talk to**?
>
> A. **About what**?
>
> Q. **About getting your charges reduced.**
>
> A. **I guess Bruce Young did it.**
>
> Q. **You possessed fifty-two grams but reduced to a misdemeanor**?
>
> A. **Yeah**, it wasn't mine. It was Mark's. He asked me to put it in my purse.
>
> Q. What happened to you as a result of that misdemeanor?

---

[25] **A careful reading of the deposition reveals that here Borton was referring to the** Rose case. Furthermore, the State has conceded that Borton was referring to the Milo Rose case and the "court reporter mistook "Rose" for "Rhodes"" (PC-R2. 328).

A. Well, I pleaded guilty to the aggravated assault, because I was living in Indiana, and having to drive back down here about three times. So I pled guilty, and I had eighteen months probation with that. So I got a year consecutive.

Q. A year consecutive probation?

A. Yeah, was altogether.

Q. **And you dealt with Mr. Young on that**?

A. **Uh-huh.**

Q. Are you still on probation now then?

A. Yeah. I have till August, and I have a hundred hours of community service left to do. And that's it.

Q. Did you have any of those other charges pending at that time? Was the DWI pending during that time?

A. I got a DWI in May of '83.

Q. So that was all over with?

A. I got it right before the trial started in June.

Q. On Rhodes [sic]?

A. Uh-huh, yeah, on Rhodes [sic].

Q. What happened on that DWI charge?

A. I got the minimum.

Q. $250 fine, six months revocation of license?

A. Yeah, but then I have three alcohol counts. I had to for extra counseling with -- I didn't need it, because I don't even drink.

Q. What happened to the other possession of marijuana charge?

A. That's my hundred hours community service, and I had five days in jail.

Q. When did that come up?

A. That was in August, I think it was -- I went to court for that.

Q. August of last year?

A. Uh-huh.

Q. Did Mr. Young help you out on that?

A. No. I still got a hundred hours community service.

Q. Did you ever tell him about that one?

A. No, I didn't tell him about that.

Q. They didn't violate your probation?

A. Yeah, but I didn't get violated really until like the day I was in court. They violated me for not having stuff done on my DWI. So within the time they violated me, I went to court and I went and got everything done. So they terminated my probation on the DWI right then. And the probation lady stood up and said I had been violated for a possession charge. So he extended my DWI probation for another year.

Q. You say he did. Who did?

A. The judge extended my DWI probation to run concurrent with my possession probation.

Q. Did you have an attorney representing you?

A. No.

Q. Did Mr. Young come to court or speak in your behalf?

A. (Shakes head.)

Q. You didn't let him know about that one?

A. **Well, yeah. I didn't really say -- I didn't threaten him, but I asked him if he would do something about it. He said he wouldn't do anything about it for me.**

Q. **You said you didn't really threaten him, but what were you going to do if he didn't help out?**

A. **I don't know. That's been awhile too. I didn't really say I wouldn't testify or anything, because he got mad at me and told me he would have a cop out where I work with a warrant for my arrest.**

Q. **If you didn't testify?**

A. **Uh-huh.**

Q. **Did you tell him your memory might get bad?**

A. **I think so. That's what I said.**

Q. **And he said he would send a policeman out to get you in an hour?**

A. **Yeah. He said he would have a cop out there with a warrant for my arrest in an hour.**

Q. **How many times did you ever talk to Young about the case or about your cases?**

A. **About Rhodes?**

Q. **Or about your cases, all of them?**

A. **I always cooperated with him on them.**

Q. **How many conversations did you have with him?**

A. **Quite a few. I can't really say, you know, because when we were in court and stuff I seen him almost every day for a week.**

Q. **That's the Milo Rhodes [sic] case?**[26]

A. **Uh-huh.**

Q. I'm talking about this case.

A. Just the one time he called me at work.

Q. Then you contacted him a couple of other times about your cases?

A. Tried to, yeah.

Q. But you had talked to him sometime obviously?

A. Yeah, a few times.

Q. **One of them was one time when you said you might forget or you might not testify**?

A. **Uh-huh. I think Mark got a warrant out for his arrest down here.**

Q. Down here?

A. Yeah, that's why he took off. He was going to come back.

(State of Florida v. Richard W. Rhodes, Case no. 84-03982, Transcript of Borton deposition)(emphasis added).

Borton thereafter provided Mr. Rose's collateral counsel with an affidavit corroborating the testimony she gave in the Rhodes case:

I, Rebecca Borton, having been duly sworn, hereby depose and say:

1. My name is Rebecca Borton and I live in the state of Indiana. In March of 1985 I gave a deposition in the case of State of Florida v. Richard Rhodes. In my

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[26] Should read "Milo Rose." See also fn.25.

> deposition I stated that in 1982 I was arrested and charged with two illegal drug possessions. One of the possessions was 52 grams of marijuana and this charge was dropped from a felony to a misdemeanor for my testimony in State of Florida v. Milo Rose. This was a true statement and I would have no reason to not tell the truth when I gave this statement. My memory would have been much better in 1985 about the 1982 event that it is now.

(PC-R2. 9)

Borton's affidavit corroborates the exculpatory evidence the State possessed which was not disclosed to Mr. Rose's defense team. Despite diligent efforts by Mr. Rose's collateral counsel, the fact that the prosecution made a deal with Borton and Poole in exchange for their testimony against Mr. Rose was unknown until 1996. Also unknown and undisclosed was the extensive relationship between the prosecution and Borton and Poole.

Furthermore, in the documents received after learning of the Borton deal, and turned over by the State pursuant to the lower court's order, the following information appears in a summary of witnesses document:

> **Mark Pool, also on probation, has called Porter and told Porter that he has an eye witness to all of this, but absent some deal or some money from the State, he is not going to reveal the source.** This assistant asked Becky Borton about that information and Becky Borton states that Mark did in fact, tell her that he did have such information, but he refused to tell her exactly what it was, stating that he would just tell the state and help you out. Becky says that Mark is in Illinois now, at home on a DUI, and also has infectious hepatitis, and consequently, will be out of circulation for a while.

This information corroborates Mr. Rose's allegations of State misconduct regarding Poole, Borton, Detective Fire and Assistant State Attorney Young.

A Brady claim requires proof that: 1) the State possessed evidence favorable to the defense; 2) the defense did not possess the evidence in question; 3) the State did not disclose the evidence; and 4) the evidence was material, i.e., its nondisclosure undermines confidence in the outcome. See Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), rev. and remanded on other grounds, 113 S. Ct. 1940 (1993), adhered to on remand, 997 F.2d 1336.

The truth of a witness' testimony and a witness' motive for testifying are material questions of fact for the jury, thus, the improper withholding of information regarding a witness' credibility is just as violative of the dictates of Brady v. Maryland as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. 667; Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result of the State's misconduct in this case, Mr. Rose was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense, and the jury was deprived of relevant evidence with which to evaluate the State's witness' credibility.

The State's failure to disclose promises of leniency made to Borton and Poole, key State witnesses, in exchange for favorable testimony clearly constituted a violation of Brady v. Maryland, 373 U.S. 83 (1963); see also Strickler v. Greene, 119 S. Ct. 1936 (1999).

Generally, the standard to determine materiality is whether "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Bagley, 473 U.S. at 682. However, a lower standard applies where the State knowingly used false testimony, as occurred here. In such a case, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". Agurs, 427 U.S. at 103 (emphasis added). Accord Giglio, 405 U.S. at 154. The lower standard applies because such cases involve prosecutorial misconduct and the corruption of the truth-seeking function at trial. Agurs, 427 U.S. at 104; Bagley, 473 U.S. at 680. The Supreme Court has indicated that this lower standard of materiality is equivalent to the Chapman v. California, 386 U.S. 18 (1967), "harmless beyond a reasonable doubt" standard, Bagley, 473 U.S. at 679 n. 9, which requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963)). In this case, where the State suppresses Brady material which exposes as false the only

evidence supporting one of the aggravating factors and negating the mitigating factors, it cannot be said beyond a reasonable doubt that the State's use of false testimony did not contribute to the verdict and death sentence.

In analyzing a Brady claim under the Supreme Court's opinion in Kyles v. Whitley, the focus is whether the false testimony had an effect on the jury. The Court explained:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. **Of course, neither observation could possibly have affected the jury's appraisal of Burn's credibility at the time of Kyles's trials.**

115 S. Ct. 1555, 1573 n.19 (1995)(citations omitted)(emphasis added). The Court's review of the evidence in Kyles similarly demonstrates its focus on the jury to determine whether the defendant satisfied the materiality standard established in Bagley. In Kyles, the Supreme Court found that the evidence withheld by the State would not only have resulted in a stronger case for the defense, but would also have substantially reduced, or even destroyed the value of the State's two best witnesses. As in this case, the State in Kyles had additional evidence (in fact physical evidence) connecting Mr. Kyles to the crime; however, the Court noted that "none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone". 115 S. Ct. at 1566 n. 8. The Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

115 S. Ct. at 1575. Under the Brady standard, Mr. Rose is entitled to a new trial if he can demonstrate that the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict". 115 S. Ct. at 1566.

Material evidence was withheld from Mr. Rose's attorneys or was not available at the time of trial. According to Borton's 1985 deposition in the Rhodes' case, Assistant State Attorney Bruce Young had knowledge of Borton's cooperation in exchange for assistance from the prosecution on her own cases. She stated: "I always cooperated with [Bruce Young]." Her deposition statement, made in Mr. Rose's case, regarding the nature of her pending charges (R. 208-209), was made to mislead Mr. Rose's trial counsel, a deception that the State was well aware of and in which the Assistant State Attorney was a participant.

In addition, the recently produced documents regarding Poole's relationship with the State further corroborates the duplicity that undermined Mr. Rose's trial. Borton's deposition in Mr. Rhodes case corroborates the State's relationship to Poole

because in order to guarantee Poole's and Borton's cooperation, an arrest warrant was issued against Mark Poole.[27]

The defense had no knowledge of the relationship between Borton, Poole and the prosecution and the State never disclosed this evidence. As a result the jury never learned of their deals to provide testimony against Mr. Rose in exchange for lenient treatment. No mention of Borton or Poole's relationship with the prosecution was ever made by either the State or defense attorneys (R. 862-884, 885-901). See also State's closing argument at R. 885-1065.

The State violated due process when it failed to disclose this material evidence. The State has a duty to turn over available evidence that challenges the credibility of their witnesses. Napue v. Illinois, 360 U.S. 264, 269 (1959); Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999). The credibility of Borton and Poole were of paramount importance to the State and the State argued its case carefully to avoid any inference that any of its witnesses credibility was subject to attack. Assistant State Attorney Young argued that no witness he presented had any more interest in testifying "than that of a normal citizen" (R. 1047). This was patently false. Moreover, Borton and Poole's testimony was a central feature of the State's case and Young continued to emphasize its importance throughout his closing argument.

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[27]Mr. Poole was in fact arrested approximately five (5) days before Mr. Rose's trial began.

This withheld evidence is material to Mr. Rose's defense because it impeaches the State's key witnesses whose testimony resulted in Mr. Rose's conviction and death sentence. The undisclosed evidence reveals that Poole and Borton received benefits from the State in exchange for their cooperation. In Smith v. Wainwright, the Eleventh Circuit Court of Appeals addressed a similar situation in which the State's key witnesses had not been impeached because of trial counsel's ineffectiveness. The Court explained the significance of this failure:

> The conviction rested on the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

799 F.2d 1442, 1444 (11th Cir. 1986).

Mr. Rose can establish that the nondisclosure of the information regarding Poole's and Borton's deals with the State and their lenient treatment in exchange for testimony undermines confidence in the outcome of the guilt phase. However, this Court must also consider the effect of this withheld evidence on the penalty phase of Mr. Rose's trial. See Garcia v. State, 622 So. 2d 1325 (Fla. 1993). If the State had disclosed evidence that these witnesses received benefits in exchange for their testimony, Mr. Rose's attorney would have had the tools necessary to impeach their credibility at the penalty phase and support

mitigating factors. Poole and Borton were critical to the State's case, and the withholding of this information denied Mr. Rose his constitutional right to confront the witnesses against him, his right to the effective assistance of counsel, and his right to a fair trial.

Mr. Rose was denied a reliable adversarial testing. The jury did not hear this exculpatory evidence. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.[28] Confidence is undermined in the outcome since the jury did not hear the evidence.

The State's misconduct in this case resulted in a failure of the adversarial process. Confidence in the outcome of Mr. Rose's trial is undermined because the unpresented evidence was relevant and material to Mr. Rose' guilt of first-degree murder and certainly to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury.[29] Either the State

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[28] Mr. Rose argues Brady and ineffective assistance of counsel in the alternative. Either the prosecutor unreasonably failed to disclose or defense counsel unreasonably failed to discover exculpatory evidence. Either way the resulting conviction was unreliable and the Sixth Amendment violated.

[29] Workman v. Tate, 957 F.2d 1339, 1346 (6th Cir. 1992)(reasonable probability found where uncalled witnesses would have provided corroboration of defense witnesses and contradicted testimony of police officers); Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989)(the undisclosed impeachment evidence, in conjunction with that already presented to the jury, may have "pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit"); Ouimette v. Moran, 942 F.2d 1, 10 (1st Cir. 1991)(confidence undermined in the outcome because suppressed evidence "might have affected the outcome of the trial"); Chambers v. Armontrout, 907 F.2d 825, 832

unreasonably failed to disclosed its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. An evidentiary hearing must be held, and thereafter, Mr. Rose' conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

ARGUMENT III

THE CIRCUIT COURT APPLIED THE WRONG STANDARD IN REVIEWING MR. ROSE'S CLAIMS AND FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL OF THE ERRORS PRESENTED SINCE MR. ROSE'S TRIAL.

The lower court failed to consider the cumulative effect of all the errors that occurred during Mr. Rose's trial as required by Kyles v. Whitley and this Court's precedent.[30] Lightbourne v. State, 24 Fla. L. Weekly S 375 (Fla. 1999); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(directing the circuit court to consider newly discovered evidence introduced in the defendant's

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(8th Cir. 1990)(in banc)(reasonable probability exists where "jury might have acquitted"). See also Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991).

[30] Mr. Rose incorporates by reference his previously pled allegations of Brady violations and instances of ineffective assistance of counsel during the guilt phase of his trial.

first 3.850 motion and the evidence presented at trial).[31] In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel and/or newly discovered evidence. Gunsby is exactly on point here and should have been followed by the circuit court. In fact, Mr. Rose's counsel informed the lower court that a cumulative error analysis was required (PC-R2. 714). In Gunsby, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. This Court also addressed the State's argument that some of the defendant's evidence did not meet the test for newly discovered evidence:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through the use of due diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington. The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the Rule 3.850 hearing

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[31] That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbank, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

> and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Id. at 924 (citations omitted). The circuit court failed to consider the effect of Mr. Rose's new evidence and also ignored this Court's instructions in Gunsby to consider evidence that does not satisfy the newly discovered test for its support of an ineffective assistance of counsel and/or Brady claims. Had the circuit court examined all of the evidence Mr. Rose presented throughout his capital proceedings, it would have found that previously unknown evidence, in conjunction with the evidence introduced at Mr. Rose's trial, undermines confidence in the outcome. Gunsby; Swafford. Had the jury heard all the evidence asserted in Mr. Rose's post-conviction proceedings, the outcome of his trial and penalty phase would certainly have been different.

A thorough review of the record indicates that **every** decision made by the jury and judge at Mr. Rose's capital trial and the lower court during Mr. Rose's postconviction proceedings relied on the credibility of Poole and Borton's testimony that Mr. Rose had confessed to them and requested that they provide him with an alibi.

At Mr. Rose's trial the strongest evidence of Mr. Rose's guilt was the testimony of Poole and Borton that Mr. Rose had confessed to them (R. 865-866; 890). Thereafter, in sentencing

Mr. Rose, the trial court discounted statutory and non-statutory mitigators based on the Poole/Borton testimony. In fact, the lower court's sentencing order reflects that one reason the court found the statutory aggravator that the murder was committed in cold, calculated and premeditated manner was based on the Poole/Borton testimony (R. 336).

During his initial postconviction proceedings Mr. Rose was denied relief on his penalty phase claims of ineffective assistance of counsel. The lower court relied on Poole and Borton's trial testimony in discounting the expert testimony regarding Mr. Rose's intoxicated state and the "black-out" theory.

Moreover, during Mr. Rose's initial postconviction proceedings he raised numerous claims regarding the ineffective assistance of guilt phase counsel. Specifically, Mr. Rose claimed that trial counsel: 1) failed to take the deposition of Carl Hayword, a critical State eyewitness; 2) failed to depose the first officer on the scene, Patrolman McKenna, who improperly[32] took the initial statements from the four eyewitnesses, as well as failed to depose Detective Walther, who interviewed State witness Bass as well as saw Bass' composite

[32] Patrolman McKenna failed to isolate each of the witnesses when he took their first statements, thereby tainting the description given be each of the witnesses. Furthermore, Patrolman McKenna possessed vital information regarding an earlier altercation wherein Mr. Rose assisted the victim, including the extent of Mr. Rose's injuries, the friendly relationship between Mr. Rose and the victim, and the name and statements of other individuals at the bar with knowledge to these same facts.

drawing; 3) failed to call Patrolman McKenna as a witness and solicit the substance of the initial eyewitness accounts, which drastically differed from their courtroom narratives; 4) failed to call Patrolman McKenna, Carl Hayword, and Maryann Hutton at the Motion to Suppress Photo-Pak hearing held the first day of trial; 5) failed to impeach each eyewitness with their inconsistent statements and educate the jury regarding the evolution of each witnesses description of the perpetrator; 6) failed to attack the State's insinuation that the blood on Mr. Rose was from the homicide; 7) failed to properly object when the State introduced "expert" testimony from Detective Fire regarding the "mixing" of blood samples taken from Mr. Rose, thereby misleading the jury into believing that it was impossible to determine the source of the blood found on Mr. Rose; 8) failed to call an expert during Mr. Rose's case-in-chief to show that because of Mr. Rose and the victim's blood types, "mixing" of the blood was impossible; 9) failed to introduce testimony from a serologist that blood swabbed from Mr. Rose did not match that of the victim; 10) failed to depose and call as a witness FDLE serologist Guenther; 11) failed to depose or call as a witness Technician Bowers; 12) failed to attack the shoddy police investigation regarding other physical evidence, all of which would have excluded Mr. Rose as a suspect, such as failing to test Poole's vehicle for traces of the victim's blood or other trace evidence, failing to test for fingerprints on glass collected at the scene, failing to test the blood found on Mr.

Rose's clothing, etc.; 13) failed to elicit from Borton that she initially stated to the police that Mr. Rose was wearing a flannel shirt when he entered the vehicle, thus contradicting the description given by the eyewitnesses; 14) failed to impeach Borton with her initial statement that it was her, and not Mr. Rose, who commented on leaving the victim a "vegetable"; 15) failed to bring out her prior statement that Mr. Rose's hair was in a ponytail, thus contradicting the eyewitness testimony; 16) failed to impeach Poole when, during the trial, he testified that Mr. Rose asked him to provide an alibi, with his prior sworn deposition testimony that Mr. Rose specifically did not ask for an alibi; 17) conceding, when cross examining Poole, that Mr. Rose requested an alibi, by asking "Isn't it a fact that you told Milo Suzanne would say whatever you wanted her to say?"[33] The lower court failed to consider the cumulative impact of Rouson's many errors and omissions when again denying Mr. Rose an evidentiary hearing on his claims.

Furthermore, in his initial postconviction proceedings, Mr. Rose claimed that he could prove that the blood collected from him on the night of the murder could not have been the victim's PC-R1. 370-373). Mr. Rose asserted that the lab report regarding the blood evidence contained incredible **exculpatory** evidence. In order to support his claim, Mr. Rose submitted the affidavit of a forensic scientist and former FDLE agent. (See Attach. B). The

[33] Due to the page limitations placed on the appellant, this list is not exhaustive, but is only illustrative of the complete lack of an adversarial testing.

affidavit indicated that according to the lab report, the victim's blood could not have been present on Mr. Rose the night he was arrested.

The lower court denied Mr. Rose an evidentiary hearing on his guilt phase issues because:

> I believe that, my recollection of the eye witness testimony is Mr. Rouson made a lot of hay with it. He made a lot of hay as to discrepancies in their testimony of the various and sundry things. And you can make an awful lot of hay when you have three eye witnesses and they all say that that may be, it may have been fifty feet, one hundred fifty feet or twenty feet. But all three say that is the guy. **And you have two people who say he he (sic) jumped in the car and said he just killed Butch and left him a vegetable, and would they provide an alibi.**
>
> I don't know whose blood it was is going to make too much different (sic). I don't think it is going to make any difference. And I don't think if we knew it was one hundred forty-two feet exactly, that would make any difference.

(PC-R1. 756-757). Mr. Rose was previously denied an evidentiary hearing on his guilt phase issues attacking the lack of an adversarial testing of the eyewitness testimony and the lack of blood evidence. The lower court relied on its previous denial to bootstrap its present denial of a guilt phase evidentiary hearing on the Poole/Borton Brady evidence. The lower court failed to conduct a cumulative error analysis when presented with this new information. Instead of looking at all of the errors that plagued Mr. Rose's trial, the lower court, in its order prepared by the State, strictly examined the new evidence in a vacuum. Lightbourne v. State, 24 Fla. L. Weekly S 375 at 21 (Fla. 1999).

In light of this new Poole/Borton evidence, this Court must allow him to revisit all guilt phase issues.

The cumulative effect of the evidence not presented to the jury either because the State failed to disclose it or defense counsel failed to discover it can result in a breakdown of the adversarial process such that a new trial is warranted. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitley, 115 S. Ct. 1555 (1995). The trial court failed to conduct a cumulative error analysis. Instead, the court considered "each piece of evidence in a vacuum" and failed to "look at the total picture of all of the evidence". Lightbourne v. State, 24 Fla. L. Weekly S 375 at 21 (Fla. 1999). As such, an evidentiary hearing is required on **all** of Mr. Rose's postconviction claims of alleged error including his claims originally denied in his initial postconviction proceedings.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. ROSE ACCESS TO THE FILES AND RECORDS PERTAINING TO HIS CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES WHICH WAS WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court erred in denying Mr. Rose access to the files and records in his case.[34]

[34] Including the joint adjudication of Mr. Rose's claim with that of Mr. Rhodes.

The lower court conducted an *ex parte in camera* inspection of the State's exempt materials. That inspection procedure violated Mr. Rose's right to a full and fair state postconviction proceeding as guaranteed by both state and federal constitutional due process and equal protection as well as state statute and federal law.

Moreover the lower court denied Mr. Rose an evidentiary hearing on his allegations of non-disclosure, inadequate search and claimed exemptions. Mr. Rose was prejudiced. For example, the materials ordered released by the lower court do not contain the handwritten notes of the author of the document referred to in Argument II regarding the relationship between the State and Poole and Borton.[35] Further, the lower court issued a detail order of the records to be disclosed, but Mr. Rose has never been provided an adequate inventory of the materials remaining withheld. Mr. Rose requested and was denied an opportunity to inquire of the custodian, Assistant State Attorney King, under oath, about the basis for the exemptions claimed, yet the State gave its input during the improper *ex parte in camera* proceeding. These procedures denied Mr. Rose a full and fair state postconviction proceeding as guaranteed by both state and federal constitutional due process and equal protection as well as state

[35]In fact, no handwritten notes were disclosed whatsoever and because of the separate and continued effect of the court's refusal to require the State to provide a detailed inventory of handwritten materials and the conducting of an improper *in camera* inspection, Mr. Rose is denied a full and fair state postconviction proceeding.

statute and federal law. Mr. Rose has been denied a full and fair state postconviction proceeding.

ARGUMENT V

MR. ROSE IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING TO FULLY INVESTIGATE AND PREPARE HIS POST CONVICTION PLEADINGS IN VIOLATION OF ARTICLE 1, SECTION 9 AND HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, THE SPIRIT AND INTENT OF 28 U.S.C § 2254 AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND SPALDING V.DUGGER.

In all criminal proceedings, and most particularly in the defense of capital cases, attorneys, investigators, adequate time to devote to investigation and legal research, and sufficient funding to support the effort are required to effectively represent an accused or convicted person. Unfortunately, Mr. Rose has, through no fault attributable to him, been denied this effort and has therefore been precluded from proving his innocence of the convictions and/or sentences in this cause. During the critical investigative phases of the postconviction process, the former CCR was underfunded, understaffed, and over-worked to the point that effective legal representation was denied Mr. Rose due to State action. Undersigned counsel has had inadequate time to remedy these past wrongs thrust upon Mr. Rose.

Effective legal representation has also been denied Mr. Rose because public records from the various agencies were not provided to Mr. Rose's counsel, or if received, were incomplete in violation of Florida Statute, Chapter 119.

Pursuant to Florida Statutes (1997) section 27.001, the Office of the Capital Collateral Counsel-Northern Region is responsible for representing Mr. Rose in his application for post conviction relief. Mr. Rose is guaranteed effective representation during his post conviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Effective postconviction representation entails review of the entire record and an assessment of whether the trial was fair and whether trial counsel competently performed his/her duties under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In reviewing and investigating these issues, counsel often requires the assistance of various forensic experts, including mental health professionals, social work experts, cultural anthropology experts, DNA professionals, fingerprint/blood spatter/ballistics experts and other potential experts. Funds for hiring experts has been inadequate for Mr. Rose's case.

The cumulative effects of years of underfunding, the one year rule for filing Motions to Vacate, procedural changes in obtaining all necessary public records, the dismantlement of CCR and the creation of the Regional Counsels, continued underfunding even into the next fiscal year, and confusing legislative changes have rendered the delivery of capital postconviction legal services a haphazard and ineffective process which violates Mr. Rose's rights to substantive and procedural due process of law.

During Mr. Rose's representation by the former CCR, the funding crisis was aggravated by both the continuous warrant statute and the costs of certified mailing and the time limitations contained in Rule 3.852. Tolling by this Court necessarily occurred on a regular basis due to the lack of funding for the increased expenditures occasioned by State action.

On April 24, 1997, then CCR Michael Minerva withdrew authorization to incur any expenses on Mr. Rose's case and all others because budgetary projections indicated that CCR, contrary to state law, would run a deficit.

In Mr. Rose's case, former counsel resigned and Mr. Rose was unrepresented from mid-August 1997 until early November 1997. Mr. Rose has been denied his State guaranteed right to effective representation in capital postconviction by the denial of adequate counsel. Spalding v. Dugger, supra.

Additionally, passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) with its opt-in provisions reveals the intent of the federal government in securing full and fair hearings for state capital postconviction litigants. The AEDPA presupposes adequate resources, effective assistance of postconviction counsel, compliance with all principles of due process of law and a resulting full and fair hearing in state court. Mr. Rose has been continuously denied the rights presupposed by the AEDPA. To require Mr. Rose to plead and present his claims in the absence of full investigation due to

lack of resources and effective assistance of postconviction counsel is to deny him due process of law and jeopardize federal review of his claims denied in state court, particularly if the State of Florida prevails in its assertion that Florida qualifies as an opt-in state under the AEDPA.

ARGUMENT VI

FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER. FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

The lower court erred in denying Mr. Rose an evidentiary hearing on this claim. Judge Schaeffer stated:

> I'm not inclined, because I don't think it's necessary in light of their decision in Jones and Remeta, to undertake that unless I'm required to and I'm told to . . . .

(PC-R2. 790). In his Rule 3.850 motion, Mr. Rose pleaded facts that were not rebutted by the record, therefore he is entitled to an evidentiary hearing on his claim. Lemon v. State, 498 So. 2d 923 (Fla. 1987).

A. STATEMENT OF THE FACTS

It has been acknowledged that "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident'..." Provenzano, Slip op. at 10 (Harding, C.J., concurring, joined by Lewis, J.). This "dread anticipation" justifiably exists because recent history has

demonstrated that "human error...seems to plague" Florida's practice of judicial electrocution. Provenzano, Slip op. at 23 (Quince, J., concurring, joined by Wells, J.).

As Mr. Rose awaits his execution, he is tormented by images from past executions: fires within and without electrocution apparatus (resulting in extensive facial burning), extensive burning of flesh due to excessive saline dripping over the face and upper body of the condemned (not to mention extensive electrode contact burns of varying severity contingent upon electrode placement and current path), arcing burns inflicted on the condemned due to unpredictable current flow, the excessive tightening of straps such that human flesh and tissue are maimed prior to any electrical current being applied, asphyxiation during the pre-electrocution preparations, knowledge that pain and torment observed by Department of Corrections employees prior to the application of electrical current will continue unabated, and lingering death following electrocution occasioned by gasping breaths, continuing heartbeat, and brain stem activity.

The Department of Corrections' (DOC), manner of executing Florida's condemned by means of judicial electrocution unnecessarily exposes Mr. Rose to substantial risks of suffering and degradation through physical violence, disfigurement, and torment. These risks inhere in Florida's practice of judicial electrocution and have been repeatedly documented. Provenzano v. Moore, Slip op. at 43-44 (Shaw, J., dissenting, joined by Anstead, J.)("Not only was every execution in Florida accompanied

by the inevitable convulsing and burning that characterizes electrocution, but further, three executions in particular were marred by extraordinary violence and mutilation.")(footnote omitted)(citing Jones v. State, 701 So.2d 70, 82-88 (Fla. 1997)(Shaw, J., dissenting, joined by Kogan & Anstead, JJ.)); id., at 71 (Anstead, J., dissenting, joined by Kogan & Shaw, JJ.)("we know from actual experience that electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc)"); Buenoano v. State, 565 So.2d 309 (Fla. 1990)(fire purportedly caused by sponge); Jones v. State, 701 So.2d 70 (Fla. 1997); and Jones v. Butterworth, 691 So.2d 481 (Fla. 1997)(another fire purportedly caused by a sponge).

Persons such as Mr. Rose face an unconstitutional risk of being tormented, degraded and dehumanized by Florida's practice of botching judicial electrocutions. DOC employees will strap Mr. Rose into the electric chair, utilizing arm straps, leg straps, chest strap, chin strap and mouth strap. There is an unconstitutional risk that the force used, as well as the shape, placement and manner of securing the straps, will cause unnecessary pain, injury, and at least partial asphyxiation. Provenzano, Slip op. at 3, 5 (noting size and shape of mouth strap may be unnecessary and not "consistent with the functioning of the electric chair"); id. at 51 (Shaw, J., dissenting, joined by Anstead, J.)("In light of the placement of the mouth-strap, the positioning of the face-mask, and the flow of blood from his

nostrils, it is reasonable to conclude--as did Dr. Kirschner--that Davis was being smothered before he was electrocuted."). Such strap-related torment was observed in the recent executions of Judias Buenoano (flesh of her breast was pulled through and pinched by buckle of chest strap), Leo Jones (used pre-arranged signal to indicate straps were smothering him), and Allen Davis. The trial court in Provenzano acknowledged that an autopsy of Allen Davis revealed that "'the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of the electrical current to him.'" Provenzano, Slip op. at 49 (Shaw, J., dissenting, joined by Anstead, J.)(quoting from trial court order).

Although DOC employees will likely become aware that Mr. Rose is experiencing pain, is unable to breathe, that partial asphyxiation is causing his face to turn red, or that he is moaning, screaming and/or bleeding, they will likely do absolutely nothing to alleviate his suffering. Provenzano, Slip op. at 3 (noting that Allen Davis began to bleed from the nose "before the electrical current was applied to him")(emphasis in original); id., at 49-51 (quoting trial court order describing the bleeding and "screams," "moan," or "muffled sounds" detected by witnesses in the execution chamber and DOC employees' lack of reaction to same).

Once DOC employees and/or agents apply electricity to Mr. Rose, there is an unconstitutional risk that he will be subjected to further violence, pain, and lingering death. For example,

> [i]t is undisputed that, despite all best efforts, inmates have been observed breathing after the electric current has ceased. This indicates that brain stem activity has continued even after the application of electrical current.
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> ***
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> Although a factual finding has been made by two different circuit court judges that Florida's electric chair causes no conscious pain, these factual findings need only be made by a preponderance of the evidence. Despite [the Florida Supreme Court's] deferential standard of review to trial court's factual findings, the expert testimony submitted by Provenzano and the witness accounts of survival after electrocution does in fact involve conscious pain and suffering.

Provenzano, Slip op. at 82 (Pariente, J., dissenting, joined by Anstead, J.); see id. at 8 (Harding, C.J., concurring, joined by Lewis, J.)(noting "conflicting evidence in the record" regarding whether Florida's practice of judicial electrocution produces instantaneous unconsciousness).

Mr. Rose faces an unconstitutional risk of being disfigured and mutilated by Florida's electric chair. There is no question that Mr. Rose will be severely burned during the judicial electrocution. Provenzano, Slip op. at 43-44 (Shaw, J., dissenting, joined by Anstead, J.); id. at 71 (Anstead, J., dissenting, joined by Shaw, J.); id. at 81-82 (Pariente, J., dissenting, joined by Anstead, J.). Because the "human error" plaguing execution by electrocution in Florida is unpredictable

and changes from one execution to the next, it is impossible to predict precisely where the electrodes will be placed on Mr. Rose's head and leg. At a minimum, he will be disfigured and mutilated with burns extending through the full thickness of his scalp and leg. These burns will result in charred skin and tissue detaching from Mr. Rose's body.

Separate and distinct from the burns to his head and leg, Florida's practice of judicial electrocution places Mr. Rose at an unacceptable risk of being burned and scalded on his forehead and face. These injuries were inflicted upon Jesse Tafero, see Buenoano v. State, 565 So.2d 309 (Fla. 1990); Provenzano, at 35-36 (Shaw, J., dissenting, joined by Anstead, J.)("Tafero's eyebrows, eyelashes, and facial hair were burned when flames licked his face. See Jones, 701 So.2d at 87 (Shaw, J., dissenting)."), and Pedro Medina.[36] Jones v. State, 701 So.2d at 86 (Shaw, J., dissenting, joined by Kogan and Anstead, JJ.).

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[36] To the extent Respondents reacted to the Medina execution by adopting what purports to be an execution protocol, see Jones v. State, 701 So.2d at 77 ("future executions pursuant to the Department of Corrections' written...execution day procedures will result in death without inflicting wanton and unnecessary pain"), said reaction is not relevant to future executions. There have been five executions since the adoption of what purports to be a written execution protocol. The protocol-specified levels of voltage and amperage for specific periods of time in the execution process have not been followed or obtained during the relevant times in any subsequent execution. In Provenzano, this Court upheld the trial court's conclusion that although the conditions which actually existed during Allen Davis's execution were inconsistent with those called for in the protocol, the protocol was not violated. Id., at 5. Under such a standard, there is substantial risk that Mr. Rose's execution will result in unnecessary pain, disfigurement, torment, and lingering death.

DOC's practice of judicial electrocution also poses for Mr. Rose a constitutionally unacceptable risk of being disfigured by electrical burns to his groin, genitals, and pubic region. Provenzano, at 52 (Shaw, J., dissenting, joined by Anstead, J.)(quoting trial court's order finding that Allen Davis "had burns on his scalp and forehead, on his superpubic (sic) and right upper medial thigh region, and behind the right knee.")

In sum, DOC's manner of effectuating judicial electrocution necessarily entails substantial and constitutionally intolerable risks that Mr. Rose will become the victim of a "somewhat ghastly" display of violence, disfigurement, and degradation. A bare majority of this Court has disregarded those risks. Provenzano, Slip op. at 2-6 (noting, but not adjudicating, claim that pre-electrocution suffering and pre- and post-mortem mutilation violates the Eighth Amendment to the United States Constitution).

The severe psychological torment Mr. Rose suffers as he awaits execution has been heightened by this Court's prior opinions in Buenoano, Jones, and Provenzano. These opinions contain graphic descriptions of all the things that can and do happen to condemned inmates during judicial electrocution in Florida. Color photographs of Allen Davis's grimacing face and bloodied nose and shirt have been published in the most recent opinion. Mr. Rose must await his imminent meeting with Florida's electric chair with these pictures firmly imprinted in his mind, acutely aware of the evidence of what will be done to his body,

and in legitimate and substantiated fear that what is typically unseen under the death mask--the excruciating pain intrinsic to Florida's use of judicial electrocution--will happen to him. Perhaps a contributing cause of his excruciating pain will be a headpiece fire or leg electrode malfunction. Perhaps a contributing cause will be suffocation by a face strap. Perhaps a contributing cause will be burns ignited by saline solution carelessly soaked into his face, upper body and clothing. Perhaps a contributing cause will be negligent placement of the electrode on his head. Perhaps a contributing cause will be unexpected and unanticipated body resistance and arcing burns inflicted in his groin or other areas. Perhaps a contributing cause will be the absence of a meaningful protocol and unpredictable application of volts and amps. Perhaps a contributing cause will be DOC employees tightening the straps as tight as they can get them and ignoring signs of severe pain. Perhaps a new and as yet unrevealed contributing cause will surface during Mr. Rose's execution; a source of torment as yet uncontemplated.

This violates the Eighth Amendment to the United States Constitution.

B. ARGUMENT AND LEGAL AUTHORITY

Punishments violate the Eighth Amendment when they involve subjecting someone to an intolerable risk of the unnecessary and wanton infliction of pain, Helling v. McKinney, 509 U.S. 25 (1992), lingering death, In re Kemmler, 136 U.S. 436, 447 (1890),

or "something inhuman and barbarous--something more than the mere extinguishment of life," id., such as the denial of basic human "dignity, civilized standards, humanity, and decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976)(internal quotation marks and citation omitted), as through degradation and mutilation, Weems v. United States, 217 U.S. 349 (1910); Wilkerson v. Utah, 99 U.S. 130, 136 (1878), which are "repugnant to the conscience of mankind," Estelle, 429 U.S. at 105, quoting State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring), in turn quoting, Palko v. Connecticut, 302 U.S. 319, 323 (1937), and thus violate society's "evolving standards of decency." Trop v. Dulles, 356 U.S. 86 (1958). Punishments are also cruel when they entail exposure to risk that "serves no 'legitimate penological objective,'" Farmer v. Brennan, 511 U.S. 825, 833 (1994), quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984), and that are "simply not 'part of the penalty that criminal offenders pay for their offenses against society'" Farmer, 511 U.S. at 834, quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981). See also Gregg v. Georgia, 428 U.S. 153, 182-183 (1976)(punishment must "comport with the basic concept of human dignity" and "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

Florida's manner of execution by means of judicial electrocution poses an "objectively intolerable risk of harm [to Mr. Rose]." Farmer, 511 U.S. at 846. See Provenzano, Slip op.

at 23 (Quince, J., concurring, joined by Wells, J.)("human error...seems to plague this form of execution" in Florida); id. at 53 (Shaw, J., dissenting, joined by Anstead, J.)(noting that "in three of twenty-three executions, i.e., in thirteen percent of executions, the prisoner was subjected to extreme violence and mutilation when the execution was botched"); id., at 82 (Pariente, J., dissenting, joined by Anstead, J.)("expert testimony submitted by Provenzano and the witness accounts of survival after electrocution raise serious questions that judicial electrocution does in fact involve conscious pain and suffering"). Exposing Mr. Rose to such risks, where the harms he would suffer are those from which contemporary society's standards of decency demand protection, violates the Eighth Amendment. Helling, 509 U.S. at 36; Farmer, supra: Estelle, 429 U.S. at 103.

Where procedures create "a substantial risk that [death] will be inflicted in an arbitrary and capricious manner," the Eighth Amendment is violated. Gregg, 428 U.S. at 188. Allowing DOC to inflict judicial electrocution on Mr. Rose in a manner that involves substantial risks of needless pre- and post-execution injury, disfigurement, degradation, and torment, where his sentence calls only for the extinguishment of life, violates the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality opinion); Beck v. Alabama, 447 U.S. 625, 637 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118-119 (1982)(O'Connor, J., concurring).

It is beyond dispute that where a human being has been condemned to death for criminal behavior, the "State's only legitimate interest is in the extinguishment of life." Provenzano, Slip op. at 80 (Pariente, J., dissenting, joined by Anstead, J.); Kemmler, supra. The violence, disfigurement and degradation inflicted on the condemned through Florida's practice of judicial electrocution are something beyond mere extinguishment of life and are not legitimate parts of the penalty which the condemned must pay. They, therefore, violate the Eighth Amendment. Kemmler; Farmer, supra. See also Weems, supra, Wilkerson, supra (gratuitous degradation and disfigurement violate Eighth Amendment).

The risks of violence, pain and partial asphyxiation, and the torment those risks entail are not necessary to successfully carry out a judicial electrocution. Inmates do not routinely catch fire, bleed, continue to breathe, scream, moan, try to speak or otherwise attempt to react to execution-related pain in other states employing judicial electrocution. Although these things need not occur in Florida, officials of the State of Florida are deliberately indifferent to their occurrence. For example, in Georgia a small football strap is used instead of the five-inch wide mouth strap or "chin strap" utilized by Florida officials. Former Georgia death row warden Walter Zant testified in the circuit court proceedings in Provenzano that the large strap used in Florida is not necessary to a judicial electrocution and further testified (upon viewing a photo of

Allen Davis) that Georgia would never use a device that restricted the inmate's air flow. Thus, this Court suggested that "it may be appropriate for DOC to revisit...the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair," although the Court ultimately held that DOC was not constitutionally required to do so. Provenzano, Slip op. at 5. Although Superintendent Crosby testified that he did not think it was necessary to strap inmates into the electric chair as tightly as possible, his employee who strapped Allen Davis into the electric chair testified that he tightened the mouth strap as tight as he could. This strapping and resulting partial asphyxiation of Allen Davis was unnecessarily violent and unquestionably painful. Therefore, it violated the Eighth Amendment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947)("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of a death sentence.") Similarly, former death row warden Zant testified that Georgia utilizes much lower levels of current to avoid mutilation of the inmate. Similarly, prison officials of other states acknowledge that use of high levels of current, such as those used by DOC in a judicial electrocution, creates an unnecessary risk of disfiguring burns. Deborah W. Denno, Getting to Death: Are Executions Constitutional?, 72 Iowa L.Rev. 319, 421 (1997)(Virginia prison officials stated they decided not to use higher currents in an effort to eliminate "the burning of the body that happened in the old high voltage system"). Exposing

Mr. Rose to these risks of violence, asphyxiation, torment, disfigurement and mutilation through DOC's manner of judicial electrocution serves no legitimate penological objective, and DOC has never claimed otherwise. Leaving Mr. Rose exposed to these risks--despite their thorough documentation from prior executions--violates the Eighth Amendment. See Farmer, 511 U.S. at 833.

Moreover, "society considers the risk[s] that [Mr. Rose] complains of to be so grave that it violates contemporary standards of decency to expose **anyone** unwillingly to such [risks]." Helling, 509 U.S. at 36 (emphasis in original). Not even an ill or unwanted dog may be killed by means of electrocution. Provenzano, Slip op. at 57 (Shaw, J., dissenting, joined by Anstead, J.)(noting that "both the Humane Society of the United States and the American Veterinarian Medical Association condemn electrocution as a method of euthanasia for animals").

C. CONCLUSION

Based on the foregoing reasoning and citation of legal authority, Mr. Rose is entitled to an evidentiary hearing so that he can prove his claims.

ARGUMENT VII

THE STATE OF FLORIDA FAILS TO AFFORD MR. ROSE A CLEMENCY REVIEW PROCESS WHICH COMPORTS WITH DUE PROCESS. THE PROCESS OF CLEMENCY REVIEW IN FLORIDA VIOLATES MR. ROSE'S FOURTEENTH AND EIGHTH AMENDMENT RIGHTS.

Mr. Rose has a continuing interest in his life, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution. See Ohio Adult Parole Authority, et al. v. Woodard, 118 S. Ct. 1244, 1253 (1998) (Justices O'Connor, Souter, Ginsburg and Breyer) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life.") This constitutionally protected interest in ones' own life does not die with the conclusion of the trial, but remains with the individual until the ultimate sentence has been carried out. Id. at 1254.

Florida's clemency scheme fails to adequately protect Mr. Rose's continuing interest in his own life, as safeguarded by the due process clause of the fourteenth amendment. As Woodard makes clear, Florida, via state action, can not disregard Mr. Rose's continuing interest in his life. Id. The scheme created by the state of Florida for reviewing whether Mr. Rose should be granted clemency insufficiently protects Mr. Rose's continuing interest in his life.

Florida's clemency scheme violates Mr. Rose's eighth amendment right to be free from the arbitrary and capricious execution of his sentence. Florida's constitutionally infirm clemency scheme renders Mr. Rose's execution arbitrary and capricious, in violation of his eighth amendment rights.

The State's withholding of material in its possession regarding clemency proceedings, which this Court permitted, renders postconviction counsel and this postconviction proceeding

incapable of protecting Mr. Rose's rights or providing Mr. Rose a full and fair state postconviction proceeding. Counsel cannot investigate this claim due to State impediments. Those impediments include the Florida Parole Commission's refusal to disclose requested materials, including exculpatory materials pertaining to clemency proceedings.

ARGUMENT VIII

THE RULES PROHIBITING MR. ROSE'S LAWYERS FROM INTERVIEWING JURORS TO EVALUATE WHETHER CAUSE EXISTS TO WARRANT RELIEF DUE TO JUROR MISCONDUCT, IN COMBINATION WITH THE STRICT DUE DILIGENCE BURDEN IMPOSED BY THIS COURT UPON POSTCONVICTION LITIGANTS REGARDING JUROR MISCONDUCT CLAIMS, VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Florida Rules of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications, or cause another to initiate communication with any juror regarding the trial. This rule denies due process to defendants such as Mr. Rose. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F. 2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent or otherwise unqualified to serve has a difficult task. This ethical rule unconstitutionally prevents Mr. Rose from

investigating any claims of jury misconduct that may be inherent in the jury's verdict.

The United States Constitution, through the Eighth and Fourteenth Amendments, require that Mr. Rose receive a fair trial. He is prevented from fully detailing the unfairness of his trial by operation of Rule 4-3.5(d)(4). This rule prohibits Mr. Rose from fully exploring possible jury misconduct and bias. Misconduct may have occurred that Mr. Rose can only discover by juror interviews. Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th Cir. 1987).

Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

This Court has recognized that overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. AllState Insurance Co., 652 So. 2d 354 (Fla. 1995). It is imperative that postconviction counsel be permitted to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room.

Furthermore, the failure of jurors to truthfully respond during voir dire has been the basis for relief in other jurisdictions, as well as in Florida. United States v. Scott, 854 F.2d 697 (5th Cir. 1988); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); Freeman v. State, 605 So. 2d 1258 (Ala. Cr. App. 1992). This Court held:

> Similarly, we find that the trial court here acted well within its authority in concluding that the Juror's failure to disclose his prior history of litigation deprived Dela Rosa of a fair and impartial trial.

Dela Rosa v. Zegueira, 659 So. 2d 239, 241 (Fla. 1995). See also, Skiles v. Ryder Truck Lines, 267 So. 2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So. 2d 253 (Fla. 1973).

The responsibility and burden imposed upon postconviction counsel to discover and plead juror misconduct which disqualifies him or her from service has recently evolved into one of strict due diligence. In Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998), this Court condoned the execution of Ms. Buenoano despite the fact that one of the jurors who served on her capital jury

had been convicted of manslaughter and was not completely candid and honest in this regard during jury selection. The Court relied upon one obscure response on the juror's written questionnaire as being sufficient to place postconviction counsel on notice of the potential disqualification issue. The Court imposed a burden of strict due diligence upon postconviction counsel to discover such juror misconduct and ignored the severe restrictions imposed upon postconviction counsel due to the above-referenced Florida Bar rule prohibiting juror interviews. The combined effect of the Buenoano decision and the prohibition on juror interviews is to violate Mr. Rose's right to Due Process of Law, right to Equal Protection of the Law, right to Free Speech, right to be tried by an Impartial Jury, and right to be free of Cruel and/or Unusual Punishments. Moreover, this rule renders collateral counsel and state court postconviction proceedings incapable of protecting Mr. Rose's rights, including the right to a full and fair state postconviction proceeding.

Mr. Rose requests that this Court declare this ethical rule invalid as conflicting with the Eighth and Fourteenth Amendments to the United States Constitution, and to allow Mr. Rose discretion to interview the jurors in this case. The failure to allow Mr. Rose the ability to freely interview jurors is a denial of access to the courts of this state under Article I, Section 21 of the Florida Constitution and deprives him of due process.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record on appeal, appellant, MILO A. ROSE, urges this Court to reverse the lower court's order denying postconviction relief and remand for an evidentiary hearing.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 19, 1999.

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