IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-964

THOMAS M. OVERTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.851 relief following a limited evidentiary hearing, as well as various rulings made during the course of Mr. Overton's request for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

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

"T" -- transcript of original trial proceedings;

"PCR" -- record on postconviction appeal;

"PCT" – transcript of postconviction proceedings.

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

REQUEST FOR ORAL ARGUMENT

Mr. Overton has been sentenced to death. The resolution of the issues 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 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 states at issue. Mr. Overton, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On August 22, 1991, Michael MacIvor and his wife Susan MacIvor were found murdered in their Tavernier Key home. Michael MacIvor had been strangled and suffered blunt head trauma, causing a deep gash over an inch long. Susan MacIvor, who was eight-months pregnant, was found naked, bound and strangled in the bedroom (R. 1). Police collected the bedding for DNA testing. Hair also was collected (T. 3852-3; 3856-7). Tire tracks and shoe prints were found in the sand outside the home and castings were made (T. 3208, 3253-4). Partial palm prints were found on a pipe in the kitchen (T. 3256). Latent fingerprints were found on a cellophane tape wrapper police believed was used by the perpetrator (T. 3309, 3030-4262). A .22 caliber shell casing was found in the home, and a bullet hole discovered in the wall (T. 3309, 4510).

An investigation began, involving the Monroe County Sheriff's Office, Florida Department of Law Enforcement (FDLE), Federal Drug Enforcement Administration (DEA), U.S. Customs, the Federal Bureau of Investigation (FBI) and other agencies (T. 4400-1; 4413; R. 768). The crime became one of the most highly publicized in the Florida Keys (R. 742-834). Newspaper articles, TV crime re-enactments and billboards were published offering rewards for

information on the crime (T. 4426; R.768, 777, 831). "Brainstorming" sessions were held to come up with names of people to eliminate as suspects. Forensic evidence was sent to a psychic in Orlando for her assessment of the killer (T. 3513-4).

Police received leads that the murders were drug-related (R. 786). Before the murders, Michael MacIvor flew to Belize to buy an airplane the government had seized in a drug trafficking bust (T. 4326, 4331, 4358). Mr. MacIvor was to return to Belize the day after the murder to retrieve the plane (T. 4331). Mr. MacIvor's neighbor, Joiy Holder, testified that the last time he saw Michael he intimated that he needed to borrow money, but he ultimately did not (T. 3075). Police could not trace the $13,000 that MacIvor had used as payment to purchase the airplane (T. 4432). Police learned that MacIvor went to a jungle airstrip in Belize and stayed there for several days (T. 4361) and that Colombian brothers, Nestor and Ivan Clavejo, bought a Cessna 404 Titan plane from him. He received $250,000 as a down payment. MacIvor's bank records showed no such deposit (T. 4402, 4429-4430). Police were unable to locate the Clavejos (T. 4420). Mr. Codekas, the source for this lead, later told police he lied to get a deal (T. 4403, 4430).

Thomas Overton was on a list of possible suspects because he was known as a "cat burglar." He had no history of sexual offenses, but had been a suspect in the murder of Rachel Surrette.

He was never charged in that crime (T. 513-14; 1188). In 1991, Mr. Overton lived on Tavernier Key and worked at an Amoco gas station near the MacIvor home (T. 4428). He was on the FBI "brainstorming" list in 1992, but police did not investigate his whereabouts on the night of the crimes (T. 4385-88; 4413-5). Amoco destroyed its 1991 employee records in 1993 (T. 4428).

The police focused on Mr. Overton, counsel argued, in retaliation for a complaint he filed against Detective Charles Visco in 1990 for illegally confiscating his car. Detective Visco was an investigating officer on the MacIvor case (T. 4196-7, 4300). He also knew and contacted Mr. Overton's girlfriend, Lorna Swaybe, six times in less than six months in 1990-1991 for reasons that were never explained (T. 4348, 4364-5). Ms. Swaybe died of AIDS in April 1994 (T. 4418-20). The defense argued that Detective Visco may have been the officer who collected used condoms from Ms. Swaybe to plant Mr. Overton's semen on the bed sheets in the 18 months the sheets were not documented by Dr. Pope (T. 4734-6).

Police had no probable cause to arrest Mr. Overton or force him to give them a DNA sample (T. 503-4, 514). In 1993 or 1994, police began using confidential informants to implicate Mr. Overton in unrelated crimes in the hope of obtaining a blood sample(T. 516-17; 3316). One informant was wired and tried to sell Mr. Overton an illegal "Uzi" firearm. He failed (T. 3316-17). In October,

1996, a confidential informant helped police arrest Mr. Overton for a trailer burglary (T. 503-4). Police promised to release him in exchange for a blood sample. Mr. Overton refused. Mr. Overton had been diagnosed depression and attempted suicide in the past. He was locked in an isolation cell under suicide watch (T. 525, 560, 573). He was told he faced life in prison on the burglary charge. Mr. Overton requested a razor blade and was given one. While in the shower, he sliced his neck (T. 526, 535-6, 553). Police took bloody towels from the suicide attempt and sent them to FDLE for DNA testing (T. 512, 537). Police never informed Mr. Overton he was suspected in the MacIvor murders (T. 505).

Mr. Overton was arrested on November 19, 1996, five years after the crimes, for the MacIvor murders and indicted on two counts of first-degree murder; the killing of an unborn child; burglary of a dwelling with assault or battery on occupant; and sexual battery with force likely to cause serious bodily injury (R. 8-15). The State's evidence against Mr. Overton included two DNA tests that matched his blood to the semen found on bed sheets and the testimony of two jailhouse informants (T. 3701-3808; 3863-4122; 4139-4244).

Mr. Overton repeatedly maintained his innocence (R. 2). His theory of defense was that the DNA tests either flawed or the DNA had been planted (T. 1166). The defense argued that the 1991 crime

scene evidence had been mishandled, contaminated and compromised. It argued that the semen stains FDLE tested may have been supplied by a spermicidal condom given to police by Lorna Swaybe and planted on the clippings taken of bed sheets (T. 3936; 4364-5; 4729; 4730; 4734-6).

The case was assigned to Judge Shea on December 2, 1996 (T. 1). The Public Defender withdrew. Judge Shea appointed Mr. Wolkowsky and Mr. Everett to represent Mr. Overton on December 10, 1996 (T. 19). On December 31, 1996, Mr. Wolkowsky moved to withdraw (T. 34). On February 18, 1997, Judge Shea appointed Mr. Everett as lead counsel and Jason Smith as co-counsel (T. 41). On April 25, 1997, Mr. Everett moved to withdraw (T. 96). Mr. Smith became lead counsel. On June 13, 1997, Mr. Garcia was appointed as co-counsel (T. 128).

The court experienced difficulty in getting effective counsel to represent Mr. Overton (R. 196-199). In frustration, Judge Shea recused himself after writing a memo critical of counsel's preparedness. Circuit Court Judge Mark H. Jones took over the case on October 3, 1997.[1]

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[1]Judge Jones first required the attorneys to recite their qualifications. Both sides disputed Judge Shea's memorandum and said they had been diligent (T. 185). Mr. Overton believed that the attorneys had done as much as they could with the volume of discovery (T. 185). Judge Shea's findings were vacated by Judge Jones, who stated that Mr. Overton had received effective

In preparing for trial, the State requested DNA testing. In June, 1993, FDLE serologist Dr. Robert Pollack received bed sheet clippings from the Monroe County Sheriff's Office. He used the RFLP method of DNA testing to extract DNA from the bed sheet (T. 3890-1). He extracted DNA from two of ten cuttings and developed a DNA profile at 5 loci that he compared to Mr. Overton's blood sample (T. 3876-7; 3942; 3953-4). Dr. Pollack said the profile "matched" Mr. Overton (T. 3949-50; 3955-3960; 4021). Dr. Pollack conceded that RFLP testing cannot measure the exact size or composition of the DNA fragments. A match is declared when the bands are "close enough" in to fit the lab's "match window." (T. 3981). The "match window" varies depending on the lab. Some labs refuse to interpret bands that exceed 10,000 base pairs in length. One of the five loci in Mr. Overton's case exceeded the 10,000 base pair limit (T. 3997; 4018-9).

The State sought a second DNA test in June, 1998 by Bode Technology (Bode), a private laboratory. This test involved STR DNA which FDLE did not do (T. 462, 1068-9). Both parties agreed that the State could conduct the first STR test and the defense could perform its own on the remaining evidence. The defense believed the presence of nonoxynol, a substance in spermicidal

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representation (R. 214-15).

condoms, would prove that the semen had been planted on the bed sheet (R843; T. 592-3; 773; 815-16; 4493-4).

Philip Trager, an expert in pharmaceutical products, was hired by the defense to test the bed sheet clippings before Bode tested. He found that the bed sheet clippings made by Dr. Pope, a former veterinarian turned serologist with the Monroe County Sheriff's Department, contained 53 micrograms of nonoxynol-9 (T. 696; 4436-9). Defense expert Dr. Ronald Wright, a forensic crime scene expert, testified that it was "highly unusual" in a sex crime to use a condom. He concluded that the presence of 53 micrograms of nonoxynol-9 on the bed sheets suggested that the semen was obtained from a condom and planted on the bed sheets (T. 4493-95).

Two months before trial, the State, unbeknownst to the defense, made new cuttings from the bed sheets and sent them to defense expert Trager for nonoxynol testing (T. 653; T. 752, 809). On November 20, 1998, the State listed a new witness, Dr. Richard Oliver, a chemist with the company that manufactures nonoxynol-9 (R837; T. 950, 4589-91). On December 16, 1998, the State disclosed that one test was positive for nonoxynol. A second test found no detectable levels of nonoxynol (R. 653; T. 1189-90, 4440-41). The State intended to show that nonoxynol was a common ingredient in products like laundry detergent, and it also would show that the defense testing could not distinguish between laundry

detergent and spermicide (T. 956). The defense argued that failure to disclose this information precluded them from ruling out the MacIvor's household products (T. 1189-90) and it requested a defense expert because Dr. Wright was not a chemist and Mr. Trager had been co-opted by the State (T. 778, 953, 4461). The defense moved for a continuance for more testing or that the State's evidence be excluded because of its late disclosure (T. 2971). The judge denied all defense motions (T. 2970).

At the Frye hearing on January 7, 1999, four days before trial, the defense said they were unprepared because they did not have all the discovery and that the State withheld materials the defense expert needed to conduct testing. The defense asked for a continuance or to exclude the DNA evidence (T. 1019-1020). The judge denied the defense motion (T.1023) saying it could have conducted depositions prior to receiving the discovery (R954; T. 1168), and that the defense could have traveled to Bode in Virginia when the test results were first received (T. 1168).

The defense refused to participate in the Frye hearing because it did not have full discovery. The defense did not cross-examine a single State witness or call a single defense witness (T. 1019-1210). The DNA test results were ruled admissible and scientifically sound without a single challenge by the defense (T. 1021-23; 1017-1211). Jury selection began on January 11, 1999 (T.

1253), and trial began on January 20, 1999 (T. 2991).

Dr. Robert Bever, Bode's laboratory director, testified that he extracted DNA from bottom bed sheet cuttings and examined them at 12 loci using the STR DNA testing method. He concluded that the DNA matched Mr. Overton's blood sample(T. 4065-9; 4084-7). The probability of finding another Caucasian with an identical pattern was one in four trillion (T. 4088). Renewing his objection, the defense conducted a brief cross examination that did not address the testing procedures (T. 4091; 4094-4112). During closing argument, the State argued that both DNA testing methods and the scientific protocol they used proved that the semen on the bed sheet clippings belonged to Mr. Overton (T. 4712). The State also argued in closing that only it had done adequate testing for the nonoxynol substance.

The only other evidence implicating Mr. Overton came from two jailhouse snitches, Guy Green and James "Pesci" Zientek. Both were impeached with evidence of bias, motive and prior convictions. Both said Mr. Overton had confessed his involvement to them. Their testimony was inconsistent with each other and with the physical evidence gathered at the crime scene.

Green was a nine-time convicted felon incarcerated on burglary charges (T. 3702). He lost nearly five years of gain time by attempting escape, possession of drugs, sex acts, inciting riots

and lying to prison personnel (T. 3806). In 1996, police approached Green about Mr. Overton, who he had met in 1992. Green provided a statement (T. 3702; 3778-9). One year later, police promised to assist him in recovering his gain time if he testified against Overton. Police promised to write letters to the Department of Corrections on his behalf (T. 3780, 3804-5, 4420-2). Green testified that Mr. Overton confessed to the crime. In exchange, Green hoped to receive gain time and, if he did, he would be close to his release date (T. 3805-7). Green admitted lying in the past to receive benefits or to mislead people (T. 3781-2).

James Zienteck a.k.a. Pesci, Stonewall, Radrick, Gwavacki, Glowscki (Pesci) was a three-time convicted felon housed in jail at the same time as Mr. Overton's trial. His pending charges included sexual battery, sexual assault, robbery, grand theft auto and resisting arrest without violence (T. 4139-40). He admitted to being a liar who fabricated stories because he wanted to "feel special" and to have others view him as special (T. 4189, 4191-93). He faced 36 years because of the habitualization of his sentence. He testified that Mr. Overton had confessed to the crimes. In exchange for his testimony, Pesci would receive a plea deal capped at seven years to be served in a federal facility rather than a state prison. The deal provided for a sentence as low as five years (T. 4186-87). Pesci admitted not respecting the legal system and

considered himself very “clever” with the law. He knew how to set up a plan to get what he wanted from police (T. 4193, 4224). He worked undercover in the past and was aware of the publicity surrounding the MacIvor murders (T. 4198-9). Pesci saw crime scene and autopsy photos and read newspaper articles about the case (T. 4151, 4201, 4225). Mr. Overton never showed him any police reports. Pesci gave police three different statements, adding new information each time about conversations he had with Mr. Overton (T. 4424). Pesci called the F.B.I. immediately after his conversation with Mr. Overton in which he confessed to the crimes. After a few days, Pesci spoke with jail chaplain Judy Remley, wife of Lt. Remley of the Monroe County Sheriff’s Office, who runs the jail (T. 4205). He was on her “good side.”

Over defense objection, Chaplain Remley testified that Pesci came to her upset and crying and told her about Mr. Overton’s confession and how he committed the murders (T. 4248, 4253, 4350).

At the conclusion of the trial, Mr. Overton was found guilty of all counts (R. 8-15, T. 4882).

The penalty phase began on February 4, 1999. Mr. Overton refused to present any evidence in mitigation, or objections or closing argument (T. 4896; 4960; 4998). During the penalty phase, the State presented testimony from the victims’s mothers and siblings (T. 4930-4956). The defense presented no evidence (T.

4998). The jury recommended death by a vote of eight to four (8-4) for Michael MacIvor's death and nine to three (9-3) for Susan MacIvor's death (T. 5017). The judge sentenced Mr. Overton to death on both counts (R. 1190-1199).

Notice of Appeal was filed on April 22, 1999 (R. 1256). Mr. Overton's convictions and sentences were affirmed on direct appeal. Overton v. State, 801 So.2d 877 (2001). Certiorari was denied on May 13, 2002. Overton v. Florida, 535 U.S. 1062 (2002).

In post-conviction, Mr. Overton litigated extensively in public records. He requested from FDLE proficiency tests and competency practice casework of named personnel, and all documentation related to laboratory protocols, validation studies, accreditation studies, equipment maintenance logs, contamination logs and laboratory error rates from January 1, 1991 through December 31, 1999 (PCR. 139). In a December 13, 2002 hearing (PCR. 296-304), the court granted the request, but limited it to records showing a failing or unsatisfactory grade or rating on proficiency or competency tests. It allowed disclosure of negative reports, failures of validation studies, or loss of accreditation for the laboratories from November 21, 1996 to January 11, 1999 (PCR. 358). FDLE was given until February 3, 2003 to file the documents with the records repository (PCR. 357-359). Mr. Overton has still not received those documents.

On April 30, 2003, Mr. Overton timely filed his initial postconviction motion pursuant to Rule 3.851, Fla. R. Crim. P. (PCR. 534-607). He filed an amended motion on October 30, 2003. Mr. Overton filed a Demand for Additional Public Records, requesting that the Monroe County Sheriff's Office-Plantation Key, provide documentation on the use of in-house credit cards used by Sheriff's deputies for purchase of gasoline during a few weeks surrounding the time of the crime from the Amoco station where Mr. Overton worked (PCR. 1125-1127).

Mr. Overton filed a Motion for DNA testing of swabs taken from the female victim's body at the crime scene, and a hair found between taped bindings (PCR. 1128-33). Judge Jones granted an evidentiary hearing on claims of ineffective assistance of counsel, use of jailhouse informants and trial counsel's conflict of interest (PCR. 1178-1182). The court denied DNA testing on the majority of items requested by Mr. Overton. However, the court reasoned that it should grant DNA testing of the sexual assault kit and the fingernail scrapings. (PCR. 1190-1192). The judge also ordered the Monroe County Sheriff's Office to locate the documents of credit card gasoline purchases on the night of the crime (PCR. 1195-1196).

On July 28, 2004, the judge was told that FDLE testing of the DNA would take five months, while an independent lab in Seattle,

Washington could conduct the testing within two weeks (PCR. 1949-1950). The State objected and offered to contact FDLE to see if it could be expedited (PCR. 1950). The court refused DNA testing outside of FDLE (PCR. 1951).

On August 6, 2004, the State reported that FDLE could complete DNA testing within 60 days with a court order(PCR. 1986-1987). Both the sides agreed that scheduling an evidentiary hearing in 90 days should be sufficient (PCR 1189-1190). The judge continued the hearing until November 15-17 to allow DNA testing to be completed and the results to be given in writing prior to the hearing. The judge clarified that the DNA testing was to include the autopsy swabs of Mrs. MacIvor (PCR. 1197, 1971-1975). After this hearing, Mr. Overton realized he had inadvertently omitted a request for the testing of hairs found in the taped bindings of the female victim (PCR. 1955-1959). The judge denied the request (PCR. 1976-1979). This order is the subject of Mr. Overton's pending DNA appeal.[2] Mr. Overton filed a motion to stay the evidentiary hearing (PCR. 2172-2174).

At a September 24,2004 hearing, Mr. Overton explained that hurricane delays resulted in insufficient time for the DNA results to reach the parties before the scheduled evidentiary hearing. He

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[2] Case No. SC04-2071; Consolidated with the instant appeal by July 21, 2005 order of this Court.

requested to continue it until the DNA results were available to both parties (PCR. 2189-2190).[3] The trial court denied the request and entered an order on October 25, *nunc pro tunc* to September 24, 2004 (PCR. 2402-2403).

Mr. Overton filed an Emergency Petition for Extraordinary Relief, a Writ of Prohibition and a Writ of Mandamus and Request for Stay of Hearing Scheduled for November 15-17, 2004, asking that the evidentiary hearing be postponed until the DNA appeal which was before this Court was resolved.[4] The petition was denied without prejudice on October 28, 2004 by this Court. Between the time Mr. Overton requested a stay in the trial court and the filing of an extraordinary writ with this Court, Mr. Overton filed a third amended postconviction motion on October 8, 2004 (PCR. 2261-2338; 2202-2260).

Immediately before the evidentiary hearing on November 15, 2004, Judge Jones summarily denied the ineffective assistance of counsel claim for failing to request a Richardson hearing but granted a hearing counsel's failure to object to the pre-indictment delay--reversing his prior ruling (PCT. 22-23).

The evidentiary hearing began with the testimony of trial

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[3] The Record on Appeal contains the handwritten "Court Minutes", but does not contain a transcript of this proceeding.

[4] Case No. SC04-2018, filed October 20, 2004.

attorney, Manuel Garcia, who had been an attorney for six years before representing Mr. Overton. Mr. Garcia had never tried a capital murder case, but had handled one second-degree murder that resulted in a plea (PCT. 38). Although he had tried five felony trials, he had more experience with personal injury cases. Mr. Garcia came on board to assist lead counsel, Jason Smith. Mr. Garcia was responsible for investigating and gathering evidence while Mr. Smith's duties were to concentrate on the DNA (PCT. 39, 45). Mr. Garcia discussed the reliability of DNA evidence with Mr. Smith, and they decided not to present evidence or question the DNA evidence at the Frye hearing because they had incomplete discovery. He denied being advised by anyone not to question the experts. (PCT. 46-47).

Mr. Garcia saw Mr. Overton at the A dorm in lockdown at the Stock Island Jail. Mr. Overton's cell as a small single cell with a cot and toilet, which was kept locked when Mr. Overton was inside (PCT. 54-55). During legal visits, counsel were placed in a room across from Mr. Overton's cell and they could see the cell door was left open while he and his client were meeting (PCT. 56). He saw Pesci walking near the attorney room when he consulted with Mr. Overton. It appeared that Pesci walked freely throughout the jail, and was a trustee (PCT. 56-58). At trial, informant Pesci denied having access to Mr. Overton's cell, yet his testimony went

unchallenged by the defense. Mr. Garcia said he did not believe he needed to put himself on the witness list to counter Pesci's testimony (PCT. 71).

Mr. Garcia testified that he would visit Mr. Overton often while preparing for trial. During these visits (PCT. 55), Mr. Overton would be brought from his cell in Dorm A, to another room set up for attorney visits (PCT. 56). Mr. Garcia said that he could see Mr. Overton's cell door was left open while they were visiting (PCT. 56-57), and on more than one occasion he saw Pesci having free access, with no restrictions, walking around the lock-down dorm "A" (PCT. 58). When questioned by the judge about the significance of Pesci having access, Mr. Garcia said that copies of the trial files and the discovery were in Mr. Overton's cell. If Pesci had access to Mr. Overton's cell, as it appeared he did from counsel's observations, then Pesci could have read the discovery about the crime scene and police investigation. These details were available in the police reports and depositions left in Mr. Overton's cell (PCT. 92-93). Mr. Garcia agreed that had he been able to establish Pesci's access to the cell that it would have been "very damaging" to his credibility (PCT. 93).

Mr. Garcia said Mr. Overton repeatedly maintained his innocence from the beginning. The defense focused on problems with the DNA chain of custody. Mr. Garcia found there was a break in

the chain when he analyzed the property receipts attached to the biological material that was tested (PCT. 63). After realizing the chain of custody problems, they pursued a defense that the semen samples had been planted by the police (PCT. 63). The defense pursued this avenue despite alibi evidence.

Mr. Overton was denied a hearing on his claim that his trial attorneys were ineffective for failing to investigate his alibi defense.[5] While Mr. Overton was not allowed to question the witnesses on this area, the State and the judge were allowed to cross examine Mr. Garcia about it (PCT. 75-77). This claim is before this Court on the merits (PCT. 95-96). Because the trial judge summarily denied the claim, postconviction counsel did not have the opportunity to present evidence or prepare questions on this claim.

Lead attorney, Jason Smith, had been an attorney since 1986 and was first appointed to work with former lead counsel, Mr. Everett (PCT. 144-146). Mr. Smith was initially the second chair, and was primarily responsible for the penalty phase (PCT. 147). Once Mr. Everett left the case, Mr. Smith became lead attorney. Mr. Garcia was to deal with issues regarding experts other than DNA

[5] Cf. Order from Case Management Conference (PCR. 1178-1182), and transcript of Case Management Conference (PCR. 1198-1267, at 1221)

(PCT. 151) and was responsible for the defense crime scene analyst, Dr. Ronald Wright (PCT. 152). Mr. Smith testified that he supervised Mr. Garcia's preparation and investigation of the case (PCT. 153).

Mr. Smith said he considered an alibi defense but was unable to find specific witnesses. Records from the Amoco gas station where Mr. Overton worked had been destroyed. They were given names of Mr. Overton's co-workers, but he did not recall contacting them. Nothing useful came from that investigation. (PCT. 159-160).

Mr. Smith hired Dr. Litman as a defense expert to review the discovery and give the attorneys background on the DNA process, educate them and develop questions for trial (PCT. 153-154). The defense also retained Dr. Wright, a crime scene and cause-of-death expert, who was hired to evaluate the police investigation (PCT. 155). Mr. Smith said these defense experts were important in dealing with the chain of custody problems. Despite such beliefs, Dr. Litman was not called as a defense witness because he could not form an opinion without the necessary documents from Bode (PCT. 188). For that reason, Mr. Smith did not present evidence or cross-examine the State's witnesses at the Frye hearing. He said cost was not a factor, but he did not have adequate discovery to conduct the Frye hearing(PCT. 158-159).

Mr. Smith was told by Dr. Litman that they could not do an

adequate job with the discovery they had received in the case. Dr. Litman was unable to advise the defense on how to proceed. Mr. Smith said they "chose" not to participate (PCT. 158-159). During cross-examination, Mr. Smith agreed that had the STR DNA results been kept out by any questioning he may have done at the Frye hearing, he thought the RFLP DNA results would have been admitted (PCT. 175, 758).

With regard to Pesci, Mr. Smith said inmates were not supposed to freely roam the cellblocks, yet he saw Pesci walking freely in the lock-down area (PCT. 168). He saw Mr. Overton's cell door left open during their legal visit (PCT. 168). Mr. Smith did not question Pesci about it at trial (PCT. 169).

Mr. Overton also called F.K. Jones, former Monroe County detective, who processed the crime scene and communicated with the victims's family. His assignment was to eliminate Mr. Overton as a suspect, and get a rap sheet on Michael MacIvor (PCT. 100-121).

Mr. Phil Harrold, former Monroe County officer attended the profiler's meetings with other detectives and was also assigned the task of eliminating Mr. Overton as a suspect(PCT. 122-125).

Mark Andrews, another former Monroe County detective and a crime scene investigator, processed the scene and found latent prints. He videotaped the scene and expressed concerns about the decision to cancel FDLE from processing the scene. He verified

that Charles Visco contacted Lorna Swaby (PCT. 196-226).

Detective Charles Visco of the Monroe County Sheriff's Office, testified that the early theory of the case was that the murders were the result of a drug hit. MacIvor's brother was afraid to go home and he suspected the brother knew something about the murders. The detective knew about Michael MacIvor's purchase of an airplane in Belize, and he interpreted the trip to Belize as part of a drug murder. He attended profiler's meetings where potential suspects were discussed and the course of the investigation was established. Before this crime, Visco had investigated Mr. Overton for the murder of Rachel Surrette, but could find no evidence linking him to the murder. Visco contacted Mr. Overton's girlfriend, Lorna Swaby, on a number of occasions, but did not investigate whether Mr. Overton was working the night of the crime (PCT. 251-279).

Detective Jerry Powell was in charge of the homicide squad for the Monroe County Sheriff's Office. He testified that police believed the murders were drug related (PCT. 285). Detective Powell learned that Michael MacIvor had been arrested for drug smuggling in 1987. Detective Powell testified that Michael MacIvor's name "pops up" on every state and federal law enforcement intelligence bulletin as a drug runner (PCT. 289). Detective Powell received information that Michael MacIvor had done work for a "drug smuggler from Costa Rica" (PCT. 292-293).

Detective Powell investigated the possibility that the MacIvor murders were related to Michael MacIvor's purchase of a plane from Belize (PCT. 306-307). The plane had been confiscated in a drug bust. Detective Powell also investigated statements from informant Mr. Codekas, who said that a man named Clavijo had confessed to the homicides (PCT. 307-308). Mr. Codekas later recanted his story after being told he'd have to testify against the Clavijo brothers (PCT. 308).

Detective Powell discussed the decision to cancel an early request that FDLE take over the investigation and processing of the crime scene. He investigated other potential suspects, the frightened reaction of Mr. MacIvor's brother, the profiler's meeting and the elimination of Mr. Overton as a suspect. He testified about the lack of investigation into Mr. Overton's employment records that would show whether he was working at the time of the murders (PCT. 280-315).

Scott Daniels, an FDLE special agent, was assigned to assist Monroe County in homicide investigations in 1992. He did not become involved in the case until six months after the murders (PCT. 516). His job was to explore whether the murders were drug related, establish the MacIvors criminal history, attend profiler's meetings and assist in eliminating Mr. Overton as a suspect.

Agent Daniels attempted to obtain employment records of Mr.

Overton from the Amoco gas station and he interviewed former Amoco employees in 1996. He placed a tracking device on Mr. Overton's car in 1995, and interviewed other drug trafficking suspects. He obtained handwritten notes from Pesci about the details of the crime as they had purportedly been given to him by Mr. Overton (PCT. 515-568).

Agent Daniels identified Pesci's handwritten notes explaining his conversations with Mr. Overton.[6] In these notes, Pesci wrote that Mr. Overton had: "Dominoe's Pizza, Key Largo, robbed at gun point, wore military camoflage fatigues w/gloves, a Ninja mask, black watch, reversed so the face of the watch is obscured" (PCT.536). Pesci misspelled the name of the pizza parlor and the word camouflage (PCT. 526).

Agent Daniels reviewed a report written by Detective Andrews about an armed robbery of Domino's Pizza (PCT. 538)[7]. Agent Daniels admitted that Pesci's handwritten notes and the report were "very similar" even down to the misspelled name "Domino's" and the word "camouflage." Both words were misspelled in exactly the same way (PCR. 539).

Agent Daniels was questioned about inmate phone records from

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[6]These were admitted into evidence as Defense (Composite) Exhibit 16.

[7] This report was admitted into evidence as Defense Exhibit 5.

various institutions where Pesci was housed while incarcerated. The records showed that Agent Daniels had been listed as Pesci's attorney and friend (PCT. 549, def. ex. FF). Judge Jones ruled that this evidence was inadmissible hearsay (PCT. 550).

On cross-examination, Agent Daniels said he cautioned Pesci to have no further contact with Mr. Overton and not to elicit statements from him (PCT. 560-561). On redirect, Agent Daniels admitted that he had not warned Pesci not to go into Mr. Overton's cell and look at his papers (PCT. 568).

Detective Larry O'Neill of the Monroe County Sheriff's Office, testified that he investigated the murder as a possible drug crime. He identified his report showing that another person had confessed to the crimes (PCT. 570-585, def. ex. 17). On cross-examination, Detective O'Neill explained that he had interviewed the person who had confessed to the crime but had denied any involvement (PCT. 585). After the man's denial, he conducted no further investigation into this suspect.

Mr. Overton also called two expert witnesses, Dr. Randall Libby and Dr. Arkady Katsnelson. Dr. Libby, a neurogeneticist, testified about the acceptable scientific standards for the preparation of biological material for DNA testing and how the failure to follow such protocols renders the testing unreliable (PCT. 316-424). He testified about the importance of the chain of

custody(PCT. 368-369).

Relying on the National Research Council's (NRC) publications, the scientific publications relied on by experts in the field of DNA forensic science, Dr. Libby and FDLE's Dr. Pollack both opined that only an intact chain of custody can DNA results be probative of a defendant's presence at the scene of a crime (PCT. 374).

Mr. Overton presented the testimony of Dr. Katsnelson, a certified forensic pathologist, former medical examiner and director of pathology services in Connecticut, who reviewed the records and photographs of the crime scene. Dr. Katsnelson disagreed with the cause of death of Michael MacIvor and believed that his body had been moved. Dr. Katsnelson opined that the physical evidence, observations by the medical examiner, and photographs suggested that Mrs. MacIvor had not been sexually assaulted (PCT. 425-441).

David Smerek, the former manager of the Amoco gas station where Mr. Overton worked, testified about Amoco's policy that employees could not leave the premises without someone at the station knowing about it. He testified about Mr. Overton's work schedule and that he worked the night shift (PCT. 227-238).

By the time he was contacted in this case, Mr. Overton's work records had been destroyed (PCT. 233-235). Mr. Smerek said that the Monroe County Sheriff's Office contracted with Amoco gas to buy

gas from his station, and officers used credit cards to buy gas. When an officer filled up his car with gas, company policy dictated that the employee on duty would initial the officer's gas receipt so that Amoco would know which employee waited on the officer (PCT. 231-232). The Monroe County Sheriff's Office allegedly destroyed all of its receipts for gasoline on September 11, 1995 (PCR. 2991). However, in the document attached to the affidavit by the General Counsel to the Monroe County Sheriff's Office, there is nothing showing that gasoline receipts had in fact been destroyed (PCR. 2992). Mr. Overton was not arrested for these crimes until November 19, 1996.

Sammie (Catherine Margaret Samantha) York, a former co-manager of the Amoco station, testified to Mr. Overton's work pattern at the time of the crimes, and the station's policies (PCT. 239-245). She had access to employment records a year after the homicides, but she was not contacted until 1995 (PCT. 249). Ms. York also witnessed an incident at the Amoco station between a Monroe County Sheriff's Officer and Mr. Overton (PCT. 242).

Lori Figur, a former Amoco employee, testified to the work shifts at the gas station. She was first contacted by investigators a few years after the murders but was never contacted by Mr. Overton's trial counsel (PCT. 442-451). None of these witnesses could recall whether Mr. Overton was working on the date

of the crimes.

Mr. Overton testified about his duties during the night shift at the gas station. One week after the murders, Detective Visco questioned him about his whereabouts on the date of the crimes, August 22, 1991 (PCT. 596). Mr. Overton showed the detective his time card that verified he was working at the time of the crime. Upon seeing the verification in the time card, Detective Visco left.

Prior to this visit, Mr. Overton had previous dealings with Detective Visco, who also investigated the murder of Rachel Surrette (PCT. 599-601). Mr. Overton said he was often harassed by police, and his car was confiscated by police (PCT. 602-609). He had filed an internal affairs report against Detective Visco for illegally confiscating his car (T.4196-7,4300).

Even though the defense attempted to elicit testimony before the jury of Detective Visco's bias against Mr. Overton due to the internal affairs report, the trial judge ruled that the testimony would open the door to evidence that Mr. Overton was a suspect in the Rachel Surrette murder. The defense decided against introducing the report. In closing, the prosecution argued that the defense had failed to show why any officer would want to plant evidence to incriminate Mr. Overton (T. 4297-8; 4303-4; 4301; 4818-9).

Mr. Overton said he was questioned a few days after the

MacIvor murders, but not arrested. He told of how Detective Visco had come to his job, asked him about a "burglary" that occurred a few days prior and asked Mr. Overton if he could verify where he was - which Mr. Overton proved by his time sheets (PCT. 595-596). Mr. Overton

knew that Detective Visco had visited his girlfriend, Lorna Swaby. Ms. Swaby had access to his DNA through discarded condoms which he used with Ms. Swaby because she had been diagnosed with AIDS. After police claimed they had a positive match for his DNA on semen samples taken from the crime scene, Mr. Overton realized his DNA had been planted on evidence taken from the crime scene (PCT. 609-614). Mr. Overton also testified that he gave alibi information to his defense and told them that the bedding samples that contained his DNA were not his. He told them that other parts of the mattress pad and sheets that had not been tested for DNA should have been tested for nonoxynol (a chemical present in spermicidal condoms). (PCT. 614-620).

As to the jailhouse informants, Mr. Overton denied speaking with Pesci or Guy Green about the details of his case. He denied showing Pesci the police reports (PCT. 621-625).

Mr. Overton was known for keeping large amounts of paperwork in his jail cell (PCT. 626-627). He kept his cell door open because he would often go back to his cell during attorney visits

to get documents (PCT. 627).

Mr. Overton identified Pesci's handwritten notes and the police report concerning the armed robbery of a Domino's Pizza. He verified that he had a copy of the Domino's Pizza report in his cell (PCT. 628). He also testified that he had given his defense the name of another prisoner, Clinton McGhee, who could verify that Pesci would go into Mr. Overton's cell when he was not there. Mr. Smith never contacted McGhee about this information (PCT. 630-632).

At the close of the evidentiary hearing, Judge Jones requested written memorandum which were submitted on December 20, 2004 (PCR. 2441-2490).

On December 30, 2004, Mr. Overton filed a Motion to Re-Open Evidentiary Hearing, requesting that the hearing be re-opened so that he could call witness Clinton McGhee to testify (PCR. 2816-2818). Mr. McGhee had been unavailable to testify during the evidentiary hearing, but was willing to testify now.

Mr. McGhee had been incarcerated in the Monroe County Detention Center in 1998-1999 where he met Mr. Overton and jailhouse informant Pesci. Mr. McGhee would have testified that Mr. Overton asked him to watch his cell when he was not around. He also would have testified that Pesci attempted to question Mr. McGhee and other inmates about their cases on a regular basis because he was a well-known informant. Mr. McGhee would have

testified that he saw Pesci enter Mr. Overton's cell, but he was never questioned by anyone about this information (PCR. 2816-2817).

The judge denied the request to re-open the evidentiary hearing finding "notwithstanding his denials, Mr. Pesci, in fact, had entered the Defendant's cell and, while there, had molested the Defendant's papers." The judge found McGhee's testimony would be "merely cumulative." (PC-R. 2819-2122). The judge denied relief on all post-conviction motions (PCR. 2823-2948; 2825-2830).[8] A Motion for Rehearing was filed (PCR. 2961-2969) and denied on March 21, 2005 (PCR. 2958-2960). Notice of Appeal was timely filed on April 19, 2005 (PCR. 2975-2976). This appeal follows.

SUMMARY OF ARGUMENT

1. Mr. Overton was denied a full and fair hearing and effective assistance of counsel at guilt phase.

2. The defense failed to adequately challenge the jailhouse informants and law enforcement's relationship with them.

3. Defense counsel was ineffective for failing to investigate Mr. Overton's alibi defense or alternate theories of defense.

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[8] This section of the Record on Appeal contains the circuit court order that is the subject of this appeal. However, an Amended Designation to Court Reporter is inexplicably present in this section for no apparent reason (PCR. 2825-2830). The full final order is at PCR. 2823--2948.

4. Defense counsel was ineffective for failing to know that the statute of limitations had run on Mr. Overton's burglarly charge.

5. The defense failed to challenge a five-year pre-indictment delay.

6. Defense counsel was ineffective for failing to declare a conflict of interest and request removal from Mr. Overton's case.

7. The State withheld Brady information from the defense and rendered counsel ineffective.

8. The lower court erred in summarily denying Mr. Overton's claim when the files and records did not refute the claims.

ARGUMENT I

DENIAL OF A FULL AND FAIR HEARING AND EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE.

Mr. Overton's case has been like a three-ring circus from the time of his arrest until today. At trial, Mr. Overton was subjected to a revolving door of trial attorneys--each one attempting to cope with the chronically late discovery and sleight-of-hand trial tactics employed by the State.

From the botched chain of custody on the DNA evidence to the bought-and-paid-for snitches, the fact that this type of evidence is the factual basis on which the State seeks to take Mr. Overton's life makes a mockery of the legal system.

No one has answered the tough questions of why Mr. Overton, a gas station attendant, would suddenly become a double murderer and rapist when he had no such history before or after the offenses.[9] None of the leads gathered by law enforcement pointed to Mr. Overton. The tire tracks did not match his car. The finger and palm prints from the pipe in the MacIvor's kitchen did not match Mr. Overton. He did not own a .22 caliber weapon, nor was one found in his possession. No one could explain the .22 caliber shell casing or the bullet hole in the wall of the MacIvor home except to say that another perpetrator may have been in the house.

No one has answered the question why. Why would Mr. Overton burglarize the MacIvor home and take nothing? Why would Mr. Overton, a man with a steady girlfriend, suddenly commit a sexual assault on a pregnant woman, wear a condom and then leave the condom packages in the room or empty its contents on the bedding? If the condom broke, why wouldn't the vaginal swabs have tested positive for semen?

More telling is the fact that the jury, which heard **no** evidence in mitigation, voted for death by a margin of 8 to 4 on Mr. MacIvor and 9 to 3 on Mrs. MacIvor (T. 5018). Lingering doubt

[9]Mr. Overton was not arrested until five years after the crime.

about guilt is the only explanation. Had Mr. Overton received effective assistance of counsel, he may have been able to persuade the rest of the jury that he was innocent.

However, instead of the post-conviction court taking a critical look at the performance of defense counsel, the trial judge did everything possible to curb Mr. Overton's ability to have a full and fair hearing. The trial judge's blind adherence to the time limits in Fla. R. Crim. P. 3.851 was not the intended purpose of the new rule. The legislative purpose of Rule 3.851 was to speed the orderly disclosure of public records and to keep death penalty postconviction cases on track so that the **defendant** could have a full and fair exercise of his due process rights. The purpose was not to rush the postconviction proceedings through so fast that the main issues on appeal are not resolved in circuit court.

Here, the State's case against Mr. Overton involves only two issues--DNA evidence and the testimony from two jailhouse snitches. There is **no other evidence** against Mr. Overton. Even the State acknowledges there were some problems with the chain of custody of the biological material used in the DNA testing. This fact alone should have spurred the trial court to consider having a thorough adversarial testing of the facts and a thorough testing of whatever biological material existed that could be probative.

Under Fla. R. Crim. P. 3.853, Mr. Overton filed two motions for DNA testing, the first of which was granted[10]. The second DNA motion asked to test hair that was recovered from the tape binding Mrs. MacIvor's hands. This hair has never been tested because FDLE does not have the ability to conduct mitochondrial DNA testing, which is specifically designed for hair and degraded or old samples. The second DNA motion was filed just days after the hearing on the first DNA motion. The purpose of the second DNA motion was to correct an inadvertent omission of listing the hair in the first motion. Inexplicably, the trial court denied the second motion.

Expediency at trial and at the postconviction proceedings took precedence over thoroughness, fairness and the due process to which Mr. Overton was entitled. At trial, defense counsel repeatedly requested continuances based on the State's failure to disclose DNA discovery (disclosed two weeks before trial)(T. 1168, 1212, 1231, 1237), evidence that condoms were found in a basket at the scene (disclosed one month after defense noticed intent to seek nonoxynol testing and six months before trial), results of new State testing

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[10] However, due to the refusal of the trial court to continue the evidentiary proceeding until this DNA testing could be completed, Mr. Overton has not been able to inform the lower court that FDLE failed to test the material that was specified in the lower court's order. Therefore, there has been no post-conviction DNA testing to date.

on nonoxynol-9 by Mr. Trager, the defense's own expert (disclosed three weeks before trial).

These late discovery disclosures dealt with highly technical, chemical tests that required expert scrutiny before trial counsel could understand the results and effectively challenge the State's evidence. The defense requested additional experts to rebut the State's new forensic testing which were denied (T. 2970).

Yet, the trial court charged ahead with trial as if Mr. Overton's case were a misdemeanor shoplifting matter, instead of a death penalty case. Mr. Overton was entitled to due process at trial and in his postconviction proceedings. See, Holland v. State, 503 So 2d 1250 (Fla. 1987).

Mr. Overton's post-conviction proceedings were pushed through the circuit court without dealing with the most important issue–the results of the DNA testing. Had this testing not been important, the trial judge would not have granted it in the first place. It was clear that initially Judge Jones sought to have any evidentiary hearing after the DNA testing was complete and the results given in writing to all parties (PCR. 1971-1975).

However, after Hurricanes Frances and Ivan caused delays in the transfer of evidence to FDLE, Judge Jones changed his mind for no enunciated reason and rushed ahead with a hearing without giving counsel an opportunity to see what the new evidence would show.

Postconviction counsel did everything in their power to expedite matters, even arranging to have an independent laboratory test the DNA because it could complete the testing in two weeks as opposed to the 60 days FDLE required to do testing (PCR. 1949-1950). Again, the trial judge denied the logical choice.

At each juncture, the trial judge sought to limit the claims that Mr. Overton would be allowed to present at an evidentiary hearing. While it is within the judge's discretion to limit the issues for evidentiary development, it summarily denied some ineffective assistance of counsel claims, such as the ineffective assistance of counsel for failure to investigate Mr. Overton's alibi defense, but then allowed the State to question the witnesses on this area. In fact, Judge Jones took over questioning from the State to find areas in which the prosecution did not adequately impeach the witnesses (PCT. 87-96, 16-121, 125, 129-134, 180-187, 193-196, 218-222, 235-39, 248-51, 403-413, 449, 500-507, 736-739).

The trial judge picked and chose specific paragraphs from the ineffective assistance of counsel Claim II of the Rule 3.850 motion on which he would grant an evidentiary hearing. The defense was required to abide by the judge's rulings. The State, however, had free reign to question on any topic. Ultimately, the trial court even denied some claims twice--once when it summarily denied the claim, and once when it considered facts the prosecution elicited

at the evidentiary hearing and denied it again (Claim II, paragraphs 20, 34, 35, PCR. 2840). Mr. Overton, however, was the only one with due process rights at the hearing, and the only one who did not get to exercise them by being able to prepare to support the claims at a hearing.

Historically, the rush to "get through" a postconviction proceeding before all of matters are completed results in duplicitous remands and repetitious evidentiary proceedings that delay finality even further than had the case been stayed in the first place. Like Teffeteller, et al v. State, 676 So. 2d 368 (Fla. 1996), Mr. Overton could not have an adversarial testing of his claims when the results of the DNA testing were not even completed. Even the claims on which Mr. Overton was allowed to present evidence, the trial court failed to conduct the proper analysis, failed to cumulatively consider trial counsel's deficiencies, and failed to recognize the prejudice Mr. Overton suffered because of counsel's errors. Mr. Overton requests that this Court conduct a *de novo* review as is the practice with ineffective assistance of counsel claims which are mixed questions of law and fact. See, Strickland v. Washington, 466 U.S. 668(1984).

A. Failure to adequately challenge the State's DNA evidence or participate in Frye hearing.

Defense counsel testified that their theory of defense was to impeach the DNA evidence and the two jailhouse snitches. Yet, counsel inexplicably failed to investigate and prepare to challenge the DNA testing they sought to rebut. An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense. Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); see also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983) ("At the heart of effective representation is the independent duty to investigate and prepare").

An early indication of trial counsel's inadequate performance is obvious from a Memorandum of Concern filed by the original trial judge, Judge Shea. Lead counsel, Jason Smith, who was the subject Judge's Shea's memo. Though subsequently set aside, Judge Shea's concerns proved prophetic of the failures that were to come.

Judge Shea was concerned that the attorneys he'd appointed had done nothing to prepare for trial in the time they had been on the case. He said:

> As of February 21, 1997, the **Court found little if any preparation for the defense had taken place**, no depositions taken, and no substantive motions filed or set, despite the fact that Rule 3.191 of the Florida Rules of Criminal Procedure require the Defendant to be brought to trial within six months.

(R. 196) (emphasis added).

* * * *

...A review of the file by the Court finds that no substantive Motions and hearings have been set by Defense Counsel on behalf of the Defendant since Mr. Smith's entry of appearance as counsel of record in January, 1997...

Despite the Court's consistent offer to defense counsel to use the offices of the Court to compel discovery, no motions to compel have been set for hearing despite a trial date in October. On September 2, 1997, Mr. Smith filed a Motion to Compel DNA discovery, yet did not set it for hearing.

The only motion filed by Defense counsel which has set for hearing before this Court was a Motion to permit the Defendant to attend depositions, which procedure is not normally permitted pursuant to Rules of Criminal Procedure 3.220. Although Defense Counsel filed a Motion for Jury Consultant for the purposes of requesting a change of venue, no hearing has been set on the motion and no Motion for Change of Venue has been filed notwithstanding a trial date less than one month away. **This case is basically a DNA case, yet no substantive motions have been filed to require the strict standards set forth by the Florida Supreme Court in DNA cases.** The State has filed a Notice of Williams Rule Evidence, and no hearing set by defense counsel pursuant to the Notice. No Motions for Continuance of the October trial date have been filed.

* * * *

...The Court has been concerned that the qualifications as well as the performance and conduct thus far of the defense attorneys **have failed to meet even the minimum qualifications set forth in the proposed rule**, and the Court has acted accordingly in monitoring their representation of the Defendant.

The only substantive motion filed by counsel since his entry of appearance in this case has been a Motion to Disqualify which the Court found legally insufficient, and which contained misrepresentations of fact and law. The Court finds that rather than zealously advocating for

> their client within the law, defense counsel has adopted the tactic of making the trial judge the issue.[11]

(R. 198-9)[emphasis added].

Judge Shea was correct. Two years later, trial counsel was no more prepared for their DNA case. Days before a Frye hearing, the defense still had not taken depositions of the technicians at Bode Technology (Bode) (R. 954; T. 1168). In fact, the failure of trial counsel to take depositions or even travel to Virginia to review the proficiency tests, laboratory protocols and procedures used in the testing was the basis for Judge Jones's denial of a continuance of the Frye hearing (T. 1029-30, 1168-73, 1240). These were the same concerns Judge Shea voiced two years earlier.

The defense failed to challenge the scientific methods and protocol of FDLE and Bode Technology's DNA testing. Despite Judge Shea's admonishments of counsel at trial, Judge Jones defended counsel in his order denying relief and during the post-conviction evidentiary hearing. The judge went took over questioning from the prosecution in order to bolster the testimony of the trial attorneys (PCT.180-187;193-196).

Judge Jones questioned Mr. Smith twice. The first time Judge

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[11]The Court went on to state that, "For that reason, notwithstanding the legal insufficiency of the disqualification motion, the Court will recuse itself from proceeding any further in this matter." (R. 199).

Jones elicited that Smith had been a public defender for five years prior to going into private practice to bolster his qualifications to handle a death penalty case (PC-T. 182). He used Smith's answers to overrule Judge Shea's complaint about his qualifications and diligence.

Mr. Smith also agreed with Judge Jones that there was no evidence that the bullet holes in the wall of the victim's living room were related to the murders and agreed that the lack of a ballistics expert was not deleterious to the defense (PCT. 184). Judge Jones also elicited that Mr. Smith did not see any reason to visit the crime scene at night and that he did not file a notice to rely on an alibi defense because he could not find any alibi witnesses (PCT. 184-187). After a re-direct by post-conviction counsel, Judge Jones again rehabilitated Mr. Smith regarding whether he actually saw Mr. Overton's cell door open (PCT. 193). Judge Jones's questioning was specifically designed to rebut Mr. Overton's questions. No questions were asked by Judge Jones to refute the State's questioning. Thus, the judge became a second prosecutor by interjecting himself into the questioning of the trial attorneys, Detective Jones, Officer Harrold, State Attorney Kohl, Detective Andrews, Mr. Smerek, Ms. York, Dr. Libby, Ms. Figur, Dr. Katsnelson, and FDLE Agent Pollack (PCT. 87-96, 16-121, 125, 129-134, 180-187, 193-196, 218-222, 235-39, 248-51, 403-413,

449, 500-507, 736-739). This is hardly the conduct of a fair and impartial tribunal.[12] When a court's neutrality is "shadowed or even questioned" a judge should not sit on the case. Cf. State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

Mr. Overton was entitled to full and fair post-conviction proceeding, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the issues by a neutral, detached judge. Not only did Mr. Overton not have a full hearing, he did not have a fair one either.

Moreover, the trial court used the facts that he elicited from the witnesses during his questioning to deny Mr. Overton relief in his Rule 3.851 postconviction motion (PCR. 2823-2870). For example, in his order denying relief, Judge Jones castigates postconviction counsel for suggesting that Mr. Garcia, who saw informant Pesci walking freely around cellblock A and saw Mr. Overton's cell door open, could have testified to what he saw. His testimony would have rebutted Pesci's false testimony at trial that Mr. Overton's cell door was always locked (PCR. 2863-64). Mr. Garcia testified

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[12]Canon 3(E)(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer..." The language of Canon 3(E)(1)(a) is mandatory.

that he saw Mr. Overton's cell door open while visiting Mr. Overton and it did not occur to him to testify about what he saw (PCT. 54-58, 70).

Judge Jones, however, went to great lengths with both attorneys to refute Mr. Garcia's testimony. Judge Jones ultimately got Mr. Garcia to say he and Mr. Smith believed that they decided not to testify but to confine their impeachment of Pesci to cross examination (PCT. 94).

This tactical reason was convenient since a few questions prior to Judge Jones's examination, Mr. Garcia testified that it "did not occur to him to testify"–a clearly unreasoned decision (PCT. 54-58, 70).

By inserting his own "strategic" reason into questioning of the attorneys, Judge Jones was then able to deny Mr. Overton's claim:

> The Court disagrees with the Defendant's claim and finds that his attorneys exercised due diligence in investigating Mr. Zientek's access to the Defendant's cell and made **professionally acceptable and well-reasoned strategic decisions as to how to handle the issue**.

(PCR. 2863)[emphasis added].

The attorneys had no "well-reasoned strategic decision" until Judge Jones inserted his own. Neither attorney had investigated whether Mr. Overton's cell was open. "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of

hindsight, it should also not construct strategic decisions which counsel does not offer." Harris v. Reed, 894 F. 2d 871, 878 (7th Cir. 1970);

In denying Mr. Overton's claims that counsel failed to adequately prepare, educate themselves, or adequately utilize DNA experts, the trial court found that "the decision not to participate [in the Frye hearing] must be distinguished from not preparing" (PCR. 2848). The judge does not, however, say in what way trial counsel had prepared for the Frye hearing. In fact, minutes before the Frye hearing, Judge Jones had admonished counsel:

> The Court: ...I will say it one more time, I have given you multiple continuances. I have indulged you to the maximum extent. I have continued this case for 15 months after it was originally set for trial at every juncture when the Defense has asked for a continuance and I sat here and I said, gentlemen, you'll get your last six months. Do whatever it takes to be ready.
>
> That's what you have asked for and I made it crystal clear that I haven't here and micro-managed. **You've made your choices. We're here. We're ready to go. As far as I'm concerned, you have had ample opportunity, you've got ample discovery, and the time has come to deal with the issues. So, let's call our first witness** -

(T. 1029-1030)[emphasis added].

Judge Jones found that defense counsel could have conducted depositions prior to receiving the discovery (R954; T. 1168). He found that counsel could have traveled to Bode Technology in

Virginia when the test results were first received (T. 1168).

Trial counsel continued to object to being forced to proceed without receiving adequate discovery materials from the State and without their expert, Dr. Litman. Trial counsel refused to participate in the Frye hearing to preserve the discovery violations by the State. Trial counsel did not cross-examine a single State witness. Trial counsel did not call a single defense witness (T. 1019-1210). The DNA test results were ruled admissible and scientifically sound without a single challenge by the defense (T. 1021-23; 1017-1211).

It is difficult to understand what part of Mr. Smith's statement "we're not ready to proceed" shows that trial counsel was adequately prepared to effectively represent Mr. Overton. The "decision not to proceed" was based on counsel's failure to prepare. Thus, the court's logic is flawed.

In the alternative, the trial court found that even if the attorneys had participated in the Frye hearing, Mr. Overton would not have prevailed and was, therefore, not prejudiced because:

> At the time of the hearing in November, 2004, almost six years had passed since the Defendant was convicted. Yet, in all that time, the Defendant has been unable to discern a basis for a claim of prejudice. With the evidence against him a matter of record and subject to the most exacting scrutiny, **even in hindsight the Defendant has not pointed out one prejudicial error in the science in general or the methodology used in this case in particular.** As the cases make clear, the

> subjective assertion that Counsel should have done something different is not enough unless one can also point out how that action or absence of action had prejudicial impact on the Defendant's defense.

(PCT. 2849)[emphasis added].

Because it found no prejudice, the lower court found "no need" to evaluate trial counsel's performance. This was also convenient since there was no attorney performance to evaluate here. The attorneys **did nothing**, the judge admonished them for doing nothing and went forward with the Frye hearing anyway. The prejudice is plainly evident. The trial court failed to see it because its analysis of Frye was wrong.

In order for FDLE Agent Pollack and Mr. Bever's testimony to be admissible as to DNA, the State must show that both the underlying scientific principle, theory or methodology used to develop the evidence is generally accepted in the scientific community and that the specific testing procedures employed to develop the evidence are generally accepted in the scientific community. See, Hayes v. State, 660 So. 2d 257, 263-265 (Fla. 1995); Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). The Hayes/Ramirez two-part standard stems directly from the Florida Supreme Court's adoption of Frye v. United States, 293 F. 2d 1013 (D.C. Cir. 1923), as the basis for evaluating the admissibility of proffered scientific testimony. See, Brim v. State, 695 So. 2d

268, 271 (Fla. 1997); Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997); Hayes, 660 So. 2d at 262; Ramirez, 651 So. 2d at 1167; Flannagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993); Stokes v. State, 548 So. 2d 188, 193-194 (Fla. 1989).

Under the first prong of the Hayes/Ramirez/Frye test, scientific testimony is inadmissible at trial as a matter of law if it is based upon novel techniques that are not yet generally accepted within the scientific community. See, Hayes, 660 So. 2d at 264; Ramirez, 651 So. 2d at 1167. This prong examines the testing technique and determines whether the technique is sufficiently established to have gained general acceptance in the scientific field. Id. See also, Frye, 293 F. 2d at 1014.

Mr. Overton alleged that both Dr. Pollack and Mr. Bever's testimony was inadmissible as a matter of law because their testimony was suspect and did not comport with those generally accepted within the scientific community. At the time of the amended post-conviction motion, Mr. Overton only knew that the trial attorneys had refused to go forward with the Frye hearing and that the State had still refused to turn over protocols and procedures necessary to effectively challenge the State's evidence.

Mr. Overton knew the evidence collection and preservation methods of Dr. Pope were very suspect. Mr. Smith objected to

State's testimony but he thought the only battle he had to fight was whether the STR DNA test itself had been generally accepted in the scientific community to be admissible in court. Had defense counsel educated itself or used its expert, they would have known that their objections were more likely to be successful attacking the way in which the tests were conducted instead of only confronting the admissibility of STR DNA testing. Had counsel have known this, they may have been able to keep out Agent Pollack or Mr. Bever's testimony altogether.

Under the second prong of Hayes/Ramirez/Frye, the results of specific experiments based upon generally accepted scientific principles are inadmissible if the testing done did not adhere to procedures generally accepted within the scientific community. See, Hayes, 660 So. 2d at 263-264; Ramirez, 651 So. 2d at 1168. Accord, Holley v. State, 523 So. 2d 688, 689 (Fla. 1st DCA 1988). This prong focuses on the quality of lab work and the testing procedures followed. See, e.g., Hayes, 660 So. 2d at 263-264 (finding DNA evidence based upon accepted methods still inadmissible because of flaws in particular testing). Further, the evidence offered at trial **must be based upon actual test results and not just the opinion of the expert witness**. See, e.g., Young-Chin v. Homestead, 597 So.2d 879 (Fla. 3d DCA 1992)(emphasis added). Mr. Overton could have proved that Dr. Pollack and Dr.

Bever's testimony was inadmissible under this second prong because acceptable scientific standards were not used to reach their conclusions even within their own agency's standards.

The trial court's error was in interpreting Frye as only dealing with the first prong -whether a court has found DNA testing to be scientifically reliable enough to be admissible. The testing must be widely accepted. the analysis does not end there.

The second prong of Frye deals with the procedures and protocols used in reaching the conclusion. A method of testing such as RFLP DNA testing may be admissible in court as a scientifically sound testing method, but if the laboratory or technician does not follow the proper protocol, even a previously approved method of DNA testing can be deemed unreliable and inadmissible.

Further, if a testing method such as RFLP testing has been rendered obsolete by subsequent improvements in testing methods, a once accepted methodology can become unacceptable. Mr. Overton, however, never got the opportunity to question either FDLE or Bode analysts. He never got that opportunity because his attorneys did not know this important distinction about Frye. This distinction could have been a fruitful area of examination, even without the protocols from Bode. Nothing prevented defense counsel from examining the FDLE analysts who had provided their data.

Mr. Overton proved prejudice with the testimony of Dr. Randall Libby, neurological DNA expert from the University of Washington Medical Center who conducts research on genotyping as DNA analysis (PCT. 324). Dr. Libby testified that the difficulty with RFLP DNA testing is that problems can occur before and during the amplification process depending on how long the DNA is allowed to "cook" by the lab technician. The longer the amplification process, the more difficult it is to get a precise measurement of the alleles necessary to make a "match." (PCT. 333-346). With STR DNA testing, an analyst is copying the DNA to be analyzed so that contaminants in the samples are also copied (PCT. 337). That is why the evidence collection process is so important.

Here, Dr. Libby reviewed the crime scene evidence pack, serology materials, FDLE analysis, Dr. Pollack's testimony, autopsy information, and crime scene processing and evidence collection information (PCT. 342) and items in evidence at the Plantation Key Clerk's office and the Monroe County Sheriff's office (PCT. 346). Dr. Libby reviewed Dr. Pope's collection of the biological evidence in Mr. Overton's case and particularly Dr. Pope's testimony.

Dr. Pope had testified that he collected swabs at the crime scene of suspected semen on August 22, 1991, but dated the envelopes August 23, 1991 (T. 3423-4). Although property receipts were to be prepared for crime scene evidence, none were prepared

for the swabs (T. 3227, 3451). Nor did Pope take the swabs to a secure storage facility, instead, he took them home, where he said he air-dried them and placed them in his personal refrigerator (T. 3480-1; 3393). The next day, he went to the hospital to gather the mouth, vaginal and rectal swabs from the autopsy of Mrs. MacIvor ("autopsy swabs"). After collecting those he put the inner thigh, pubic and buttock area swabs ("crime scene swabs")with the autopsy swabs and put them all in the sexual assault kit for the police officer to check into custody (T. 3300, 3323-4, 3423, 3582-4). However, the property receipt for the assault kit did not reflect the presence of the crime scene swabs (T. 3586).

At some point, Dr. Pope conducted presumptive tests for semen on all swabs from the body (T. 3424-5, 3427). All of the swabs tested negative for semen (T. 3425-6, 3583). Dr. Pope persisted in his belief that there was semen on Susan MacIvor's body, even though medical examiner Dr. Nelms testified that swabs from the body are usually the best evidence in sexual assault cases (T. 3674). Dr. Pope rejected that idea and thought the semen results must have been negative because the heat had caused the seminal fluid to degrade (T. 3130, 3427). Dr. Nelms, however, saw no signs of decomposition (T. 3677). Dr. Ronald Wright testified that negative semen results due to decomposition or degradation would be exceptionally surprising given the short time period between death,

the discovery of the bodies and the collection of the swabs (T. 4501-2).

After Mr. Overton's arrest, police decided to send the crime scene swabs [taken from the victim's inner thigh, buttock and pubic area (T. 34, 46)] to FDLE, but police could not find them (T. 4372-3). Dr. Pope could not remember where he had put them (T. 4372). The autopsy swabs were found in the sexual assault kit and sent to FDLE where the swabs tested negative for semen (T. 3969, 4031-2, 4372). The crime scene swabs, however, were never tested.

On July 28, 2004 before the evidentiary hearing, the lower court finally ordered the crime scene swabs to be tested (PCR. 1951)[13]. Dr. Pope testified that he used a luma light to identify and mark semen stains on the MacIvor bed sheets (T. 3351). The stains were located on the bottom sheet and mattress pad (T. 3191, 3354-6, 3399). Pope cut a small piece of the stained bed sheet for his "own purposes" with the intent to test the evidence "not through the laborious process of case notes" but for his "own particular interests." (T. 3351). Pope and Detective Petrick then folded the sheets and placed them in paper bags, which Petrick took

[13] Because the lower court refused to continue the evidentiary hearing until DNA results were available, the litigation had concluded before any evidence was taken on the DNA testing. Thus, lower court has never been informed that FDLE erroneously re-tested the autopsy swabs, instead of the crime scene swabs as the court had ordered. The crime scene swabs have still never been tested.

to the Marathon evidence vault (T. 3194-7, 3356). Two days later, they were released to Pope for serological testing (T. 3197-8).

He took them home because the property room was closed and he needed to hang the evidence to dry (T. 3393). Petrick, however, testified that the sheets were already very dry at the crime scene (T.3224). Pope hung the sheets in his "guest room, office, catch all" area of his house using a clothesline to hang the sheets in a horizontal "dipped" position. He did not place paper under the sheets to collect any trace evidence (T. 3393-4, 3505, 3535). According to FDLE Special Agent Pollack, it is improper to take serological evidence to one's home (T. 4027-30).

On August 26, 1991, Dr. Pope took the bed sheets to the police property room and checked them out the same day and took them to his lab in Key West where he tested the small bed cuttings he made at the crime scene for his "own purposes" (T. 3395-6, 3427, 3432). Pope claimed this cutting tested positive for semen, but the sample was consumed during testing, and was therefore, not submitted for DNA analysis. (T. 3432, 3518, 3552).

Two weeks after the alleged positive test, Pope made 10 more cuttings from the stained areas of the MacIvor bottom bed sheet and mattress pad. He placed those cuttings in unsealed envelopes (T. 3406-7, 3419-21, 3520, 3818). Over the next year and a half, Dr. Pope kept the unsealed envelopes in an unlocked refrigerator in his

Key West lab, then later in a locked refrigerator/freezer in his Marathon lab (T. 3416, 3420, 3523-5). No notes exist to document how, when or by whom the cuttings in the unsealed envelopes were transferred to the Marathon lab (T. 3523-5, 3549). Pope did not test the cuttings until October, 1992, more than a year after they were "stored." (T. 3521). There was no evidence that Pope was the only person to have access to the bed cuttings. Not surprisingly, the presumptive tests in 1992 were positive for semen (T. 3410, 3420).

Six months later in April, 1993, Dr. Pope resigned from the Monroe County Sheriff's office (T. 3417). All of the evidence in his possession for his "personal use" was contained in six containers full of envelopes and was transferred to Key West (T. 3417, 3693, 3695, 3831-2). It was not until the containers arrived in Key West that the envelopes containing the MacIvor bed sheet cuttings were finally sealed and documented to show that the evidence even existed (T. 3494, 3818, 3836). Two months later, the envelopes were sent to FDLE for DNA testing (T. 3890-1).

After reviewing Dr. Pope's testimony, Dr. Libby said:

> ...I have to admit I don't know anyone in the scientific community which would think that's acceptable, taking it [the evidence] to his home. I think that's a very bad practice.

(PCT. 387).

Dr. Libby said that the problem with taking evidence home, as Dr. Pope did, was there were no monitors, checks, or controls and no one to sign off as in legitimate labs performing tests. "Whenever there is a manipulation [of evidence], there is another analyst there that signs off that this is in fact what was done." (PCT. 387). It is the chain of custody for what occurred during the processing of the sample. Dr. Libby could not say whether Dr. Pope's taking the DNA evidence home altered it because he did not know under what conditions it was kept. But, he did know that STR DNA testing runs a much higher risk of contamination than RFLP testing because with STR the DNA is copied (PCT. 387-89).

Dr. Libby said he was familiar with degraded DNA. In STR testing, degradation can result samples matching a person who did not contribute the DNA–a false positive (PCT. 394). The degraded sample can match on all alleles as a false positive.

Dr. Libby said it was common practice in 1991 for crime scene technicians to wear gloves and gowns when collecting evidence (PCT. 389). Dr. Pope did not wear gloves or a gown when collecting evidence at the crime scene. It was not clear what Dr. Pope was wearing when he conducted his tests for his "personal use" at home.

Judge Jones asked Dr. Libby if he believed this case was problematic:

Dr. Libby: ...I don't think you can, as any scientist,

> you can't just make that assumption without looking at the data. Maybe it's true, may it's not true, but the fact is with RFLP testing there's lots of very similar profiles and it has to do with, you know, how they size the allele, how they size the bands. And all of these have to be independently evaluated by a person outside a laboratory.

(PCT. 409).

The results in Mr. Overton's case were not evaluated or verified by a person outside the laboratory because the protocols and procedures have never been disclosed. No one has been able to replicate the results of the State's DNA testing because the procedures followed by the State's analysts have not been disclosed.

The prejudice to Mr. Overton is that he could not discover whether the RFLP or STR DNA tests were properly analyzed and present that evidence to his jury. From the irregularities that are evident in the collection and storage of the DNA evidence, it is more likely than not, Mr. Overton would have the answers to his questions.

Counsel's failure to address the chain of custody aspect of Frye is ineffective and prejudicial. Standing silent without questioning the process or taking depositions of the laboratory technicians was unreasonable. Even without seeing the procedures and protocols, Dr. Libby could still comment and analyze the scientific soundness of the evidence based on the information he

did know. Trial counsel could have done the same, instead they sent Dr. Litman home without having him testify.

Mr. Smith was asked if he was advised to not to ask questions at the Frye hearing and he replied that "Mr. Litman said we couldn't really do an adequate job with the discovery that we had gotten so far. There were lots of things that he wanted to see before he could adequately advise us." (PCT. 158).

Due to the attorney's failure to obtain the information needed for Dr. Litman, their expert was useless and his lack of information was used as an excuse for refusing to litigate the Frye hearing. In United States v. Cronic, 466 U.S. 648 (1984), the Court stated:

> The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecutions case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if the defense counsel may have made demonstrable error - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. At 656.

Defense counsel's refusal to participate at the Frye hearing caused the DNA evidence to be admitted with no adversarial testing.

This was *per se* ineffectiveness. Mr. Overton does not have to demonstrate that the results of the DNA testing would have been different had counsel been effective. He must only show that methods used by the Monroe County Sheriff's office in collecting and storing the evidence was below the standards in the scientific community for acceptable evidence preservation. See, Frye, supra. Counsel's failure to adequately challenge this evidence was deficient performance. Mr. Overton's inability to present this favorable evidence is prejudice.

B. Failure to rebut the chain of custody of the forensic evidence.

Dr. Libby testified that the potential for contamination exists every time a sample is handled or stored (PCT. 415). A mix-up in the handling of the sample can produce a false positive that can go undetected by analysts (PCT. 389, 413-16). If there is a problem with the collection and storage of a DNA sample, the results could be the same in different laboratories (PCT. 413). That's why it's difficult to detect scientifically if someone has planted a defendant's DNA on a sample (PCT. 416).

The lower court found that the chain of custody was intact and that Mr. Overton had not proved prejudice as a result of any break in the chain of custody.

In its order, the lower court analyzed the chain of custody of

the evidence in great detail (PCR. 2823-2824, 2931-2948).[14]

> Since many of the Defendant's claims are predicated on the assertion that the DNA evidence was unreliable because of a troubling chain of custody, that issue will be examined first. If the DNA was the Defendant's **and the chain of custody was intact**, any other **identifiable miscues committed in the course of the investigation and subsequent trial lose much of their significance**" (PCR. 2844) (Emphasis added).

If this is true, then the converse is equally true.

According to Florida law, a party attempting to exclude relevant physical evidence based on a gap in the chain of custody must show probability of tampering. A bare allegation by a defendant that the chain of custody has been broken is not sufficient to render relevant physical evidence inadmissible. Floyd v. State, 850 So. 2d 383 (Fla. 2002), Terry v. State, 668 So. 2d 954, 959 (Fla. 1996).

Dr. Libby defined tampering as any sample that is somehow altered by introducing more biological material or is a consequence of the manner in which the sample is stored (PCT. 383). He said such tampering can be inadvertent and as easy as storing the samples improperly. In seeking to exclude certain evidence, Mr. Overton must show the **probability** of tampering. Once this burden

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[14] The Clerk of the Court inadvertently inserted Mr. Overton's Designation to Court Reporter (R. 2825-2830) into the beginning of the final order, which pages should be excluded in citing to the final order.

has been met, the burden shifts to the State to show that tampering did not occur. Murray v. State, 838 So. 2d 1073 (Fla. 2002). Mr. Overton carried that burden, and the State failed to submit evidence that the tampering did not occur.

The defense failed to know the burden of proof. The prejudice to Mr. Overton was that the altered DNA and its enormous statistical probabilities was used against Mr. Overton.

The lower court attached four exhibits to its final order:

> Exhibit A--an "abridged trial testimony of Dr. Donald W. Pope, the veterinarian/Sheriff's Office forensic serologist (PCR. 2847, 2872-2881);
>
> Exhibit B--the applicable pages of exhibit A are attached as cumulative Exhibit B (PCR. 2847, 2882-2933);
>
> Exhibit C--"abridged trial testimony of Diane O'Dell, the Sheriff's Property Director" paraphrased by the Court (PCR. 2847, 2934-2935);
>
> Exhibit D--applicable pages of the trial testimony of Ms. O'Dell (PCR. 2847, 2936-2948).

The lower court's error is in the exhibits and pages omitted from the "abridged" trial testimony.

Dr. Pope, the veterinarian-turned serologist (T. 3322-3329), processed the crime scene and collected the bedding which included a mattress pad, bottom sheet and comforter. It was on the sheets and mattress pad that DNA samples allegedly matching Mr. Overton were found. Dr. Pope took samples, referred to as clippings, from each piece of bedding for later DNA testing(T. 3379, 3381). Two

of these clippings were tested years later and the DNA profiles supposedly match Mr. Overton. The clippings are the **only** evidence that have significance regarding chain of custody.

On August 23, 1991, Detective Petrick took into evidence the mattress pad, sheet and comforter from the victim's bedroom (T. 3194). He put all of the evidence in his van (T. 3281). The next day, August 24, he gave the pad, comforter and sheet to Dr. Pope (T. 3197-98, 3223). The property receipt, number 15523, indicates that the mattress pad, sheet and comforter were taken into evidence (T. 3238). This property receipt also shows additional items, 1B and 2B, which are two envelopes of clippings, and item 3B which is five envelopes with clippings (T. 3239). Therefore, the chain of custody issue solely surrounds what happened to items 1B, 2B, and 3B on property receipt 15523 which are all clippings taken from the bedding.

Detective Petrick, who was primarily responsible for processing the scene, testified that he was unable to identify the evidence bag. It was not the bag he placed the bedding in and the signature "Detective R. Petrick" was not his (T. 3221-3222).

Detective Petrick then reviewed property receipt 15523 showing that clippings were added. He testified that he did not place the clippings into evidence and that although the property receipt states, "Above list represents all property impounded by me in my

official performance of duty," he had not added any bedsheet clippings. He said the markings were added after he had affixed his signature (T. 3240).

Moreover, Detective Petrick noted that the property receipt **did not indicate when the clippings were impounded**. He suggested that Dr. Pope be asked that question (T. 3242) (Emphasis added).

Although Detective Petrick gave the bedding to Dr. Pope on August 24, 1991, the property receipts read "8/26" (T. 3223). Dr. Pope testified that he was an "assistant" to Detective Petrick at the crime scene, which included making up evidence bags and labeling them (T. 3356). He testified that **he** had taken the bedding from Detective Petrick on August 24 (T. 3391), and immediately took the bedding to the property room in Key West, put them into evidence and immediately checked them out that same day to work on them (T. 3395). The bedding was not returned to the property room until November 21 (T. 3396).

Dr. Pope was asked to identify many pieces of evidence. He identified the evidence bag containing the bottom sheet (T. 3357-3358),[15] and agreed that he had made clippings from the sheet (T. 3359). Although he had been given the bedding on August 24, Dr. Pope testified that he took the sheet clippings on September 9 (T.

[15] State's Exhibit 50 in evidence.

3365). He never signed off on any property receipts because he was only "assisting" at the crime scene (T. 3366). He said, " I should have put Detective Petrick/Doc Pope, but to me, I know my handwriting, I know the scene, and it just doesn't make any difference to me" (T. 3366-3369).

Dr. Pope then identified the bag containing the mattress pad that was taken from the crime scene (T. 3376-3378),[16] and from which he also took a cutting (T. 3378). He testified that the mattress pad cutting was also done on September 9 (T. 3407). Again, his indifference to proper documentation and processing led him to sign "Detective Petrick" on the evidence bag (T. 3377).

There is a discrepancy as to when the clippings were made, since Dr. Pope later testified that his notes indicate that he made the clippings on September 11 rather than September 9 (T. 3519, 3544).

When the State showed Dr. Pope an envelope and asked if he placed the mattress pad cutting into that envelope, he replied, "I put half of it in this envelope" (T. 3415). There are no further discussions about the whereabouts of the other half of the mattress pad cutting. But later, Dr. Pope said he took clippings, cut them in half and put one half in his "working envelopes" (the ones

[16] State's Exhibit 51 in evidence.

they've been looking at in evidence) and the other half went into his DNA storage envelopes (T. 3521). There was never any further explanation by Dr. Pope as to what he did with the "DNA storage envelopes." He was not asked to explain this during cross-examination by the defense. Not even the State could figure out how many envelopes Pope had created and what they contained:

> THE STATE: Are there more envelopes than these 10 envelopes, is that what you're telling me?
>
> DR. POPE: I don't know how they're labeled, but there's -- there's other envelopes besides the ones you showed me yesterday.

(T. 3521).

Dr. Pope testified that he kept half of the mattress pad cutting "…in my working refrigerator in my lab in Key West" and that it was an unlocked refrigerator in his locked lab (T. 3416). He was not questioned about who had access to this lab, either by the State or Mr. Overton's counsel.

Dr. Pope also testified that he kept the bottom sheet clippings in the "same place, in the refrigerator" in his lab (T. 3420). However, he then testified that immediately prior to his leaving the Sheriff's office, the **clippings were in his locked refrigerator-freezer at Marathon**. He added that he had taken the clippings from Marathon and brought them to Key West in 1993 (T. 3421, 3549).

According to his testimony, Dr. Pope either had the clippings in his unlocked refrigerator in Key West from September 1991 (when the clippings were made) until 1993 when he left his job at the Sheriff's Office, or, he had the clippings in Marathon until they were brought to the Key West lab in 1993.

Dr. Pope identified a bag containing the comforter taken from the scene (T. 3384-3385).[17] There was no discussion of any clippings being made from the comforter and no envelopes were identified as containing any comforter clippings. There was no discussion on why the comforter, that presumably would have been on top of the bedsheets, was eliminated as a possible source for biological material.

There was also a discrepancy in Dr. Pope's testimony as to where the clippings were made. Dr. Pope stated that the clippings were made at the lab (T. 3379). He then said that some were made at the scene and some at the lab. (T. 3381).

When the clippings were made, they were added to a supplemental sheet, which was attached to the original property receipt (T. 3492-3493). When asked to review the supplemental sheet that accounted for the clippings, Dr. Pope testified that the first time the clippings were documented was when they were placed

[17] State's Exhibit 52 in evidence.

in evidence on 6/10/94 (T. 3494, 3514).

According to Dr. Pope, the paperwork accompanying the clippings that were tested for DNA shows that Dr. Pope took the bedding on 8/24/91, made clippings on either 9/9/91 or 9/11/91, and that the clippings were not received by the Sheriff's office property room until 6/10/94.

Dr. Pope first took the bedding from Detective Petrick on 8/24/91 and placed it in the property room and then checked it out so he could work on the bedding, presumably at home. This was done so that there would be documentation that the bedding existed and was in someone's custody and control. No questions were asked of Dr. Pope concerning the clippings – which ultimately became individual pieces of evidence and which were found to contain evidence of Mr. Overton's DNA. There is no explanation given as to why Dr. Pope didn't take the clippings he had made on 9/9/91 or 9/11/91 and immediately take the envelopes in which they were placed to the property room then check them out so that they could be documented as being in existence and in the custody and control of Dr. Pope.

The lower court relied on the testimony of Diane O'Dell, property director for the Monroe County Sheriff's Office. The judge attached portions of her trial testimony to the final order to show an intact chain of custody. But a review of her testimony

makes the chain of custody even more troubling. The clippings were not accounted for until **after** Dr. Pope left their employment in 1993.

Ms. O'Dell reviewed the property receipt for the bedding, which included additions for the trace sweepings (envelopes) and additions for the clippings. She verified that the receipt showed Detective Petrick impounded the bedding and then gave it to Dr. Pope (T. 3813). Dr. Pope took the bedding to the property room where it was turned over to James Adams, property assistant, who documented the fact that the property was turned in. Dr. Pope then immediately checked out the bedding from the property room, which is documented (T. 3813). Ms. O'Dell explained:

> He [Dr. Pope] brought it in and took it out at the same time. That was a common procedure to generate paperwork to keep track of the evidence (T. 3813). She later explained that "[the bedding] came to storage but went right out. We just logged it into the computer, just to put it in our system"

(T. 3833).

Ms. O'Dell verified that the property receipt showed that Alice Cervantes, property assistant, documented that she received trace evidence on 9-9-91 (T. 3814), which is the same date that Dr. Pope said he had done a sweep for trace evidence of the bedding (T. 3361, 3519). Ms. O'Dell testified that the first time there is any indication that bed clippings existed was "[o]n 4-26 of '93 when I,

the first time that the envelopes showed up, third line." (T. 3831). When she was asked why the documentation as to the trace sweepings was placed towards the bottom of the property receipt, she explained "we probably were not expecting any more entries." (T. 3833).

What is missing from Ms. O'Dell's and Dr. Pope's testimony is an explanation for why no such documentation procedure existed for the clippings that ultimately tested positive for Mr. Overton's DNA. It is curious that the most damaging evidence presented at trial came from items that, according to Monroe County Sheriff's records, did not exist for more than 18 months. These are the same clippings that Detective Petrick did not recognize even though his signature supposedly appears on a bag. It is not clear when or where the clippings were made, nor do we know where they were kept or who had access to them. There is no explanation as to why the Monroe County Sheriff's office policy of placing evidence into the property room to document its existence was not followed with the only pieces of evidence that place Mr. Overton at the scene of the crime.

It is insufficient to merely allege that a chain of custody has been broken in order to render relevant evidence inadmissible. Floyd v. State, supra; Terry v. State, supra. The evidence will be admissible unless there is an indication of probable tampering.

Mr. Overton maintained that the DNA found on the clippings was planted there long after the murders. The defense theorized that Detective Visco obtained the defendant's sperm in a condom from Mr. Overton's girlfriend, Lorna Swaby, who was suffering from AIDS, and that he had the opportunity and access to place the semen on the bed sheet clippings. Overton v. State, 801 So. 2d at 887 (Fla. 2001). Mr. Overton was denied an evidentiary hearing to develop this fully.

Although limited testimony was elicited from trial counsel about police targeting and harassing (PCT. 160), Mr. Overton was never given a hearing to develop this evidence. There was testimony at trial that showed that this was a high profile case where the police had exhausted all other leads and suspects before focusing on Mr. Overton. Those facts, coupled with the substantial problems with the making, storing and handling of the clippings, meet the threshold requirement of probable tampering.

The standard for the proper collection and storage of evidence is governed by National Research Counsel standards. FDLE crime lab analyst Dr. Pollock and defense expert Dr. Libby agreed that the National Research Council's reports on forensic DNA testing are the seminal works in this area (PCT. 347, 735). This Court recognized in Hayes v. State, 660 So. 2d 257 (Fla. 1995) that the National Research Council of the National Academy of Sciences (NRC) was

called upon to establish recommended standards concerning DNA. The NRC stresses the critical need for a well-documented and secure chain of custody in DNA cases:

> Even the strongest evidence will be worthless – or worse, might possibly lead to a false conviction – if the evidence sample did not originate in connection with the crime. Given the great individuating potential of DNA evidence and the relative ease with which it can be mishandled or manipulated by the careless or the unscrupulous, the integrity of the chain of custody is of paramount importance. This means meticulous care, attention to detail, and thorough documentation of every step of the process, from collecting the evidence material to the final laboratory report.

National Research Council, Committee on DNA Forensic Science: An Update; Commission on Forensic Science: An Update, *The Evaluation of Forensic DNA Evidence*, National Academy Press, Washington, D.C. 1996, p. 25, 82.

In Dodd v. State, 537 So. 2d 626 (Fla. 3d DCA 1988) cocaine was seized and admitted into evidence. However, there was discrepancy in the weight of the cocaine from the evidence locker to the crime lab, and different markings on the container were not adequately explained. This was all that was necessary to prove that a "probability of tampering" existed. The court ruled that the evidence should not have been admitted.

In the instant case, no property receipts document that the bed clippings existed until 18 months later. Dr. Pope, the person claiming to have made them, never signed them in as evidence on the property receipt. He never took them to Marathon or Key West to

have the evidence logged in and then checked out like he did with the bedding when it was given to him by Detective Petrick.

The jury was forced to take Dr. Pope's word for the fact that he made the bed clippings from the sheets collected at the MacIvor household on September 9, 1991 or September 11, 1991. With the absence of any proof as to what Dr. Pope did, he could have made cuttings from any bed sheet in the Keys and no one would know the difference. These discrepancies ruin the chain of custody because no one knows when the cuttings were made, how they were made and where they were kept. It is not sufficient to just take Dr. Pope's word for it as the lower court does in its order.

Nowhere in the National Research Council guidelines does it make a provision in the chain of custody for DNA testing for taking the analysts' word for what they've done to the evidence.

Here, there was no evidence presented as to who had access to the evidence either in the lab or in Dr. Pope's guest room/office/catch-all. The policies of the Sheriff's office for submission of evidence to the property room for proper documentation were not followed. The most suspicious aspect of this scenario is that the only time the Sheriff's office procedures were not followed was with the crime scene swabs and bed clippings–the only physical evidence implicating Mr. Overton.

But the chain of custody was not only suspect because of Dr.

Pope. State Attorney Mark Kohl testified that when he arrived at the crime scene he was the sixth person on the scene (PCT. 126). [18] He did not remember telling Mr. Overton's attorneys that the crime scene had been "messed up," but it was possible he said it (PC-T. 126). He would have preferred FDLE process the crime scene but "it wasn't my call." (PCT. 137).

Detective F.K. Jones testified that he also would have preferred FDLE process the crime scene due to their experience and specialized lab because "they process all the evidence anyway." (PCT. 120).

Detective Mark Andrews testified that he had only processed **one** murder case before the MacIvor murders (PCT. 196). He thought the "limitations" of his experience were "complicating factors" in the processing of the crime scene. He did not feel he could adequately process it himself because at the time the crime scene person was "out of town" (PCT. 218-220). He thought his limited experience was the reason an offer had been extended to the Monroe County Sheriff's Office for FDLE to come in (PCT. 219-220).

Detective Powell testified that he was involved in the decision not to have FDLE process the crime scene. He thought their crime scene staff was "adequate." (PCT. 280). Pops (Petrick)

[18] At least, eight people were present in the crime scene as it was being processed (PCT. 251, 280, 129, 196).

and Mark Andrews processed the scene. Even though Andrews had only processed one other murder scene, he thought he was "qualified enough." (PCT. 284).

Contrary to Judge Jones's order, Mr. Overton was not required to prove by direct evidence who tampered with the evidence and broken the chain of custody. Circumstantial evidence of tampering is sufficient. Mr. Overton proved that the only damaging forensic evidence against him was not in a locked property room in police custody for 18 months. This is tampering and a break in custody under the law. See, Murray, supra; Dodd, supra; Hayes, supra.

Detective Petrick, the lead investigator, could not identify the bag the clippings were in at the time of trial nor did he sign the bag that bore a forgery of his signature. Had Dr. Pope not resigned from the Monroe County Sheriff's Office in 1993, the evidence would still be in his refrigerator next to the leftover meatloaf.

Dr. Pope himself could not remember when he made the cuttings from the bed sheets on September 9th or 11th, 1991 (T. 3366-3369; 3519, 3544). He admitted hanging the sheets to dry in his guest room at home. He never said who visited his home while the evidence dried. He said he never signed off on the property receipts because he knew his own handwriting and the crime scene and it didn't make any difference to him (T. 3366-69). But it does make a difference

under Florida law and the NRC standards. This is not the "meticulous care and thorough documentation of every step" anticipated in Hayes, Murray and Dodd.

In his Brady claim, Mr. Overton alleged that the State withheld valuable impeachment and exculpatory information regarding Dr. Pope's unique methods of collecting evidence. Specifically, Dr. Pope's evidence collection techniques had been found to be shoddy and suspect in the past.

In another capital case from Monroe County, Lloyd Chase Allen v. State, 854 So.2d 1255 (Fla. 2003)[19] the FDLE Crime Lab had refused to accept evidence submitted by Dr. Pope, because the sample was collected in a unprofessional manner and contaminated. Mr. Allen alleged that the FDLE Crime Lab had many problems with contamination and misreporting during the time of Mr. Overton's investigation and trial. The facts in Mr. Overton's case are different from Allen in that Mr. Overton can prove prejudice.

The only evidence against Mr. Overton was DNA evidence and two jailhouse snitches who were severely impeached on the stand. Any evidence favorable to the defense that rebutted the State's DNA case was critical. Failure to disclose this information is a Brady

[19]Mr. Allen raised his claim as a Brady v. Maryland claim. The clam was summarily denied because Mr. Allen could not prove prejudice. See, Allen v. State, 854 So. 2d 1255, 1257 (Fla. 2003).

violation.

The trial court summarily denied this claim and, as a result, Mr. Overton could present no evidence on this issue to the court.

At his evidentiary hearing, Mr. Overton proved more than a mere "probability" of tampering. He proved the failure of trial counsel to track and challenge this evidence and to know how to challenge this evidence at a Frye hearing. Counsel's omissions was deficient performance. Not only did trial counsel's failures affect challenging the State's case, it prevented the defense from examining the DNA testing conducted by FDLE and Bode Technology. Because the trial attorneys failed to investigate the procedures used by Bode, they had no way of investigating whether the clippings tested by Bode were contaminated or whether one contaminated sample was simply duplicated over and over.

Under Rompilla v. Beard, 125 S. Ct. 2456 (2005), the United States Supreme Court reversed a case in which trial counsel failed to review a file on a prior conviction that was to be used to aggravate Mr. Rompilla's crime. The court held that counsel had a duty to make every reasonable effort to learn what they could about the offense, including obtaining the prior conviction file to discover any mitigating evidence.

Here, the defense knew the State intended to introduce the DNA test results and evidence of the bedding. As the trial court said

four days before trial, they could have traveled to Virginia to depose the Bode personnel and could have done something besides sit mute as the State presented its evidence unchallenged. The prejudice here is that Mr. Overton could not refute the State's case before the jury. The jury was left with the impression that a botched chain of custody was sufficient. Mr. Overton's attorneys conceded the validity of the DNA testing by not participating in challenging the State's evidence and by failing to show the weaknesses in the State's case. Mr. Overton did not agree to the this concession. Cf. Francis v. Spraggins, 720 F. 2d 1190 (1983).

But for counsel's errors, there is a reasonably probability that the four jurors who voted for life in the absence of any mitigating evidence would be persuaded if the State's DNA evidence was effectively challenged. For these reasons, Mr. Overton's judgment and sentence should be vacated and the cause remanded.

ARGUMENT II

INEFFECTIVE ASSISTANCE OF COUNSEL–FAILURE TO ADEQUATELY CHALLENGE THE JAILHOUSE INFORMANTS.

The trial court found that Mr. Overton's prosecution was "not based on, nor dependent on, Zientek's (Pesci's) information." The trial court made this finding based on prosecutor Ellsworth's testimony that the State would have prosecuted Mr. Overton regardless of whether Pesci testified or not, there was no

prejudice to Mr. Overton on the fact that his attorneys failed to adequately challenge Pesci on the stand (PCR. 2858-59).

The State went to great lengths to obtain Pesci's cooperation. Mr. Garcia testified that he saw Pesci in cellblock A and that he walked freely around the lockdown cells, talking to inmates, attorneys and guards (PCT. 54). Mr. Smith corroborated Mr. Garcia's testimony.

If the trial court's theory is correct, then prosecutor Ellsworth had no reason to offer Pesci such a deal in exchange for his testimony. Pesci was a three-time convicted, habitual felony offender. His pending charges were for sexual battery, sexual assault, robbery, grand theft auto and resisting arrest without violence (T. 4139-40). He faced 36 years in prison because of the habitualization of his sentence. If he testified that Mr. Overton had confessed and told him details of the crimes, he would receive a deal capped at seven years to be served in a federal facility rather than a state prison. The deal provided for the possibility of a sentence as low as five years (T. 4186-87). It was never disclosed when the five year sentence would be offered.

If the prosecution found Pesci's testimony to be so expendable, as the judge believed, it would not have run the risk of setting a habitual felony offender for sexual assault back out on the street. The State needed someone to tie Mr. Overton to the

scene of the crime and the two snitches served that purpose.

The trial court also suggested in footnote 23 that Guy Green, the second snitch, "did not ask for any benefit nor was he offered any benefit as an inducement for his statement" (PCR. 2855). The record is contrary to this ruling. Green was a nine-time convicted felon incarcerated on burglary charges (T. 3702). He lost five years of gain time by attempting escape, possession of drugs, sex acts, inciting riots and lying to prison personnel (T. 3806). In 1996, the police approached Green initially because they knew he and Overton had met in 1992. Green provided a incriminating statements Mr. Overton allegedly made in the MacIvor murders (T. 3702; 3778-9). One year later, police promised Green assistance in recovering his gain time if he cooperated in the Overton prosecution. It is not clear why the police would make this offer if Green was testifying for no benefit, as the trial court suggested. The reinstatement of five years of gain time is a benefit. Gorham v. State, 597 So. 2d 782 (Fla.

Police promised to write several letters of recommendation to the Department of Corrections on Green's behalf (T. 3780, 3804-5, 4420-2). Green then testified that Mr. Overton confessed to the crime. Green "hoped" to receive his gain time back as a result of his testimony, and if so, he would be close to his release date (T. 3805-7). Green admitted he had lied in the past to receive

benefits or to mislead people (T. 3781-2). This was not considered by the lower court.

The benefit here was the return of five years of gain time, which meant he would get out of jail. Mr. Ellsworth desperately needed Pesci and Green. He only had DNA evidence to place Mr. Overton at the crime scene. Without more, Mr. Ellsworth knew the defense could impeach the DNA on the botched chain of custody, just as things had gone awry in the Lloyd Chase Allen case with the contaminated forensic evidence.

Counsel's failure to adequately investigate the background of these two men was deficient performance. Mr. Overton was prejudiced when the defense failed to show that, at least, Pesci was a state agent when he snuck into Mr. Overton's cell to review his discovery documents.

It is also unexplained why the defense could not impeach Pesci on the uncanny similarities between his notes to law enforcement and Detective Andrew's report of Mr. Overton's suspected involvement in a prior burglary that had been left in Mr. Overton's cell.

The trial court said the defense could not impeach Pesci on these facts because it would open the door to other crimes. But Mr. Overton was already facing two first-degree murder charges, the killing of an unborn child, burglary of a dwelling with assault or

battery on occupant, and sexual battery with force likely to cause serious bodily injury (R. 8-9). Learning that Mr. Overton had a police report on a burglary in his cell paled in comparison to what he faced at trial. The trial court's reasoning here is contrary to the facts and law. Mr. Overton is entitled to a new trial.

Also related to the ineffectiveness of counsel with regard to the snitches is Mr. Overton's claim that State failed to disclose that Pesci was acting as a state agent when he gathered evidence against Mr. Overton. In his postconviction motion, Mr. Overton alleged that Pesci had a past relationship with Agent Scott Daniels and that he was in charge of "handling" Pesci for the prosecution. He testified that he had not had any prior dealings with Pesci until the time of trial and that he had carefully cautioned Pesci not to solicit information from Mr. Overton (PCR. 2865). Yet, documents show that Pesci was reporting to Daniels and provided him with notes.

The trial court held that Mr. Overton's claim was not supported by the evidence, but circumstantially, the closeness of Daniels' dealings with Pesci supports this claim. If Agent Daniels was not in a position of authority over Pesci, there would have been no need for him to coach Pesci on how to get information out of Mr. Overton more naturally (PCR. 2866).

Agent Daniels had a professional relationship with Pesci.

Post-conviction counsel attempted to confront Agent Daniels with phone records from prisons where Pesci was housed. The records showed that Agent Daniels was listed as Pesci's attorney and friend (PCT. 549, def. ex. FF). Judge Jones ruled this evidence was inadmissible hearsay even though hearsay is admissible in penalty phase and relaxed evidentiary rules are necessary in postconviction proceedings (PCT. 550).

Agent Daniels cautioned Pesci to have no further contact with Mr. Overton and not to elicit statements from him (PCT. 560-561). But, Agent Daniels admitted that he had not warned Pesci not to go into Mr. Overton's cell and look at his papers (PCT. 568). Had the defense investigated this, and the State been forthcoming, the defense could have questioned Pesci about his relationship with Agent Daniels. However, the defense chose not to cross-examine Agent Daniels or ask him about this existing relationship with Pesci (T. 3862). The trial court's order denying relief was in error. Mr. Overton had proof of a link between snitch Pesci and Agent Daniels, the court disallowed it to be introduced at the hearing.

ARGUMENT III

INEFFECTIVE ASSISTANCE OF COUNSEL-- FAILURE TO INVESTIGATE ALIBI OR ALTERNATIVE THEORIES OF THE CRIME.

In denying relief on this claim, the trial court said it was

obvious that the defense could not investigate Mr. Overton's alibi because by the time trial counsel was appointed to represent Mr. Overton in 1997, the Amoco employee records and co-worker witnesses' recollections were already destroyed (PCR. 2861). Witnesses who testified at the 2004 evidentiary hearing were asked whether they would have been able to remember in 1997, an event that occurred in 1991. It is an impossible task to accurately speculate on what a person might have remembered had counsel immediately investigated Mr. Overton's alibi witnesses. But trial counsel had a duty to do so, once they were appointed.

The passage of time from the pre-indictment delay of six years did not preclude the investigation of other defenses, in particular, an alibi defense.

Witnesses York, Smerek and Figur, co-workers of Mr. Overton would, have had better memories of what transpired in 1991 had trial counsel contacted them at the first opportunity in 1997. There were also other witnesses to contact. Mr. Overton had given counsel the names of witnesses to call on his behalf.

However, the defense failed to explore this possibility. The defense was stuck to the idea of attacking the DNA evidence and the jailhouse snitches. Mr. Overton told the defense that he was working at the Amoco Station in Tavernier at the time of the murders. But the defense failed to promptly investigate numerous

alibi witnesses.[2021]

These alibi witnesses included fellow employees[22] and the Monroe County Sheriff's Officers who may have investigated the case or fueled their cars at his gas station.[23] Even with this information, the defense failed to obtain records, employee job applications or gas receipts and failed to interview fellow workers who could have corroborated Mr. Overton's alibi. They never established contact with these people or deposed them.

The defense failed to develop any aspect of Mr. Overton's alibi defense and decided not to pursue an alibi at trial without

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[20]

[21] Mr. Overton testified that he had given his attorneys names of several people with whom he had worked at the Amoco station in Tavernier, including Sammie Connors, David Smerek, Greg VanDyke, Blane Taylor, Lori Gonzales (Figur) and a person named Gino (last name unknown to Mr. Overton)(PCT. 613).

[22] Mr. Overton worked the night shift. There were two positions: floor person, who worked from 10 pm to 6 am; and register person who worked from 11 pm to 7 am. There were a minimum of four fellow employees who would have been able to testify, not only that Mr. Overton worked the midnight shift of August 21-22, 1991, but also that it was not possible for him to have left the station and returned for any length of time without it being known. For security reasons, workers were not allowed out of each other's sight for more than a few minutes at a time, and definitely not without notice to each other.

[23] The Monroe County Sheriff's Office had a contract with the Amoco Station for the purpose of fueling its officers cars. These officers used special in-house credit cards. The employee working the register was required to sign their initials and road officers were required to also sign and write in their identification number. Mr. Overton had shown his attorneys copies of these in-house receipts and asked that they follow through in locating the receipts for August 21 and 22, 1991.

fully investigating the defense. Counsel could not have made a reasoned decision to abandon this defense at trial particularly given its consistency with the innocence defense that was presented at trial.

It was counsel's duty to explore other possible defenses. In postconviction, a certified forensic pathologist, former medical examiner and director of pathology services in Connecticut, Dr. Katsnelson, were retained to review the records and photographs of the crime scene. Dr. Katsnelson disagreed with the cause of death of Michael MacIvor and believed that his body had been moved. Dr. Katsnelson opined that the physical evidence, observations by the medical examiner and photographs suggested that Mrs. MacIvor had not been sexually assaulted (PCT. 425-441).

Although Mr. Overton presented a defense of innocence at trial, the defense failed to investigate or adequately present evidence of other suspects pursued by law enforcement, such as the drug angle. Counsel failed to elicit that at least three others had confessed to being involved in the murders. The MacIvor murder occurred in August, 1991. The investigation went on for years and took the police to Belize to investigate leads regarding the victims involvement in drug smuggling (T. 4327). Once police zeroed in on Mr. Overton, the other leads disappeared. The police did not like him and even suspected him in an unsolved murder.

The trial court's order fails to consider that trial counsel had a duty to investigate all avenues of defense before deciding which one to pursue.

ARGUMENT IV

INEFFECTIVE ASSISTANCE OF COUNSEL-- FAILURE TO KNOW STATUTE OF LIMITATIONS.

In his third amended postconviction motion, Mr. Overton alleged that his defense failed to recognize that the statute of limitations had run on the burglary charge at the time of trial. A prosecution for burglary must be brought within 4 years after it is committed. Sec. 775.15, Fla. Stat. (1991). In Perez v. State, 545 So. 2d 1357 (Fla. 1989), this Court said, "the limitations period in effect at the time of the incident giving rise to the criminal charges controls the time period..." Mr. Overton was charged with two counts of first-degree murder, burglary, sexual battery and murder of an unborn child. The burglary was a felony of the first degree in 1991.[24] The crime occurred August 21, 1991 (R. 1-2). The prosecution did not begin until December, 1996 (R.1-2, 8-15). Counsel never objected to the burglary charge was beyond the statute of limitations under §775.15. Failure to know this basic law was ineffectiveness.

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[24]"Burglary is a felony of the first degree . . .if in the course of committing the offense, the offender: (a) makes an assault or battery upon any person". §810.02, Florida Statutes (1991).

The lower court found counsel's failure harmless. The court told the State it could have cured the problem by amending the information to armed burglary. Mr. Overton was prejudiced by counsel's failure to object in that the burglary was used as an aggravating circumstance. The jury vote was 8 to 4 and 9 to 3. Elimination of this additional charge may have made a difference to a deeply divided jury. Mr. Overton is entitled to relief.

ARGUMENT V

INEFFECTIVE ASSISTANCE OF COUNSEL -- FAILURE TO CHALLENGE A FIVE-YEAR PRE-INDICTMENT DELAY.

In his postconviction motions, Mr. Overton alleged that the unjustified delay of five years in indicting him violated his right to due process under the Fourteenth Amendment to the United States Constitution.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), this Court held that a defendant bears the initial burden of showing actual prejudice when alleging a due process violation due to pre-indictment delay. If the initial burden is met, the court must then balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment. Id. at 531.

In Scott v. State, 581 So. 2d 887, 892-893 (Fla. 1991), this Court held that an unjustified delay of seven years in seeking an indictment, which resulted in the loss of a considerable amount of evidence, violated his due process rights.

Like Mr. Scott, Mr. alleged he was prejudiced by the State's delay in indicting him. Mr. Overton maintained that he was working at the Amoco station on the night of the murders, and that there were witnesses present who could substantiate his claim. Because of the unjustified delay in this case, Mr. Overton was prejudiced because, by the time of his arrest, co-workers were unable to recall what occurred on a given day, five years earlier. Records kept in the normal course of business by the owners of the Amoco Station and gasoline receipts kept by the Monroe County Sheriff's office had been destroyed by the time of Mr. Overton's indictment and trial. Had these records been available, they would have established that Mr. Overton was at work at the time of the murders.

As in Scott Mr. Overton maintains that his alibi was checked by law enforcement officials a few days after the homicides (PCT. 595-597),again in September, 1991, and again in 1992.

Detective Andrews gave a deposition before trial in which he discussed having Mr. Overton's fingerprints compared to the latents

taken from the scene (PCT. 213, Defense Exhibit 7).[25] This was done at Detective Andrews' request on September 21, 1991, because he had suspected Mr. Overton. Detective Andrews also believed that Detective Visco or another officer, immediately after the homicides, had checked into whether Mr. Overton had been working at the Amoco on the nights of the murders (PCT. 213, Defense Exhibit 7, Page 36, Lines 8-19, 23; Page 37, Lines 1-19). Also, early in the investigation, law enforcement conducted "brainstorming" sessions. A State document titled, "Rough Notes from Profilers Meeting 05-06-92, FOP Lodge, Key Largo" gives a suggested course of investigation to eliminate Thomas Overton as a suspect on the list.

Following this meeting, the first two names on the list, George Reynolds and Joiy Holder, were investigated and cleared of any involvement in the murders. The State has disclosed no records pertaining to Mr. Overton in the subsequent brainstorming sessions, nor has the State disclosed what was discussed during any brainstorming sessions pertaining to Mr. Overton. The outcome of any brainstorming sessions could only have been to verify Mr. Overton's alibi and to eliminate him as a suspect. Because of the State's delay in seeking an indictment, Mr. Overton was denied the

[25]The deposition of Detective Andrews was admitted into evidence at the evidentiary hearing as Defense Exhibit 7. Page and lines will be referred to as the citation to this exhibit.

ability to raise an alibi defense.

As in Scott, a witness critical to Mr. Overton's defense, Lorna Swaby, died before the indictment was filed. She could have established Mr. Overton's alibi. At trial, Mr. Overton's theory of defense was that the DNA evidence had been planted, and that Detective Charles Visco had previously obtained Mr. Overton's DNA from a condom provided by a prior girlfriend, Lorna Swaby. Because of the State's delay in seeking an indictment, Ms. Swaby was unavailable to testify because she died in 1994.

Because of the delay in this case, the physical evidence from the crime scene had deteriorated and become contaminated by the time of trial. This degraded evidence rendered its forensic value meaningless. The physical evidence was subject to months in Dr. Pope's unlocked home refrigerator before a profile was finally obtained.

Materials in other crimes had been compared to Mr. Overton's hair samples by FDLE. FDLE had access to biological material from Mr. Overton and the ability to compare it to crime scene samples immediately after the MacIvor murders. Yet, this was not done. Comparison of the crime scene profile to Mr. Overton's samples was unreasonably delayed until 1996.

The trial court erroneously denied this claim based on facts not in evidence. The court found that Mr. Overton was not a strong

suspect early on, yet the testimony of detectives showed that they were investing large amounts of resources to arrest Mr. Overton on other crimes. Law enforcement paid confidential informants to try to sell Mr. Overton illegal firearms to get him arrested and force him into giving a DNA sample.

The trial court found Mr. Overton only became a primary suspect after they obtained his DNA. If that was the case then the police expended a great deal of money and time in pursuing a potentially fruitless lead.

The trial court then stated that "the Defendant cannot point to any prejudice that resulted from the delay." (PCR. 2867). This is clearly wrong. The Amoco records weren't destroyed until 1993. The Monroe County Sheriff's Office receipts were not destroyed until 1995. Ms. Swaby, a critical witness for Mr. Overton, did not die until 1994. Had Mr. Overton been indicted when he was placed on the suspect list, his witnesses would have been able to refer to actual receipts and time cards. His girlfriend who was visited by Detective Visco would still be alive. And the DNA evidence would have been newer.

The government's need for an investigative delay was severely outweighed by the actual prejudice to Mr. Overton. "It is clear that the delay in this instance provided the prosecution with a tactical advantage." Scott, 581 So. 2d at 893. "[D]ue process will

require dismissal of an indictment where it is 'shown that the pre-indictment delay caused substantial prejudice to (an accused's) right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.'" United States v. Townley, 665 F.2d 579(5th Cir. 1982) citing United States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Dismissal was warranted. Counsel's failure to raise this issue is ineffective assistance of counsel.

ARGUMENT VI

MR. OVERTON'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DECLARE A CONFLICT OF INTEREST.

The defense created a conflict of interest when it violated its duty of confidentiality and loyalty to Mr. Overton. Before trial, Mr. Overton learned about a potential legal defense from a book titled *Presumed Innocent*. Subsequent to reading the book, Mr. Overton provided a copy of the book to his counsel. The issue, one involving the presence of nonoxynol in the DNA sample, led to significant leads in his case.

Mr. Overton believed that his defense either gave the book to the State or disclosed the possible defense strategy to the State without his permission.

After the State became aware of the nonoxynol issue, it undermined Mr. Overton's defense by retaining the defense expert,

Phillip Trager, with whom Mr. Overton's counsel had been consulting. The Sixth Amendment requires that defense counsel avoid an "actual conflict of interest" that adversely affects his representation. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

Counsel Florida Rule of Professional Conduct 4-1.6(a). "A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b)(c) and (d), unless the client consents after disclosure." Counsel's actions do not fall within any of the exceptions. Mr. Overton did not consent.

The lower court cited to the testimony of prosecutor Ellsworth, who said he got the nonoxynol defense idea from his own copy of the book and that it was he who asked the defense if they were going to use that defense. The defense said it was Dr. Ronald Wright who told them about the nonoxynol 9 testing. The issue is whether the defense disclosed its strategy to the State.

Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial...[its] infraction can never be treated as harmless error." Holloway v. Arkansas, 435 U.S. 475, 489 (1978). Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, the prejudice test is relaxed where counsel is shown to have had an actual conflict of interest. Strickland; 466 U.S. at

693; Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). The defendant need not show that ineffective counsel "probably changed the outcome of his trial." Walberg v. Isreal, 766 F.2d 1071, 1075 (7th Cir.), cert. denied, 474 U.S. 1013 (1985); McConico v. Alabama, 919 F.2d 1543, 1548-49 (11th Cir. 1980); United States v. Cronic, 104 S.Ct. 2039 (1984). Mr. Overton's conflict adversely affected his representation.

ARGUMENT VII

THE BRADY CLAIM

The trial court erred in summarily denied this claim finding that the allegations in the Rule 3.851 motion were conclusory. Fla. R. Crim. P. 3.851 states that a movant shall file a "brief statement of the facts" not an exhaustive litany to justify a legally sufficient pleading. Mr. Overton alleged that two items were withheld from the defense that were material and could have resulted in a new trial. One item was police brainstorming session notes where they discussed Mr. Overton as a suspect. The trial court wrote that because "no reports" were generated by law enforcement there can be no Brady violation. This is untrue.

Mr. Overton was entitled to any evidence favorable to the defense or impeaching in nature. This includes notes, drawings, photographs or receipts. Brainstorming notes in which the officers

decided to eliminate Mr. Overton as a suspect should have been disclosed.

Counsel's ineffectiveness was compounded by the State's willful withholding of relevant impeachment and exculpatory evidence and its knowing presentation of false testimony. Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1979) occurred.[26] See also, United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Moreover, "...the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437-38.

Early in the investigation, police conducted "brainstorming" sessions. One session involved Mr. Overton and who was listed as a suspect. After this meeting, the first two names on the list, George Reynolds and Joiy Holder, were cleared. The State provided information on the investigations of these two men, but no records on Mr. Overton were ever provided. The State never disclosed any subsequent brainstorming sessions on Mr. Overton. When Mr. Overton

[26]Mr. Overton pleads Brady and ineffective assistance of counsel in the alternative. Either the prosecutor unreasonably failed to disclose or defense counsel unreasonable failed to discover the evidence. Either way the resulting conviction was unreliable.

was not arrested, the logical rationale was that he had been eliminated as a suspect.

Mr. Overton's testimony at his evidentiary hearing was that Detective Visco visited him at the Amoco station shortly after the murders. He showed Detective Visco his time card and the officer left. He was not arrested until years later.

The State also withheld valuable impeachment information regarding Dr. Pope's sloppy evidence collection. In Lloyd Chase Allen v. State, 854 So. 2d 1255 (Fla. 2003), the FDLE Crime Lab had refused to accept evidence submitted by Dr. Pope, because the sample was contaminated. The FDLE Crime Lab also had problems with contamination and misreporting during Mr. Overton's investigation and trial. The State never revealed this impeachment to the defense, even though it would have cast doubt on the State's case. Had the defense, the judge, and jury been made aware of Dr. Pope's reputation for substandard work, four jurors who voted for life could have been persuaded to question the State's DNA evidence. Had the impeachment evidence been disclosed, the outcome would have been different.

Mr. Overton was convicted and sentenced to death in part on the testimony of jailhouse informants. Both informants voluntarily provided police with information after Mr. Overton purportedly made incriminating statements. The State portrayed the informants as

"fortuitously present" when Mr. Overton made these admissions. This was untrue.

The State also failed to disclose information about three suspects. On January 22, 1999, a witness told the police that Hector Hernandez had confessed to the "airport murders." Hernandez said that he was present with two others at the time of the murder. The State was obligated to disclose this information to the defense, which could have used it to conduct further investigation or attack the State's theory that one person committed the murder.

Finally, the State failed to disclose documents including missing pages from police reports (R. 413-415). The State said it had turned everything over (R. 430). The Court found the State had complied with the discovery requests, even though the pages were never produced.

Exculpatory evidence did not reach the jury. Either the state failed to disclose it, or the defense failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. The trial court failed to take the allegations in Mr. Overton's Rule 3.851 motions as true. The trial court erred in summarily denying this claim.

ARGUMENT VIII

SUMMARY DENIAL CLAIM

Where the lower court held no evidentiary hearing, the

appellant's factual allegations must be accepted to the extent that the record does not refute them. Peede v. State, 748 So. 2d 243 (Fla. 1999). Under Rule 3.851, a defendant is entitled to an evidentiary hearing unless the motion and the files and the records in the case conclusively show that he is entitled to no relief, or the motion or particular claims are legally insufficient. Fla R. Crim. P. 3.851; Patton v. State, 784 So. 2d 380 (Fla. 2000). Mr. Overton alleged facts, which would entitle him to relief.

For example, the lower court denied an evidentiary hearing on Claim I, that alleged FDLE and Monroe County Sheriff's Office's failure to provide investigative records on other suspects which were the subject of brainstorming sessions (PCR. 939).

An evidentiary hearing was denied on Claim III that alleged Brady and Giglio violations concerning the withholding of information about police investigation of Mr. Overton's alibi. The State also withheld information of FDLE Crime Lab contamination and its refused to accept evidence from Dr. Pope in other Monroe County cases. The lower court dissected the claims on which it did grant an evidentiary hearing. For example, the court allowed an evidentiary hearing on Claim II on ineffective assistance of counsel, but only allowed certain paragraphs of the claim. The lower court removed paragraph 20, ineffective assistance of counsel for failure to consult with/or utilize experts in crime scene

investigation; and paragraphs 22-28 concerning counsel's failure to secure an expert witness for additional testing of nonoxynol and for failing to secure a fingerprint expert considering the palm print found on the metal pipe at the crime scene and on the tape binding the victim didn't match Mr. Overton's print. Also removed was paragraph 29 alleging counsel's failure to adequately cross-examine state witnesses, including Detective Petrick who testified at trial that he didn't know the partial palm print on the pipe didn't match Mr. Overton. Paragraph 29 also alleged that counsel failed to adequately present the conflicting evidence of the State's experts in that Dr. Nelms, Medical Examiner, opined that given the location of the bodies and strength of Mr. MacIvor, there was a distinct possibility that there was more than one individual involved in the incident, and his belief that the murders were done professionally.

The court removed paragraphs that alleged counsel's failure to impeach Detective Visco with Mr. Overton's consistent statements from the Surette homicide investigation. This impeachment showed Detective Visco's bias and motive to plant Mr. Overton's DNA evidence. Paragraph 34 was removed which concerned counsel's failure to investigate numerous alibi witnesses, and to obtain work records or Sheriff's Office gasoline receipts. Paragraph 37 from Claim II was removed which alleged counsel's failure to investigate

evidence of Mr. Overton's targeting and harassment by the Monroe County Sheriff's officers prior to the crime which have substantiated the defense theory of police planting of evidence.

The lower court also erroneously denied claims that were sufficient pled including: Claim VII: ineffective assistance of counsel for failing to object to the jury instruction on testimony of expert witnesses; Claim VIII: rules forbidding trial counsel to interview jurors to determine if constitutional error was present is a denial of effective assistance of counsel; Claim IX: Ineffective assistance of counsel during voir dire; Claim X: cumulative error; Claim XI: ineffective assistance of counsel by failing to object to time-barred offenses; Claim XII: Mr. Overton's death sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002); Claim XIII: Ineffective assistance of counsel for failure to request a Richardson hearing. In the claims dismembered by the court, Mr. Overton was prevented from presenting facts that if taken as true would entitle him to relief. See, Lemon v. State, 498 So. 2d 923 (Fla. 1986). The lower court erred in denying these claims without hearing. Mr. Overton is entitled to an evidentiary hearing.

CONCLUSION

For the foregoing reasons, Mr. Overton requests that his conviction be vacated and/or any other relief granted this Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished by first-class postage prepaid to Ms. Celia Terenzio, Asst. Attorney General, 1414 W. Flagler Ave., Ste. 900, West Palm Beach, FL 33401 on May 4, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby affirm that this Initial Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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