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

REPLY 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 Reply Brief:

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

"T" -- transcript of original trial proceedings;

"PCR" -- record on postconviction appeal;

"PCT" – transcript of postconviction proceedings.

"DNA-R" – transcript of DNA appeal

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

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

A. Denial of a Full and Fair Hearing .--The standard of review here is whether the files and records conclusively rebut the Rule 3.851 claims on which Mr. Overton did not get a hearing and whether the defendant was afforded due process on the claims on which an evidentiary hearing was granted. *Holland v. State, 503 So. 2d 1250 (Fla. 1987)*. The trial court's fact findings are then assessed *de novo* as to whether they are supported by substantial evidence. *See, Stephens v. State, 743 So. 2d 1028, 1034 (Fla. 1999); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997).*

The State fails to make any argument that Mr. Overton received a full and fair hearing. Instead, the State says an evidentiary hearing was held, what more does due process require? The State also argues that Mr. Overton has not proved his ineffective assistance of counsel claim. But the State offers no explanation for how Mr. Overton could prove the prejudice of counsel's failures when the trial court ordered DNA testing (the main issue in the case) was not completed nor adversarially tested in any way. The same issue has

arisen in *Swafford v. State, SC05-242,* another DNA case pending before this Court. In that case, the issue is how can due process be met when the trial court has prevented the defense from equal access to DNA experts, use of laboratories of its choice and evidentiary challenges when the State has unlimited access to FDLE and its resources. It is a fundamental due process right that the playing field be level when both parties present evidence in court. That is the hallmark of *Holland* upon which this Court has repeatedly relied. The State ignores the due process aspect of this claim and urges this Court to blindly adopt the trial court's fact findings and punish Mr. Overton for not proving his claims.

The State argues that "these [due process] allegations are not properly before this Court as they had never been presented below." (State's Answer Brief, p. 25, footnote 7). The record belies that assertion. Without concern for due process, the trial court rushed to hold the hearing without allowing the DNA test results to be given to the defense or adversarially tested even though the court had previously ordered the testing. Before to the evidentiary hearing, Mr. Overton requested DNA testing of several items in evidence; including rope cuttings obtained from several locations at the crime scene, debris from around the female victim's body, tape cuttings from both

victim's bodies, hair from the mattress pad, hair found in the tape on shoulder of man's T-shirt, fingernail scrapings from the victims, a sexual assault kit and a swab potentially containing a DNA specimen from fluid found on the leg of the female victim, (PCR. 1165-1170). Mr. Overton believed these items would lead to evidence likely to either exonerate him or implicate additional perpetrators and affect the proportionality of his sentence.

A hearing was held on the issue and on May 17, 2004, the trial court allowed testing of fingernail scrapings and only certain swabs from the sexual assault kit (DNA-R. 35-57; PCR. 1186-1194). Mr. Overton asked that the order be clarified and to continue the evidentiary hearing. He argued that all of the victim's swabs should be tested, particularly those taken from the female victim's body at the scene. Previously, these swabs had been "lost" and later found by law enforcement. (DNA-R. 67-70). On June 27, 2004, Mr. Overton filed an objection and a request for testing by an independent laboratory. The defense argued that an independent laboratory could complete the testing in a couple of weeks (DNA-R. 71-73). The lower court held a hearing. Mr. Overton requested that the evidentiary hearing be postponed until the results from the DNA tests were available. (DNA-R. 94).

The hearing was continued so the trial court could know how quickly FDLE could complete the DNA testing. (DNA-R. 113-133). The hearing continued on August 6, 2004, when the State reported that FDLE could complete DNA testing within 60 days with a court order. (PCR. 1986-1987). Both 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 specifically to allow DNA testing to be completed and the results to be given in writing prior to the hearing. (PCR. 1197). Based on the State's representations, the lower court denied Mr. Overton's request to have an independent lab test the materials. (PCR. 1971-1975). The trial judge also reversed his earlier ruling saying that the crime scene swabs potentially contained a DNA specimen from the leg of the female victim and those were to be included for DNA testing as part of the sexual assault kit. As a result, the *entire* sexual assault kit (the crime scene swabs and the autopsy swabs) were be tested by FDLE. On August 10, 2004, Mr. Overton sought to add hairs found in the tape bindings of the female victim to be tested for DNA because they had been advertently omitted from the original request. (PCR. 1955-1959).[1] The request for testing of the tape binding hair came

[1]At the time of the crime, this hair had not been tested because FDLE did not

only days after the hearing on the first DNA motion. Inexplicably, the trial court denied testing of the tape binding hair even though the tape was actually attached to the victim at the time of the crime and could exonerate Mr. Overton as the perpetrator of the crime (DNA-R. 139-151; PCR. 1976-1979).

Within the 90-day extension period, South Florida was struck with two hurricanes which caused delays in law enforcement transporting the DNA samples for testing. Mr. Overton noticed the trial court of the problem at a September 24, 2004 hearing and explained that hurricane delays resulted in insufficient time for the DNA testing to be completed before the scheduled evidentiary hearing. Mr. Overton asked for a continuance which was denied. (PCR. 2189-90; 2402-2403).

Mr. Overton's evidentiary hearing ended before any DNA results were available. Thus, the trial court never learned that FDLE mistakenly failed to test the crime scene swabs as the trial court had ordered. As of this date, the crime scene swabs have still never been tested though the trial court ordered it to be done. None of the DNA results have been made a part of the

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have the ability to conduct mitochondrial DNA testing.

record or been challenged by the defense.

This is a denial of due process when the trial judge specifically continued the evidentiary hearing from August until November, 2004, for the purpose of allowing FDLE to have sufficient time to test the DNA material. The trial court held that the evidentiary hearing was to begin after the DNA testing was complete (PCR. 1971-1975). There was no explanation for the trial court's reversal. The purpose of section 925.11 and rule 3.853 is to provide defendants with a means to challenge convictions when there is a "credible concern that an injustice may have occurred and DNA testing may resolve the issue." *Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2nd DCA 2002).* Mr. Overton was denied due process because he could not control the speed of the FDLE crime lab or the hurricanes that delayed the transfer of evidence. The trial court's failure to allow this evidence to be presented was error. The State failed to address the issue.

Similar circumstances occurred in *Teffeteller, et al v. State, 676 So. 2d 368 (Fla. 1996)* where the trial court so severely limited the way the defendants were allowed to present their proof at an evidentiary hearing that this Court remanded for new proceedings. There could be no adversarial testing of this claim without the results of the DNA testing. *Holland v. State, 503 So 2d 1250 (Fla. 1987), Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994)*. Mr. Overton objected to the unfair process and took every legal recourse possible. Yet, the State's only response is that Mr. Overton did not preserve the issue when he clearly did. (State's Answer Brief, p. 25).

The trial court denied portions of claims, and made it impossible for Mr. Overton to present his evidence in full. (PCR. 1198-1267). For example, an evidentiary hearing was denied on Claim I that concerned the failure of FDLE and the Monroe County Sheriff's Office to provide investigative records on

other suspects who were discussed at the "brainstorming sessions." (PCR. 939). An evidentiary hearing also was denied on Claim III that alleged *Brady* and *Giglio* violations where police withheld information about their investigation of Mr. Overton's alibi and that the FDLE Crime Lab had refused to accept evidence from Dr. Pope in another Monroe County case due to his sloppy handling of evidence. (PCR. 1198-1267). The trial court granted a hearing on portions of claims, yet dissected the claims line-by-line, limiting Mr. Overton on the evidence he could present.

For example, the trial court allowed an evidentiary hearing on Claim II on ineffective assistance of counsel, but only allowed certain paragraphs of the claim to be presented. The trial court removed paragraph 20 which claimed ineffective assistance of counsel for failure to consult with/or utilize experts in crime scene investigation. The

trial court also removed 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. Paragraph 29 was denied which alleged that trial counsel failed to adequately cross-examine state witnesses, including Detective Petrick who testified at trial that he didn't know that a partial palm print found on a pipe at the crime scene did not match Mr. Overton. That paragraph also alleged that counsel failed to elicit conflicting testimony of Medical Examiner, Dr. Nelms, when he said that due to the location of the bodies and the size and strength of Mr. MacIvor, it was possible there was more than one perpetrator involved and that the murders were done by professionals (PCR. 1198-1267). Paragraph 37 from Claim II was denied; limiting Mr. Overton's ability to show how trial counsel failed to investigate the Monroe County Sheriff's officers harassment of Mr. Overton prior to this crime. This provided motive

for the defense theory of police planting evidence. *Id.*

When a claim was denied or limited, Mr. Overton was forced to abide by the court's decision. However, the State was allowed full reign on its questioning of witnesses, and did not limit itself to only those claims granted a hearing. Although the judge has discretion to limit the issues, 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.

The trial court even denied some claims twice; first when it summarily denied the claim, and again when it considered facts the prosecution elicited at the evidentiary hearing (Claim II, paragraphs 20, 34, 35, PCR. 2840). The defense had no opportunity to present evidence on the claim because it had been summarily denied. The State fails to address this

issue.

The State also fails to refute that a full and fair hearing is not possible when the trial judge played the role of prosecutor and took over questioning from the State in areas where 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). When trial counsel testified at the evidentiary hearing, the judge took over questioning from the prosecution in order to bolster their testimony. (PCT.180-187; 193-196).

On two occasions, the judge questioned trial attorney Smith. The first time was to show that Mr. Smith had been a public defender for five years before going into private practice, in order to strengthen his testimony about his experience necessary to handle a death penalty case (PC-T. 182).

The judge also got Mr. Smith to agree that there

was no evidence that the bullet holes in the wall of the victim's home were related to the murders, that the lack of a ballistics expert was not harmful to the defense, that 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). The trial judge then rehabilitated Mr. Smith after a re-direct by post-conviction counsel. This was when Mr. Smith was being questioned about whether he saw Mr. Overton's cell door open. (PCT. 193). The judge's questions were solely designed to rebut Mr. Overton's questions. Throughout the entire hearing, the judge asked no questions to refute the State's case.

The judge became a second prosecutor by extensively questioning 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 deprived Mr. Overton of a fair and impartial tribunal.

Moreover, no deference can be given to the trial court's findings when it so actively became a member of the prosecution team. The prejudice to Mr. Overton was that the trial judge then cited to the specific testimony that he had elicited from the witnesses in order to deny Mr. Overton relief. (PCR. 2823-2870). At one point, in his order denying postconviction relief, Judge Jones criticized postconviction counsel for suggesting that trial counsel Garcia could have informed the court (pre-trial) that he personally had witnessed Mr. Overton's cell door open when he visited with his client, and that he also saw the informant, James Pesci (Zientek) moving freely around Mr. Overton's cell block. The allegation by Mr. Overton was that trial counsel was ineffective for failing

to impeach informant Pesci and show that the snitch had full access to all of the discovery materials that Mr. Overton had kept in his cell. The jury would then know that Pesci did not have to talk to Mr. Overton to learn details about the case. This also would have rebutted Pesci's false testimony at trial that Mr. Overton's cell door was always locked. (PCR. 2863-64).

At the evidentiary hearing, Mr. Overton elicited testimony from trial attorney Garcia who said it did not occur to him to testify about what he had seen. (PCT. 54-58, 70). This question caused concern to the trial judge, who went to great lengths to question both trial attorneys in order to refute Mr. Garcia's "it hadn't occurred to me" testimony. Judge Jones finally got Mr. Garcia to say that they decided not to bring the matter to the court, but rather to confine their impeachment of Pesci to cross-examination (PCT. 94). The judge had the trial attorney create a "tactical" reason to counter

the “it hadn’t occurred to me” response, which was clearly an unreasoned decision and beneficial to Mr. Overton’s claim. (PCT. 54-58, 70). The judge then used the testimony that he had elicited in his order:

> 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).

It was improper for the trial court to “construct strategic decisions which counsel does not offer.” *Harris v. Reed, 894 F. 2d 871, 878 (7th Cir. 1970).* There was no testimony or evidence of a “well-reasoned strategic decision” until the judge led the witness to making that statement after first giving an answer that was not based on trial tactics.

The trial court also created roadblocks when it

refused to order the State to provide laboratory protocols, validation studies, accreditation studies, equipment maintenance logs, contamination logs and laboratory error rates from January 1, 1991 through December 31, 1999 from FDLE. Mr. Overton filed his request for additional public records on September 30, 2002, (PCR. 133-139). Following a hearing in December, 2002 (PCT. 296-304), the trial court denied access to these records. The trial court granted limited access only to the proficiency tests and competency practice casework records "reflecting a failing or unsatisfactory grade or rating on proficiency or competency tests… (PCR. 357-358), and also allowed disclosure of only the records showing negative reports, failure of a validation study, and the loss of accreditation for the laboratories involved in testing evidence from November 21, 1996 to January 11, 1999 (PCR. 358). It is not only negative information that is instructive to the defense but the manner and method

of the DNA testing that could be used at a *Frye* hearing. Mr. Overton claimed that trial counsel were ineffective in failing to challenge the State's scientific evidence at the *Frye* hearing, thus, the failure to provide this information prevented Mr. Overton from fully litigating and pleading the claim. This is not an even playing field.

Again, the record refutes the only argument of the State that the allegations showing a denial of a fair and full hearing were not properly before this Court because they were never presented below. Every example and instance of a denial of due process was brought to the lower court's attention at each opportunity. This case should be remanded to the trial court for an evidentiary hearing that affords Mr. Overton his due process rights to a full and fair hearing before an impartial tribunal.

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

The State argues that Mr. Overton is partially

asserting that trial counsel was ineffective for failing to present evidence at the *Frye* hearing that "STR DNA" testing was not generally accepted within the scientific community (State's Answer Brief, p. 10). This is incorrect. Mr. Overton has shown that trial counsel was ineffective for failing to challenge and investigate the scientific methodology and protocols for DNA testing of FDLE and Bode Tech laboratories, which, if not proper or not correctly done, would render the results of the DNA testing inadmissible. It would not be the type of DNA testing that would not be accepted in the scientific community, but rather, would be the manner in which the sample was tested that would be suspect or the manner in which the lab was run that would make the DNA testing suspect.

The trial record shows that Mr. Overton's counsel failed to become proficient in DNA evidence, failed completely to prepare for the *Frye* hearing, and refused to participate at the hearing. This

deprived Mr. Overton of any adversarial testing of the admissibility of the DNA evidence. The State now argues that this issue was disposed of on direct appeal by quoting the decision of this Court. However, the issue before this Court on direct appeal dealt with the denial of defense counsel's motions for continuance and their allegation of a discovery violation, when the trial attorneys claimed not to have sufficient time to prepare for the *Frye* hearing and that they were deprived of documents from the Bode laboratory. In the decision, this Court concluded that the trial court did not abuse its discretion by not finding a discovery violation or by denying the motions for continuance because trial counsel was aware in June, 1998 that Bode would be conducting independent testing and in October 1998, that the requested manuals, tests and studies were too voluminous to copy and ship. The defense did not visit the lab, phone its director (Dr. Bever), set a deposition, or

even question Dr. Bever at the *Frye* hearing. Nor did this Court find that defense counsel had requested continuances so that he could consult with the lab. *Overton v. State, 801 So. 2d at 877 (Fla. 2001).* Contrary to the State's argument, the fact that they attended was not enough.

The question on direct appeal concerned an alleged discovery violation. This Court's opinion underscores that it was trial counsels' failure to timely request a continuance and conduct timely investigation that were at fault not the discovery violation by the State.

What was omitted from this Court's opinion was that two years earlier Judge Shea was so concerned about the failure of trial counsel to prepare for trial that he had written that he'd found little, if any preparation. He wrote that Mr. Overton's case was basically a DNA case, yet defense counsel had not filed any substantive motions to adhere to the strict standards set forth by this Court in DNA

cases. Judge Shea said that despite its consistent offers to defense counsel to use the offices of the Court to compel discovery, and that although a "Motion to Compel DNA Discovery" had been filed, it had not been set for a hearing. (R. 198-199). Judge Shea took the unusual step of memorializing that there was a pattern of inaction set by trial counsel early on in the proceedings. He said, "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. (T. 1029-1030). He also found that defense counsel could have conducted depositions prior to receiving the discovery (R. 954; T. 1168) and could have traveled to Bode Technology when the test results were first received (T. 1168).

The failure to take depositions of Bode Technology technicians and to review the proficiency tests and laboratory protocols used in the DNA

testing was both the basis for the trial court's denial of a continuance of the *Frye* hearing, and was also the basis for this Court's finding that decision to be sound. That, coupled with trial counsel's refusal to ask a single question of the State's witnesses at the *Frye* hearing, or to put forth any evidence on behalf of Mr. Overton, is a proper basis to find that no adversarial testing occurred. The State's argument that trial counsel attended the *Frye* hearing and that STR DNA testing was acceptable in the scientific community is an overly simplistic view of *Frye* and counsel's responsibilities at trial. *Frye v. United States, 293 F. 2d 1013 (D.C. Cir. 1923); Hayes v. State, 660 So. 2d 257 (Fla. 1995).* This deprived Mr. Overton of effective assistance of counsel.

The State argues that even if this Court should determine that counsel was deficient, there has been no showing of prejudice. The finding of the lower court is consistent with this argument, but also

faulty due to both the lower court and the State's incorrect analysis of the requirements of *Frye*.

Mr. Overton argued that the State must show that 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. *Hayes v. State, 660 So. 2d 257, 263-265 (Fla. 1995); Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995)*. The State only refers to the first prong of the *Hayes/Ramirez/Frye* test which requires the scientific principle, theory or methodology used to develop the evidence be generally accepted in the scientific community. It is the second prong where the problems lie. The second prong requires a showing that the specific testing procedures employed by FDLE in conducting the tests in this case were such that they are generally accepted in the scientific community. The

trial court and Mr. Overton's trial counsel believed the only issue was whether the STR DNA test itself had been generally accepted in the scientific community to be admissible in court.

Trial counsel either failed to know or inexplicably failed to challenge that the methods used by the Monroe County Sheriff's office in collecting and storing the evidence were below the standards in the scientific community for acceptable evidence preservation. The State's witnesses substantiated the fact that evidence collection and preservation methods of Dr. Pope were suspect and did not follow the community standards:

> On August 22, 1991, Dr. Pope collected swabs at the crime scene of suspected semen on Mrs. MacIvor's inner thigh, pubic and buttock area ("crime scene swabs"), but misdated the envelopes August 23, 1991 (T. 3423-4).
>
> No property receipts were prepared for the crime scene swabs (T. 3227, 3451).
>
> Pope took the swabs home rather than to a secure storage facility, where 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 crime scene swabs in sexual assault kit with the autopsy swabs 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 show that the crime scene swabs were included. (T. 3586).

After Mr. Overton’s arrest, police decided to send the crime scene swabs to FDLE, but could not find them (T. 4372-3). Dr. Pope could not remember where he had put them (T. 4372).

Later, when the autopsy swabs were found in the sexual assault kit, they were sent to FDLE where they tested negative for semen (T. 3969, 4031-2, 4372). The crime scene swabs, however, were never tested.

Pope had cut a small piece of the victim’s 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 folded the sheets and placed them in paper bags, which Petrick took to the Marathon evidence vault (T. 3194-7, 3356). However, 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). However, Petrick, 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. He did not place paper under the sheets to collect any trace evidence (T. 3393-4, 3505, 3535).

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.

> 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).

According to Agent Pollack, it is improper to take serological evidence to one's home (T. 4027-30). The National Research Council of the National Academy of Sciences also condemns such practices. The testimony of Pollack and the National Academy of Sciences confirm that the second prong of the *Hayes/Ramirez/Frye* test was not met. Both confirm that the methodology used did not comport to the scientific community standards. Had trial counsel become familiar with the evidence and with the legal standards, he could have succeeded in keeping the DNA testing from being admitted into evidence. 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.

Dr. Randall Libby testified that the difficulty with RFLP DNA testing is that problems can occur before and during the amplification process. 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 and highlights the necessity of further independent DNA testing which Mr. Overton requested and was denied.

Moreover, the trial court's failure to allow Mr. Overton to get the DNA results and retain his own expert to review those results and adversarially challenge them in open court directly affects Mr.

Overton's ability to prove prejudice in this ineffectiveness claim. It was impossible with the manner in which the trial court conducted the evidentiary hearing for Mr. Overton to show that the DNA results were affected by law enforcement's botched chain of custody of the biological material when the court did not allow him to know what the results were or present them in open court **before** the evidentiary hearing.

Due process demands that the defense be given equal access to DNA testing and experts the same as the State. The State's assertion that Mr. Overton cannot establish prejudice is erroneous. Even without the DNA results, Mr. Overton has established that he is entitled to relief on this claim. **C. Failure to rebut chain of custody of forensic evidence.**

The State argues Dr. Pope and Detective Petrick were "thoroughly cross-examined on the chain of

custody" thus Mr. Overton's claim should fail (State's Answer Brief, p. 21). The State agrees with the trial court that said Mr. Overton was selectively reading the transcript where Detective Petrick testified that the paper bag "containing the sheet stained with the semen" did not have his writing on it. The lower court cures the "problem" by pointing to Dr. Pope's admission that the writing was his. (PCR. 2846).

This confusion has plagued the chain of custody issue from the inception of this case. The trial court continues to "follow" the paper bag with the sheet in arguing that the chain of custody is sound, but that was **not the relevant DNA evidence**. The relevant material to follow for the chain of custody purposes was the **clippings** taken from the sheet which were not placed in the paper bag and were not placed in evidence for 18 months after the crime. These are the bed clippings that were kept in Mr. Pope's guest bedroom at home and his "second" lab.

It was the 10 cuttings, placed in **unsealed envelopes**, which were not placed into evidence for almost two years. (T. 3406-7, 3419-21, 3520, 3818). The bedding in the paper bag did not contain the 10 bedding clippings from which Mr. Overton's DNA was purportedly extracted. The trial court was confused as is the State.

According to the State, when the defense attorney "conducted a thorough cross-examination" on the chain of custody, the inquiry focused on the signature on a bag containing bedding that was **not** tested and **not** used against Mr. Overton as evidence linking him to the crime. The inquiry also focused on the improper collection and storage techniques. However, the inquiry by trial counsel, and the analysis by the trial court in its order denying Mr. Overton's request for postconviction relief have never focused on the correct piece of evidence. The chain of custody in question is the 10 clippings in

unsealed envelopes that supposedly contained Mr. Overton's DNA, not the paper bag with the questionable signature, though both are equally disturbing.

The haphazard way in which the Monroe County Sheriff's Office handled its property receipts in 1991 is confusing. But it was trial counsel's responsibility to figure it out. No reasonable trial attorney would have lost track of the DNA evidence on which they were challenging the chain of custody. The trial defense strategy was to challenge the chain of custody and show the jury how sloppy the police work had been. There was a paper trail of sorts created by law enforcement after the fact on the 10 clippings, yet trial counsel failed to discover or correct the court's misconceptions. Post-conviction counsel was able show that the chain of custody of the 10 clippings containing Mr. Overton's DNA had been accessible to a myriad of unknown people without a scintilla of protection or

professional oversight as required by FDLE and by the National Research Council. (See, Initial Brief, pp. 76-85). The property director for the Monroe County Sheriff's office, upon review of a property receipt, confirmed that the first time there is any indication that the clippings were in existence, was on April 26, 1993 – almost two years after the homicides. (T. 3831).

According to Dr. Libby, tampering with DNA evidence can mean that inadvertently or purposefully a sample can be altered by the introduction of more biological material or as a consequence of the manner in which the sample is stored. Tampering with DNA can be as easy as storing the samples improperly. (PCT. 383). Pope improperly stored the bed clippings.

Florida case law requires a showing of a probability of tampering when a party attempts to exclude relevant physical evidence based on a break in the chain of custody. *Floyd v. State, 850 So. 2d*

383 (Fla. 2002), Terry v. State, 668 So. 2d 954, 959 (Fla. 1996). This burden was met. Both the State's witness, Dr. Pollack, and the defense expert, Dr. Libby, agreed that only an intact chain of custody will allow for DNA results to be probative of a defendant's presence at the crime scene. (PCT. 374).

The burden of proof shifted to the State to show that tampering did not occur once Mr. Overton made his showing of the probability of tampering with the DNA evidence. *Murray v. State, 838 So. 2d 1073 (Fla. 2002)*. The State did not meet its burden, the defense failed to know the burden of proof and the trial court did not apply the proper law. This resulted in the altered DNA, and its statistical probabilities being used against Mr. Overton. This is prejudice. Mr. Overton is entitled to his requested relief.

ARGUMENT II--INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO ADEQUATELY CHALLENGE THE JAILHOUSE

INFORMANTS

Mr. Overton agrees with the State that the issue is whether trial counsel failed to adequately investigate and present three areas of impeachment that would have caused the snitch, James Pesci, to be incredible. These are: (a) that Pesci had access to Mr. Overton's cell to review police reports; (b) that Pesci was an agent of the State, and, (c) that Pesci's handwritten notes of conversations with Mr. Overton concerning other crimes compared with actual police reports of those investigations show that Pesci copied the police reports and was not told the information by Mr. Overton (State's Answer Brief, p. 29). Where the State is wrong is in its argument that no other witness could testify that they saw Pesci near Mr. Overton's open cell (State's Answer Brief, p. 30). The State's argument highlights the importance of trial counsel Garcia either testifying or bringing to the court's attention that he had personally

observed Pesci wandering around Mr. Overton's open cell block unsupervised, and that he further observed Mr. Overton's cell door remain unlocked during attorney visits. Mr. Garcia knew that copies of hundreds of pages of discovery materials were inside Mr. Overton's cell. Mr. Garcia was an important eyewitness.

The introduction of Pesci's notes of alleged conversations with Mr. Overton concerning other crimes which contained the same phrasing and misspelled words as found in the police reports kept in Mr. Overton's cell was clear proof that Pesci had copied the reports. Mr. Pesci lied about having those conversations with Mr. Overton, which should have led trial counsel to question the truthfulness of Pesci's testimony concerning Mr. Overton's alleged confessions to the charged crimes. It also is proof that Pesci lied about having access to Mr. Overton's cell. Trial counsel had an obligation to show the jury that Pesci was a liar.

Judge Jones wrongly believed that there were no police reports or other discovery provided to the defense that would show the cut telephone wires or the address book with torn pages (PCR. 2823-2948, at 2862-3). During the evidentiary hearing, Mr. Overton presented copies of handwritten notes that Pesci had given to law enforcement as his personal documentation of alleged conversations with Mr. Overton. (PCR 1515, Defense Exhibit 16). Detective Scott Daniels read Pesci's notes into evidence, and confirmed that Pesci had written about a conversation where Mr. Overton supposedly admitted to having committed a prior armed robbery at Domino's Pizza in Key Largo where he wore camouflaged clothing. (PCT. 536-537). Detective Daniels confirmed that "Domino's Pizza" was misspelled in Pesci's notes as "Dominoe's Pizza" and that Pesci's notes misspelled "camouflage" clothing (PCR. 1515; PCT. 536-537). Detective Daniels spelled the word "camouflage" as it was written by

Pesci to be “camoflage.”

Detective Daniels also identified Defense Exhibit 5 which was Detective Mark Andrews’ four-page police report. (PCT. 537; PCR. 1616–1619, at 1616). The first page of that report said, “Shortly after the discovery of Overton’s return, Domino’s Pizza in Key Largo was robbed at gun point… White male, wearing military camouflage uniform, gloves and a Ninja mask…” (PCT 538; PCR. 1616). However, Detective Daniels then also verified that in the police report written by Detective Andrews, that the word “Domino’s was misspelled as “Dominoe’s” – the exact misspelling found in Pesci’s handwritten notes. He also verified that “Camouflage” was spelled as “Camoflage” – again the exact way that Pesci misspelled the word (PCT. 539; PCR 1616).

Mr. Pesci had access to Mr. Overton’s cell, and had copied police reports and written them verbatim in his notes regarding Mr. Overton’s prior criminal activity. Despite this evidence, the trial court

found that Pesci must have had conversations with Mr. Overton because he could not have known that phone wires were cut and the pages were missing from a MacIvor address book found at the scene.

During the 1999 trial, Detective Petrick testified that he discovered that the phone wires had been cut in the box outside of the victim's home (T. 3212). Detective Petrick identified State's Exhibits 48 and 49 as a photographs he had taken of the MacIvor's telephone junction box (T. 3213-3214).

Detective Petrick described State's Exhibit 48 as a junction box that he had to open in order to photograph the cut wires inside (T. 3214). Trial counsel did not object to this testimony nor did they bring to the trial court's attention any discovery violation. This critical information was given to defense counsel and to Mr. Overton who kept his records in the only place he could–his jail cell.

Detective Petrick discussed processing the crime scene in the bedroom where they collected a phone book. The book was photographed. (T. 3189). He identified State's Exhibit 37 as a photo of the address book. (T. 3190). Detective Petrick also testified that he photographed the master bedroom and identified three photos as State's Exhibits 17-19. (T. 3136-3137). The photos show on top of the bed an address book with the first couple of pages partially torn out (T. 3138). These photographs were provided to defense counsel and ultimately to Mr. Overton. Mr. Pesci acknowledged looking at photographs. This is proof that photos of the crime scene and autopsy were provided in discovery and given to Mr. Overton. Mr. Garcia testified that Mr. Overton had a copy of all the discovery in this jail cell (PC-R. 92-93). The trial judge knew this because he questioned Garcia at the evidentiary hearing. If proper police procedure was followed, there were written reports generated at the same

time the photographs were taken that would have documented the taking of the address book into evidence.

Pesci acknowledged knowing when Mr. Overton received discovery materials, seeing “two batches of crime scene photographs” (including photos of the bedroom with Mrs. MacIvor), reading newspaper accounts of the case. He also considered himself “ pretty clever with the law” (T. 4149; 4150;4194; 4201; 4226). He denied seeing a photo of cut telephone lines, but acknowledged seeing a photo of the phone lines pigtailed out of the box (T. 4227). Detective Petrick’s photos showed the cut phone lines (T. 3214).

Detective Mark Andrews testified at trial that he had been at the crime scene and noticed that there were pages torn from an address book. (T. 3307). The photograph of the bedroom would have shown Pesci the address book with the torn pages. The trial judge’s fact finding was contrary to the

record. Substantial proof shows that Pesci committed perjury at trial.

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

The State argued that Dr. Arkady Katnelson's opinion was "ridiculous in light of the un-assailed evidence" and that "His testimony would have been completely discounted" at trial by the language of this Court's opinion. (State's Answer Brief, p. 39); *Overton v. State, 801 So. 2d 877, at 882-3 (Fla. 2001)*. This Court's opinion was a summary recitation of the facts adduced at trial. Mr. Overton argues that different facts should have been presented to the jury which could have resulted in a different jury verdict and a different ruling by this Court.

The trial court's summary dismissal of this claim was error. Dr. Katsnelson, a board-certified forensic pathologist, testified at the evidentiary hearing with over 45 years of

experience in the field. In 45 years, he has only testified about six times for the defense. He is board certified in general and forensic pathology, and was accepted as an expert in forensic pathology. (PCT. 425-435, 501, 503).

Dr. Katsnelson reviewed the autopsy reports, crime scene videos and photos and trial testimony of experts and opined that Mrs. MacIvor had not been sexually assaulted. He found no evidence of extensive injuries in the entrance to the vagina around the genitals and no contusions or superficial abrasions on the inner part of the upper legs (PCT. 481-482). Dr. Katsnelson also discussed the injury to the vaginal area found by the Medical Examiner, Dr. Nelms, that was one small superficial abrasion on the entrance of the vagina and no other injuries. He opined that Mrs. MacIvor was almost at full-term pregnancy, where there typically is edema around the genitals, meaning the genitals would be swollen. He said that a small abrasion in this area would be

expected since with this kind of swelling, even a small type of contact will create some injuries. In fact, there is a high possibility that Mrs. MacIvor would be able to inflict this injury herself when she is cleaning or dressing. He said that had there been a sexual assault, there would be extensive injuries to the external part of the genitals because it is extremely easy to damage the organs when they are so swollen (PCT. 482-483).

Dr. Katsnelson found no evidence of anal rape. There were only feces found around the anus, most likely due to ligature strangulation where typically the victim will have involuntary defecation and urination. Because he found no injuries of anal penetration and no vaginal rape, Dr. Katsnelson disagreed with Dr. Nelms' testimony that Mrs. MacIvor had been sexually assaulted. He agreed with the autopsy report that there was a small abrasion near the vagina, the cause of death is asphyxiation, and the mechanism of death is ligature

strangulation. (PCT. 484-486).

The trial judge questioned Dr. Katsnelson, asking him for his “honest opinion” as to whether Mrs. MacIvor was sexually assaulted. The doctor assured the judge that his honest opinion was that she was not, and he also noted that the vaginal swabs from the autopsy report showed no semen and no evidence of anal intercourse. (PCT. 507-508). Dr. Katsnelson opined that Mrs. MacIvor was bound postmortem due to no hemorrhage in the areas of the bindings, and that she could have been bound to prepare her to be moved from the crime scene to a different place. (PCT. 475).

The trial court misstated Dr. Katsnelson’s testimony in finding that he opined that the victims had been murdered elsewhere. (PCR. 2851-A). The judge said:

> Dr. Katsnelson did not offer an opinion as to why the nude female victim’s clothing was brought back to the home with her and,

along with items emptied from her purse, stuffed under the comforter upon which her body had been placed... Or, if she was still clothed when the body was returned to the home, why her lifeless body was disrobed so violently that the shanks broke away from the buttons. But, in fairness, the Doctor was not asked these questions, perhaps, because, as noted above, the Defendant was not actually granted a hearing on this claim. The Doctor's testimony on this issue came in tangentially in the context of other claims. Note is made of it here because the Court wished to accord the Defendant the fullest and fairest possible hearing. (PCT. 2851, footnote 22). (Emphasis added).

The trial court was wrong. Dr. Katsnelson never testified that Mrs. MacIvor was killed elsewhere and her body was brought back into her home. He said

the victim's hands were bound as if to prepare to move her to another location.

The trial judge not only misstated the testimony, but misstated Mr. Overton's claim as a "failure to use expert witnesses adequately at the trial, particularly to testify that the murders were committed elsewhere and the bodies subsequently moved to the house." (PCR. 2851-A). Mr. Overton's claim was an "ineffective assistance of counsel for failure to call a crime scene expert" (PCR. 534-605; 1211) in which Mr. Overton was denied an evidentiary hearing (PCR. 1211; 1178-1182). The trial court plucked paragraphs out of claims on which to grant or deny an evidentiary hearing. The trial court denied Mr. Overton any preparation or evidentiary development of the issue but then used testimony he said was "tangential" to other issues against Mr. Overton to portray Dr. Katsnelson's testimony as ridiculous and beyond the realm of possibility.

Mr. Overton had no way to rebut the judge's

findings because he had been denied a hearing on the claim. This was not the "fullest and fairest possible hearing" but a mockery of due process (PCT. 2851, footnote 22). Mr. Overton established that counsel was ineffective for failing to explore alternative theories and was entitled to a full evidentiary hearing on his claim before a fair and impartial judge. Mr. Overton relies on his Initial Brief to rebut the remaining State's arguments

CONCLUSION

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 U.S. Mail to Ms. Celia Terenzio, Asst. Attorney General, 1414 W. Flagler Ave., Ste. 900, West Palm Beach, FL 33401 on November 6, 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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