IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-31

RICHARD W. RHODES, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of post-conviction relief after conducting an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

“RS” -- record on the resentencing proceeding;

"PC-R." -- record on post-conviction appeal to this Court;

“PC-R. Supp” – first post-conviction supplemental record;

“PC-R. Supp.2"- second post-conviction supplemental record.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF FONT

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INTRODUCTION

In 1985, the State admitted it only had circumstantial evidence against Mr. Rhodes. Absent from the case was any physical evidence linking Mr. Rhodes to the crime. No weapon was ever found. The only evidence against him were the stories of jailhouse informants who gained favorable treatment in exchange for their testimony and the fact that Mr. Rhodes had the victim's car, which he said he had permission to drive. Mr. Rhodes's own statements were so fantastic that even law enforcement initially didn't believe them.

Mr. Rhodes' conviction rested on the word and reputation of police. The State presented evidence that it had done everything in its power to investigate the forensic evidence in the case. Blood and hair analysis was presented at guilt phase in 1985 by FBI agents to show that the State had throughly investigated its case. But, blood analysis from jeans purportedly belonging to Mr. Rhodes was inconclusive, and the hair clutched in the victim's hands was inconsistent with Mr. Rhodes.

FBI Special Agent Michael Malone testified that the failure to match the hairs did not mean Mr. Rhodes was not present at the crime scene. He told the jury that all of the hair in the victim's hands was her own, pulled from her head in the "throes of death." The State brought Malone from FBI headquarters in Quantico, Virginia to show the jury that it was not to be faulted for the lack of evidence linking Mr. Rhodes to the crime.

Still, the circumstantial evidence was tenuous. The residual doubt over Mr. Rhodes's guilt was evident in the 7-5 death recommendation by the 1985 jury. The jury made this recommendation even though it had heard prejudicial prosecutorial closing argument, prejudicial testimony of a another victim on a tape recording, and improper jury instructions on the heinous, atrocious and cruel and cold, calculated and premeditated aggravating factors. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). The penalty phase errors were found so prejudicial by this Court that it reversed for a new sentencing. The guilt phase errors were ruled harmless.

At the 1992 resentencing, Mr. Rhodes's guilt phase evidence could not be presented because lingering doubt is not a proper consideration. The jury recommended death by 10-2.

On appeal, this Court found more error in that resentencing counsel had "acquiesce[d]" to a hearsay reading of the informant's testimony into the record; failed to rehabilitate or object to the excusal for cause of two jurors; failed to object to hearsay in the reading of a doctor's report; and failed to object or preserve numerous jury instruction errors, such as Caldwell error. This Court found the errors not preserved and affirmed. Rhodes v. State, 638 So. 2d 920 (Fla. 1994).

Now, additional error has surfaced. At the evidentiary hearings in 2001-2002, Mr. Rhodes presented evidence that Brady material was withheld from the defense at the original trial, and he received ineffective assistance of counsel at resentencing.

During the evidentiary hearing on October 24, 2002, new information was disclosed to the defense. The State disclosed that FBI Agent Malone had given false testimony at trial. He had not tested all of the hair in the victim's hands, nor had he examined the exhibits he identified at trial being the hair and fiber he tested. The State's exhibits were entered into evidence without the jury ever knowing that Malone had not analyzed any of them.

Mr. Rhodes' jury did not know this information because it went uncorrected by the State. When this information is considered cumulatively with the evidence previously presented, confidence in the reliability of the outcome of Mr. Rhodes' trial and resentencing is undermined.

STATEMENT OF THE CASE

The Circuit Court for the Sixth Judicial Circuit in Pinellas County, Florida, entered the judgment of conviction and sentence of death. A grand jury indicted Mr. Rhodes on one count of first-degree premeditated murder on June 20, 1984 (R. 20-21). Mr. Rhodes was represented by Judge Henry Andringa (R. 960).

Mr. Rhodes' jury trial began on August 6, 1985 before Judge Helen Hansel (R. 960). On August 19, 1985, the jury found Mr. Rhodes guilty as charged (R. 2540). The penalty phase was conducted on August 27, 1985 and the jury recommended a death sentence by a vote of 7 to 5 (R. 274, 2750).

On September 12, 1985, the court sentenced Mr. Rhodes to death finding the aggravating circumstances of under sentence of

imprisonment at the time of the crime; prior violent felony; during the course of a robbery or sexual battery; heinous, atrocious and cruel (HAC); and cold, calculated and premeditated (CCP)(R. 2959-2960). In mitigation, Judge Hansel found some evidence of a long-term personality disorder (R. 2960).

On direct appeal, this Court vacated the death sentence, finding that the trial court erroneously allowed the jury to consider a taped statement of a prior victim without an opportunity to cross examine; that the trial court allowed inflammatory prosecutorial closing argument; that the trial court instructed the jury on the HAC and CCP aggravators when neither applied; and that the trial court answered a jury question without notice to counsel. This Court also found improper prosecutorial misconduct in guilt phase and that an improper guilt phase jury instruction on flight should not have been given. This Court found the errors harmless. This Court did not consider the merits of Mr. Rhodes' argument that the trial court erred in allowing FBI agent Michael Malone to testify outside his area of expertise. Rhodes v. State, 547 So. 2d 1201, 1203 (Fla. 1989). The case was remanded for a new sentencing proceeding.

On February 11-14, 1992, a resentencing took place before Judge W. Douglas Baird (RS. 508). Attorney John Swisher represented Mr. Rhodes in this proceeding. The jury voted 10 to 2 for death on February 14, 1992 (RS. 1179). On March 20, 1992, Mr. Rhodes was sentenced to death. The judge found the aggravating factors that Mr. Rhodes was on parole at the time of

the crime; that he had been convicted of a prior violent felony; and that the crime was committed during the course of an attempted sexual battery. In mitigation, the court found that Mr. Rhodes was 30 at the time of the crime and that his ability to appreciate the criminality of his acts was substantially impaired. In non-statutory mitigation, the judge found that Mr. Rhodes was abandoned as a child by his parents; that he never experienced a normal family life; and that he spent most of his life in state mental hospitals and prisons (RS. 1199, 488-491).

On direct appeal of the resentencing, this Court found that the resentencing court botched the jury instruction on a felony involving use of violence; that the resentencing judge erred in allowing Oregon Officer Gary Wright to testify about an Oregon mental health report that the defense had no opportunity to challenge; and that the State improperly questioned Officer Wright on collateral crimes that were not before the jury. See, Rhodes v. State, 638 So. 2d 920, 926-927 (Fla. 1994). This Court found the errors harmless. Id. Certiorari was denied on December 5, 1994. Rhodes v. Florida, 115 S. Ct. 642 (1994).

On April 12, 1996, Mr. Rhodes filed his first post-conviction motion raising 35 claims (PC-R. 1-176). An amended post-conviction motion was filed on January 8, 1999 (PC-R. 327-362). The State responded on August 23, 1999(PC-R. 453). After a Huff hearing, the trial court granted an evidentiary hearing on only two claims: ineffective assistance of counsel at resentencing and a Brady/newly-discovered evidence claim (PC-R. 469-629). Evidentiary hearings were conducted on May 1, 2001,

October 24, 2001, Feb. 25, 2002 and May 29, 2002.

On December 19, 2001, Mr. Rhodes filed a Motion for DNA Testing pursuant to Fla. R. Crim. P. 3.853 and a motion to establish the condition of forensic evidence and chain of custody (PC-R. 701-702; 703-709). The motion was granted on July 19, 2002 after the conclusion of the evidentiary hearing (PC-R. 770). The FDLE report stating its DNA results was not available to the defense until January 27, 2003 and the full file was not disclosed until March 11, 2003 (PC-R. 1008).

Mr. Rhodes filed a motion to depose the State's DNA expert on July 7, 2003 (PC-R. 1008), but the request was denied. None of the DNA results or procedures have been tested in open court or admitted into evidence for this appeal.

The trial court denied Mr. Rhodes' motion for post-conviction relief on November 12, 2003 (PC-R. 1033-1035). A motion for rehearing was denied on December 12, 2003 (PC-R. 1025-1032; 1033-1035). A notice of appeal was filed on December 31, 2003 (PC-R. 1036-1037). This appeal is timely made.

STATEMENT OF FACTS

Mr. Rhodes was granted an evidentiary hearing on ineffective assistance of counsel at resentencing and a Brady/newly-discovered evidence about recently disclosed information on FBI Agent Malone's trial testimony.

A. Ineffective Assistance of Counsel

At the May 1, 2001 evidentiary hearing, Kenny Rhodes, Mr. Rhodes' younger brother, testified that his parents were Richard Rhodes Sr. and Bessie Rhodes, but he was raised by his foster

family, the Bartikians, since he was seven years old (PC-R. 1058). He said his natural parents ruined his life (PC-R. 1059). He described his father as a deviant who liked to "mess with children" and destroy them (PC-R. 1059-60). His biological mother did nothing to stop Richard Sr.'s behavior (PC-R. 1060). Kenny was sexually molested by Richard Sr. and abandoned to foster care when he was 7 (PC-R. 1060).

Kenny could not remember his parents feeding them regularly. The children would be given a bean sandwich that fell apart in their hands and they were forced to eat it off the ground. They were fed sauerkraut three times a day until they threw it behind the couch. When their father discovered it, he made them eat it off the floor (PC-R. 1061). Kenny hid from his father. He saw his father rape his step-sister and brothers. He knew that eventually his father would come for him (PC-R. 1062).

When Kenny was 7 and James was 8, they were abandoned by their parents. They were left in a house and were forced to drink from the toilet (PC-R. 1062). They ate from garbage cans because there was no food in the house. They did this for two days before child protective services came and took them away (PC-R. 1062).

Kenny has had difficulty overcoming his early childhood. He has grown angrier and more hateful each day (PC-R. 1063). He described James as unruly. While in foster care at the Bartikian home, James tried to "heave me [Kenny] over an overpass on the freeway to see if I could bounce or not." (PC-R.

1090). Richard Jr. was at Napa State Hospital (PC-R. 1090). Richard Jr. was sent there because his father thought the best way to get rid of him was to throw him out like garbage (PC-R. 1064).

Kenny lived with the Bartikians for five years before he was returned to his father. When he was 12, his father threatened to kill him if he did not do what his father wanted. Kenny was raped several times by his father. Richard Sr. also allowed his step-mother's sons to put a pitchfork to his throat and beat him up (PC-R. 1066). After his father destroyed Kenny mentally, physically and sexually, his father sent him to juvenile hall because he was uncontrollable (PC-R. 1067). James was sent there, too.

As a result of his upbringing, Kenny tried to commit suicide twice (PC-R. 1070). He claimed his father abused all the children, and went to prison for it (PC-R. 1070). Kenny has difficulty controlling his temper and was given the choice at age 18 to go to jail or enlist in the military (PC-R. 1072). Kenny enlisted and lasted about a month and a half. He was honorably discharged because of mental disabilities (PC-R. 1072).

Kenny was given Dilantin to control his behavior. He was sent to a mental hospital in Woodland. He tried to overdose on drugs (PC-R. 1073). Kenny married and had a child, but the child was taken away because of his temper (PC-R. 1074). After he lost his child, he began using heroin and cocaine (PC-R. 1074).

Kenny had a foster family that loved him. The Bartikians tried to teach him right from wrong (PC-R. 1075). At the time of the evidentiary hearing, Kenny was taking Amitriptyline to control his anger and rages (PC-R. 1076). He has been on disability because he cannot hold down a regular job (PC-R. 1089). Kenny was never contacted by Richard Jr.'s defense attorneys. Had they contacted him, Kenny would have cooperated (PC-R. 1080).

Eileen Meis[1] married Richard Sr.'s brother, Gerald Vailes in 1949 (PC-R. 1094). She lived in Santa Rosa when Richard Jr. was born and saw him as a small boy (PC-R. 1095). She first met Richard Sr. when he returned from Korea in 1949 and was staying with his mother, Mary Vailes (PC-R. 1095). He had no previous relationship with his mother because he had been raised by her sister's family. Richard Sr. asked Ms. Meis' husband if he could sleep with Eileen (PC-R. 1096). Her husband slammed Richard Sr.'s through a plate glass window, and he made no further advances.

Richard Sr. married a woman named Dorothy, but the marriage lasted only a few weeks (PC-R. 1096). He then married Bessie, Richard Jr.'s mother. When Richard, Jr. was born, both Bessie and Richard Sr. had alcohol problems (PC-R. 1096). The couple fought "continuously" and Bessie had black eyes and facial bruises. Bessie told her it was "not pleasant" living with Richard Sr. (PC-R. 1097). Bessie was quiet, reticent and scared

[1]The record incorrectly spells her name as Mease.

(PC-R. 1097).

Ms. Meis did not want to be in “same room alone with [Richard, Sr.] him.” (PC-R. 1097). If Richard Sr. had several drinks, he would explode (PC-R. 1098). She was afraid to be with him because she had seen him hit his mother in a “full-out punch.” (PC-R. 1098). This behavior continued after Richard Jr. was born.

After Richard Jr.’s birth, Bessie was diagnosed with tuberculosis and was placed in a sanatorium for two years. Richard Jr. was placed in foster care (PC-R. 1098). The foster family wanted to adopt him, but his parents refused (PC-R. 1099). Mrs. Meis was appalled because Bessie was in a sanatorium and Richard Sr. “didn’t seem to want or need the child at all.” (PC-R. 1099). When Richard Jr. returned to live with his natural parents, the family lived in employee housing in farming communities. The family moved often because Richard Sr. would be fired for drinking (PC-R. 1100). The children were never in a tidy home. There was a week’s worth of dishes in the kitchen, and the remains of meals. There was mold and clothing everywhere (PC-R. 1100).

Mrs. Meis knew that Mrs. Vailes, Richard’s mother, would buy clothes for the children. They would wear the clothes until they were so filthy that they threw them out. The family often moved in the middle of the night because it could not pay the rent (PC-R. 1101). The family lived outdoors. Mrs. Meis saw them living in ditches and in a “hay pod in the middle of a field” (PC-R. 1103).

Mrs. Meis and her father-in-law took food to the children (PC-R. 1101). She was “sick” when she saw Richard Jr. and James sitting at the table “filthy dirty.” They had not been taught to eat with utensils. She saw the boys put their hands into a bowl of beans (PC-R. 1101). The bowl was not clean, and the boys were shoving food into their mouths (PC-R. 1102).

Mrs. Meis said the children had behavior problems. She saw the children hit so hard it left a full hand print across their faces. She also saw black eyes, bruises, contusions and cuts all over the boys’ bodies (PC-R. 1102). On one occasion, she saw Richard Sr. hit Richard Jr. with his “full fist.” (PC-R. 1113).

Mrs. Meis suspected the children had been sexually abused because Richard Jr. would cower when his father came around. Richard Jr. told her he had been sexually molested by his father (PC-R. 1103; 1117). He told her this before he went to Napa State Hospital at age 6 (PC-R. 1117). Mrs. Meis told her in-laws about the abuse but it was ignored (PC-R. 1117).

When Bessie was pregnant with Kenny, Mrs. Meis and her father-in-law went to Richard Sr.’s home and found him in bed with Bessie and her sister (PC-R. 1119). Bessie told Mrs. Meis that her sister was also pregnant by Richard Sr. (PC-R. 1120). Richard Sr. molested Mrs. Meis’ daughter when she was a small child (PC-R. 1104), but she did not tell Mrs. Meis until she was 40.

Bessie and Richard Sr. often abandoned their children. One time, they left the children with a babysitter in San Diego.

When it was apparent they were not going to return, the children were sent to foster homes (PC-R. 1107).

When Richard Jr. was 12, he returned to his parents. Richard Sr. had divorced Bessie by then and married Pat, who had two children of her own, Cheryl and Michael (PC-R. 1108). The family came to visit Mrs. Vailes but did not bring Richard Jr. When Mrs. Vailes asked where Richard Jr. was Cheryl said he was "chained to the bed or closet or someplace." Richard Jr. was not allowed to visit his grandmother because he wet his bed, and this was his punishment (PC-R. 1108). Richard Jr. also had been chained to the doghouse for three weeks for wetting his bed (PC-R. 1108).

Pat Rhodes, Richard Sr.'s third wife, wanted nothing to do with Richard Sr.'s first four children. She refused to care for them, and that precipitated Richard Jr. being sent to Napa State Hospital (PC-R. 1109). Richard Sr.'s sexual conduct continued with Pat's children. He was charged and sent to prison for sexually molesting Cheryl (PC-R. 1109).

Mrs. Meis had not seen Richard Jr. since he was 18 when he was released from Napa State Hospital (PC-R. 1110; 1114). He had no education (PC-R. 1114). In 1992, Mrs. Meis was not contacted by Richard Jr.'s attorneys. Had she been contacted, she would have been available to testify (PC-R. 1111).

Lorraine Armstrong, a charge nurse at Napa State Hospital, testified that Richard Jr. had been a patient in the children's section (PC-R. 1121-22). She was in charge of 45 children. She knew Richard Rhodes Sr. because he was raised by friends of

hers. She recognized 12-year-old Richard Jr. when he came into the hospital because he looked just like his father (PC-R. 1123-24). Richard Jr. was compliant and would do anything to get the other children to like him (PC-R. 1125). One time, Richard Jr. went so far as to stick his hand into a bee hive to collect bees for a child who sold them. His entire arm was stung, but Richard got the bees just to help (PC-R. 1125).

Mrs. Armstrong thought Richard Jr. had a schizophrenic diagnosis and was given Thorazine (PC-R. 1125). Student doctors treated the children and Richard Jr. had four or five doctors (PC-R. 1127). Because of budget cuts, the hospital had little money for the children. At times, Ms. Armstrong would be the only one in charge of the children (PC-R. 1130).

Mrs. Armstrong said Richard Jr. was not very good in school. She did not consider him a smart child (PC-R. 1134). Richard Jr. worked making coffins in a carpenter shop with the retarded patients (PC-R. 1131). She thought he was “pretty slow.” (PC-R. 1134). She did not remember him reading or writing (PC-R. 1135).

In the three-years she had contact with Richard, Jr., he was visited by his father once for one hour (PC-R. 1128). At the visit, he acted like a stranger. He did not hug Richard Jr. He took him out for a hamburger and then brought him right back (PC-R. 1128). Mrs. Armstrong read a May 2, 1967 letter into the record in which she documented to Catherine Broussard, Richard Jr.’s aunt, the short length of his father’s visit (PC-R. 1131). At times, Mrs. Armstrong took Richard Jr. to her home because he

had no visitors on holidays (PC-R. 1134).

After leaving the children's ward, Mrs. Armstrong did not see Richard Jr. nor did she know he was in the adult unit of the hospital (PC-R. 1141). Mrs. Armstrong was not contacted by Richard Jr.'s defense attorneys at the time of his resentencing but would have testified had she been contacted (PC-R. 1134).

Dorothy Bellew[2],an investigator, interviewed Mr. Rhodes' aunt, Kathleen Bussard [sic] [Broussard] in 1995 or 1996. Ms. Broussard was in her 80s at the time and is now deceased (PC-R. 1281). Ms. Broussard told Ms. Ballew that Richard Jr.'s mother, Bessie, was an alcoholic, had a low IQ, and was possibly retarded. Bessie drank alcohol during all of her pregnancies (PC-R. 1285).

Ms. Brouussard said Richard Jr. was the first-born child. She knew that her brother, Richard Sr., was a pedophile and had been in San Quentin and Arizona (PC-R. 1285).

Ms. Broussard saw the extreme deprivation and sexual abuse that Richard Jr. suffered (PC-R. 1286). Ms. Broussard called the Sonoma Child Protective Services when she realized that Richard Sr. had chained Richard Jr. with a dog chain and had been feeding him dog food out of a bowl when he was 5 or 6 (PC-R. 1286). She also reported to child welfare when Richard Jr. and his two brothers were abandoned in a house in Sonoma County (PC-R. 1286).

[2]Her name was misspelled in the record as Bellue.

Cheryl Nuss,[3] a California investigator, located Marco and Kate Piazza, the foster parents of Richard Jr. (PC-R. 1295). She spoke with the Piazzas and reduced their statements to an affidavit. However, when she returned the next day with their typewritten affidavits, the couple did not want to be involved (PC-R. 1297). In a proffer, Ms. Nuss said she was told by Marco Piazza that he was Richard Jr.'s foster parent. Mr. Piazza told Ms. Nuss that the couple got "Ritchie" when he was three months old. They felt sorry for him because he was always going back and forth between his parents, who would keep him for a week or a month(PC-R. 1298). One time, Mr. Piazza had to go to Sacramento to get Ritchie because his parents abandoned him and his baby brother in a motel room (PC-R. 1299). The Piazzas wanted to adopt Ritchie but it became too hard on them to keep returning the boy. They eventually told the social worker they could not do it anymore (PC-R. 1299). Mr. Piazza said neither he nor his wife were contacted by Richard Jr.'s trial attorneys(PC-R. 1299).

Ms. Nuss proffered that she took the statement of Kate Piazza who said the couple had Ritchie's younger brother for a while. She said they were babies who constantly bounced back and forth between their parents and the Piazzas. Mrs. Piazza said it was hard to watch Ritchie being bounced around because he would get used to them [the Piazzas]. He cried when the social worker brought him back. Just as he got happy again, the

[3]She was incorrectly identified in the record as Cheryl Smith.

parents would come and take him away (PC-R. 1300). She remembered the children being abandoned in a motel. They were filthy and smelly. Their diapers were long overdue to be changed, and the motel was filthy with food and garbage (PC-R. 1301). When Ritchie was 14 or 15, a social worker called to see if they would take him back. Ritchie was on medication. Mrs. Piazza had never been contacted by any one Mr. Rhodes' Jr., trial attorneys (PC-R. 1301).

The depositions of Mary Vailes, Mr. Rhodes' grandmother, and Helen Greco, Mr. Rhodes' aunt, were presented in lieu of live testimony (PC-R. 1305).

Mr. Rhodes presented Ron Eide, a Pinellas County assistant public defender, who testified that he was the original trial attorney in April, 1984 (PC-R. 1183). Mr. Eide made a demand for discovery on June 27, 1984 and received the State's answer on August 9, 1984 (PC-R. 1184). Another attorney and an investigator were assigned to the case, but withdrew in September, 1984 due to a conflict (PC-R. 1185). Mr. Eide's file did not show he was contacted by Swisher (PC-R. 1187).

Judge Henry Andringa testified that before becoming a judge he represented Mr. Rhodes at trial. He was appointed by the court on October 30, 1984 (PC-R. 1193-95). He received some documents from prior counsel and also made a demand for discovery with his co-counsel, Jim Denhardt (PC-R. 1193). He expected that he had received all the evidence from the State Attorney's Office (PC-R. 1194). He hired an investigator on the case and did not have difficulty finding witnesses with the

exception of one local witness (PC-R. 1196). Mr. Rhodes' wife was "one of many" contacts he used during the investigation of the case (PC-R. 1205).

Andringa got "along very well" with Mr. Rhodes. He describe Mr. Rhodes as cooperative (PC-R. 1196), and he had no problems getting information. Andringa recalled his frustration with Judge Hansel because the case was only her second criminal case, and it moved slowly (PC-R. 1198). At the end of trial, Andringa asked that all the physical evidence be preserved for appeal. When the case was reversed on appeal, Andringa had no contact with the attorneys other than turning over his files to them (PC-R. 1198-99). Attorney Swisher told him he had been assigned to represent Mr. Rhodes (PC-R. 1199).

Swisher was court-appointed to represent Mr. Rhodes at resentencing in 1991 (PC-R. 1349). At that time, a third of his practice was criminal work. In 1991, he was paid $50 per hour and $25-35 an hour for investigators (PC-R. 1351). Swisher obtained the Rhodes' files from Jim Denhardt (PC-R. 1352). He was appointed on July 22, 1991 and filed a motion to continue trial on July 25, 1991 (PC-R. 1354). Swisher also filed a motion for appointment of confidential expert on August 26, 1991 (PC-R. 1355). An order granting the motion was signed on December 10, 1991 (PC-R. 1356). On the first day of resentencing, Swisher filed a motion in limine. He filed no other motions (PC-R.1357).

Swisher prepared for resentencing by "going through" the testimony of witnesses at the prior trial, talking to Dr. Taylor

and Dr. Mariner [sic][Merin], and the client (PC-R. 1357).

An attorney named Flanagan assisted with the trial pro bono, but his role was "very minor." Swisher made all the strategy decisions (PC-R. 1358). He did not hire an investigator. He did not explain to Mr. Rhodes what a penalty phase was because he had already been through one. Mr. Rhodes was "pretty much" cooperative before trial. Swisher believed they were "doing fine." (PC-R. 1394). Mr. Rhodes gave him some witness names, who he believed were people from death row. Swisher knew that Mr. Rhodes had two half-brothers who were in the Marine Corps (PC-R. 1359). Swisher believed that the client was the "captain of the ship" when it came to decision making (PC-R. 1361).

Swisher contacted Dr. Taylor to testify at the resentencing, and he provided background materials that may have come from the trial attorney's files (PC-R. 1361). After reviewing his bill, Swisher noted that he had picked up records and reviewed them on July 26, 1991 and then got medical records and reviewed them from the State Attorney's Office on January 27, 1992 (PC-R. 1363). He did not recall where he got the background materials. Swisher acknowledged it was his responsibility to get background information to Dr. Taylor (PC-R. 1363).

Swisher was unaware that the State intended to use Mr. Rhodes' medical records to support the aggravating factors (PC-R. 1364-65). He did not believe there were any aggravating factors in the medical reports (PC-R. 1365). Swisher did not

recall how the State got Mr. Rhodes' medical records into evidence.

Swisher did not recall whether he spoke to any of the doctors listed on Mr. Rhodes' medical documents (PC-R. 1365). He spoke to Dr. Afield on the telephone but did not recall speaking with Dr. Fireman (PC-R. 1366). He did not recall speaking with any of the witnesses Mr. Rhodes had given him (PC-R. 1366). He tried to talk to Mary Vailes, Mr. Rhodes' grandmother, but could not reach her by phone. Dr. Taylor spoke with her instead (PC-R. 1366). Swisher did not speak to any other family members, friends, nurses or doctors about Mr. Rhodes' background (PC-R. 1367).

Swisher's theory of defense was to establish Mr. Rhodes' mental health mitigation through Dr. Taylor (PC-R. 1367). He intended to get in Dr. Afield's prior testimony through Dr. Taylor and through the cross-examination of Dr. Merin (PC-R. 1367). Swisher wanted to convey to the jury that Mr. Rhodes had a "difficult time" growing up and had been abused (PC-R. 1368).

Swisher was unaware of any problems between himself and Mr. Rhodes until February 11, 1992, the first day of the resentencing. That was the first time Mr. Rhodes claimed Swisher was ineffective (PC-R. 1369). To preserve the issue, they had an in camera hearing in Judge Baird's chambers (PC-R. 1369). Swisher thought the meeting was Mr. Rhodes' opportunity to get him off the case without telling the State what was going on (PC-R. 1370). Swisher made a motion to withdraw during the

hearing. Instead of removing him, the judge gave Mr. Rhodes a choice of calling two witnesses. The State contacted Mr. Rhodes' brother, James, and Don Betterly to testify on Mr. Rhodes' behalf (PC-R. 1370). Swisher did not feel he had a conflict of interest at that point.

Swisher did not recall whether he acknowledged to Judge Baird that he had not contacted any of the people Mr. Rhodes had given him (PC-R. 1370-71). He did not hold any ill will against Mr. Rhodes for complaining (PC-R. 1371).

The State located the two witnesses. Swisher spoke with James Rhodes when he arrived in Florida and Mr. Betterly by phone (PC-R. 1371-72). Swisher went through James Rhodes' testimony at his hotel and felt his testimony would corroborate the social history Dr. Taylor was going to testify to. He did not want to call Mr. Betterly as a witness because he described Mr. Rhodes as "manipulative" and a "liar" (PC-R. 1372). He said Mr. Betterly did not corroborate the abuse Mr. Rhodes suffered at Napa Hospital or the medications he was prescribed (PC-R. 1374).

Swisher did not intend to introduce the medical or other background records into evidence at penalty phase because they contained negative things. He planned to have Dr. Taylor testify about the records (PC-R. 1373). However, when he gave the records to Dr. Taylor, included in them was the Napa State Hospital document with Mr. Betterly's negative statements (PC-R. 1375).

Mr. Rhodes was concerned that without the medical records

Dr. Taylor would have nothing to corroborate his testimony (PC-R. 1375). Mr. Rhodes complained that Swisher was not doing his job. Swisher said the only way to corroborate Dr. Taylor's testimony was to get the records into evidence and that is how the records were introduced at the resentencing (PC-R. 1375). Before the resentencing, Mr. Rhodes knew Dr. Taylor's testimony had to be substantiated from outside sources and that is why Swisher tried to contact Mrs. Vailes (PC-R. 1375).

However, during Dr. Taylor's cross examination, the State referred to Mr. Betterly's negative comments, which Mr. Rhodes believed would not come in (PC-R. 1376). Mr. Rhodes got upset and grabbed Swisher's arm. Swisher got scared (PC-R. 1377). Swisher thought he was being set up and that Mr. Rhodes forced him to put in the medical records because he was not giving Dr. Taylor background material. He did not think Mr. Rhodes had ever given him his brother James' name or Mr. Betterly's name prior to February 11, 1992 (PC-R. 1377). He asked to withdraw (PC-R. 1378).

Swisher did not know whether the jury saw Mr. Rhodes grab his arm (PC-R. 1382). "It happened quickly and the bailiff was on him pretty fast." Swisher made it known to the court that he did not want to continue as counsel as he had a conflict of interest (PC-R. 1383). He was numb and started shaking thirty minutes later. Swisher did not know whether his fear affected his representation of Mr. Rhodes. The court took a long lunch break so that Swisher could compose himself (PC-R. 1383). Mr. Rhodes then left the courtroom and did not return until later

(PC-R. 1395).

Swisher testified that Mr. Rhodes never gave him the names of his brothers until the *in-camera* hearing and that was the first time he had heard of the brothers (PC-R. 1385). He interviewed Mr. Rhodes when he first began representing him, but Swisher did not get his brother's names. He only recalled being given the step-brother's names who were in the Marines (PC-R. 1397). Swisher did not contact the brothers who were in the Marines. (PC-R. 1399).

Swisher did not recall looking at the Oregon State Penitentiary or Nevada prison records to see if they contained the names and addresses of family members (PC-R. 1397). Swisher thought Mr. Rhodes was setting him up because he withheld the names of his brother and Mr. Betterly (PC-R. 1403). He did not recall whether any names were in Andringa's trial files (PC-R. 1398).

During the *in-camera* meeting, Swisher was given 24 hours to find the two witnesses Mr. Rhodes wanted called and the State offered assistance in getting the witnesses to trial (PC-R. 1398). Dr. Donald Taylor testified that he was given background materials from Swisher that included Napa State Hospital records from 1965 and 1972; 1973 psychiatric evaluations by Dr. James Martin and Dr. Wisert; Oregon prison records from 1974-78; Dr. Afield's evaluation and 1985 trial testimony; Florida State Prison records from 1985-89; and Pinellas County Jail records (PC-R. 1405). He interviewed Mr. Rhodes in November, 1991. He spoke with Mary Vailes, Mr.

Rhodes' grandmother in January, 1992 (PC-R. 1406). Mrs. Vailes told him that Richard Jr. had been mistreated and that when he was a little boy he was disturbed and on medication (PC-R. 1406; 1416). She said he was locked in a closet on one occasion and tied to a bed another time. She did not know if he was sexually abused, but recalled that he was sent to Napa State Hospital (PC-R. 1406). Dr. Taylor realized that Mary Vailes had limited contact with Richard Jr. (PC-R. 1422). Even though Dr. Taylor noted that another family member, Catherine Broussard, lived with Mrs. Vailes and had the same phone number, he did not speak with her or any others (PC-R. 1406-07; 1422). He did not contact any of the doctors listed in the reports he was given (PC-R. 1408). He and Swisher agreed that he would not read any other materials since Mr. Rhodes could not remember the crime (PC-R. 1409).

Dr. Taylor was impeached about not knowing about Mr. Rhodes' statements to police. Before the evidentiary hearing, Dr. Taylor was given additional background materials on Mr. Rhodes, including school, hospital and prison records, affidavits of family members; and transcripts of the sentencing phase in 1985 and 1992 (PC-R. 1410). Dr. Taylor found that the duress statutory mitigator did not apply to Mr. Rhodes based on this new information (PC-R. 1412). If he had known the information before he saw Mr. Rhodes, he would have responded better to the impeachment questions. He still found Mr Rhodes was unable to conform his conduct to the requirements of the law at the time of the crime (PC-R. 1413). He could not say that

Mr. Rhodes was under the influence of a mental or emotional disturbance at the time of the crime, but he believed that Mr. Rhodes was emotionally damaged and disturbed throughout his entire life. Part of the emotional disturbance was that he could not conform his conduct to the requirements of the law. Dr. Taylor relied largely on Mr. Rhodes' self report and the records that were available to him at the time (PC-R. 1413). Swisher told him that his theory of defense was to present the statutory mental mitigators (PC-R. 1414). However, in his report, he said he needed more information to give an opinion as to what Mr. Rhodes' mental state was on the day of the crime (PC-R. 1423). At the time of the resentencing, he did not know that Mr. Rhodes had given any statements to police (PC-R. 1423).

Dr. Faye Sultan, a clinical psychologist, reviewed the records previously provided to Dr. Taylor and reviewed his testimony at trial and resentencing. She also reviewed the testimony of James Rhodes and Dr. Sydney Merin, Mr. Rhodes' 1992 sentencing transcripts, and the Florida Supreme Court opinion of May 4, 1994, (PC-R. 1435). She reviewed government publications describing the conditions at Napa State Hospital in the 1960s and early 1970s. She reviewed Detective Porter's testimony from 1984-92 and documents declaring Richard Rhodes, Sr. a mentally disordered sex offender (PC-R. 1440). She interviewed Kenneth Rhodes, Helen Greco, Richard Jr.'s second cousin, Mary Vailes, Don Betterley, Eileen Meis, Lorraine Armstrong, and Rebecca Rhodes (PC-R. 1442). She interviewed Mr. Rhodes on four separate occasions (PC-R. 1442).

Dr. Sultan found that Mr. Rhodes had extreme psychiatric disturbances early in life. This was found in the records of Catholic Social Services and St. Vincent's School for Boys, where he was described as an extremely disturbed child who was disruptive, who climbed on desks and was hyperactive (PC-R. 1443). The records showed the instability of his early life and the effects of his abandonment on his emotional development. One teacher noted that she had to give Richard Jr. two pencils, one to chew on and one to write with because he could not contain himself any other way (PC-R. 1444). The documents showed that Richard Jr. still wet his pants at age 8, sucked his thumb and complained of physical ailments that doctors could not confirm. (PC-R. 1445).

Dr. Sultan found evidence of organic brain damage in the Oregon State records in a 1963 EEG. This was part of an evaluation done on Mr. Rhodes in 3rd or 4th grade. It also showed signs of convulsive seizures (PC-R. 1447). Mr. Rhodes was repeatedly described as unable to control his behavior (PC-R. 1447).

Dr. Sultan found no evidence that Mr. Rhodes underwent psychotherapy. He was institutionalized and medicated on Mellaril, Trilafon and other anti-psychotic medications (PC-R. 1451-52).

Dr. Sultan found it significant that Don Betterly was listed on the visiting records as Richard Jr.'s father in 1974 and there was a questionnaire he filled out where he described Richard Jr. as a pathological liar who cannot help himself. He

said Richard Jr. had an unusual sex drive and that they lived together for several months after his discharge from Napa State Hospital (PC-R. 1447).

Dr. Sultan interviewed Mr. Betterly, a technician in the adult unit at Napa State Hospital (PC-R. 1470). She described him as psychiatrically disturbed and aroused by young boys (PC-R. 1472). He knew Mr. Rhodes well and spent many years with him. He knew that Mr. Rhodes worked in the coffin factory. Mr. Betterly laughed when he told Dr. Sultan that it was common for the weakest boy in the unit to perform oral sex on the toughest boy (PC-R. 1470). He laughed as he described a "wet sheet treatment" in which a straitjacket or wet sheet was wrapped around a child so he was unable to move any part of his body and then submerged in cold water for a long period of time (PC-R. 1471). Mr. Rhodes was given this "wet sheet" treatment (PC-R. 1473).

Mr. Betterly knew Mr. Rhodes had been on antipsychotic medication during his stay at the state hospital. He brought Mr. Rhodes home with him from Napa (PC-R. 1473). Mr. Betterly corroborated that he had an "intimate" relationship with Mr. Rhodes. He described Mr. Rhodes as manipulative and a liar (PC-R. 1473). He seemed angry when he spoke of Mr. Rhodes but also described him as very psychiatrically disturbed (PC-R. 1473).

Mr. Betterly said he adopted boys from Japan after he was in the military. He smiled a lot and the tone of his voice was intimate when he talked about what a "handsome, sweet, blond boy Steven Fox was." (PC-R. 1471). Mr. Fox lived with Mr.

Betterly. Dr. Sultan also interviewed Mary Vailes, Mr. Rhodes' grandmother (PC-R. 1464). Dr. Sultan learned of an intergenerational pattern of abandonment of children in that Mrs. Vailes abandoned Richard Sr. when he was a baby, and he was raised in her sister's house with his cousin Helen Greco (PC-R. 1464). She told of her own alcoholic history and that Richard Sr.'s drinking problems escalated when he returned from the Korean War. She described her son's life with Bessie Cowan as full of poverty and deprivation (PC-R. 1465). She understood that Richard, Jr. was subjected to cruel treatment by her son (PC-R. 1466-67), but had "almost no recall" of Richard Jr. (PC-R. 1467).

Dr. Sultan interviewed Helen Greco who had been raised in the same house with Richard Rhodes, Sr. (PC-R. 1467). She described him as odd and difficult. He did not like to work, drank, and allowed his children to go hungry (PC-R. 1468). The family did not have a place to live and would drift around and sleep in creek beds (PC-R. 1468). He was rough with the children and Bessy.

She recalled a time when Richard Sr. brought the children to visit and made them stay in the car (PC-R. 1468). When she made sandwiches, he made all of the children share a sandwich while sitting in the car (PC-R. 1468). The children were dirty and unkempt. They did not use silverware to eat (PC-R. 1469). Ms. Greco had contact with the children when they traveled through the area as migrant farmers (PC-R. 1469). Ms. Greco knew Richard Jr. while he was at Napa State Hospital (PC-R.

1469). She described him as a sad, institutionalized person (PC-R. 1469).

Dr. Sultan's diagnosis showed a history of escalating violence when Mr. Rhodes was outside the institution and self-destructive behavior (PC-R. 1475). She said Mr. Rhodes suffered from cognitive disorders with the abnormal EEG at a young age, learning disabilities and attention problems (PC-R. 1476). Mr. Rhodes met the criteria for post-traumatic stress disorder with flashbacks and memories of torture (PC-R. 1476). Mr. Rhodes also has a mood and a depressive disorder that distorted reality. He had a life-long pattern of self-destructive behavior and destructive behavior toward others (PC-R. 1476). Dr. Sultan saw no indication that Mr. Rhodes' condition improved over time (PC-R. 1477).

Dr. Sultan found that Mr. Rhodes suffered from a personality disorder not otherwise specified. He had characteristics of anti-social personality disorder, border line personality disorder, and paranoid personality disorder (PC-R. 1478). Dr. Sultan said Mr. Rhodes cannot function outside an institution. He has never held a job or formed healthy attachments to others (PC-R. 1482).

Dr. Sultan agreed with Dr. Afield's 1982 conclusion that Mr. Rhodes could not conform his conduct to the requirements of law and that he committed the crime under the influence of an extreme mental or emotional disturbance (PC-R. 1483). Dr. Sultan could not say whether Mr. Rhodes knew that his behavior was criminal at the time of the crime (PC-R. 1484). Unlike Dr.

Afield, she would not have found Mr. Rhodes to have been under "duress" at the time of the crime because she interprets duress to mean influence from external factors, which she did not find (PC-R. 1485).

With regard to Mr. Rhodes' statements to police, Dr. Sultan said this behavior was not any different from Mr. Rhodes' confessions in other cases. She said he makes up stories that are not very compelling. He shows self destructive behavior as he tries to protect himself and he is "not very good at it" (PC-R. 1486). Dr. Sultan would have been able to testify as to these statutory and non-statutory mitigating factors in 1992 had she been called to testify (PC-R. 1489).

Dr. Sydney Merin,[4] a clinical psychologist and neuropsychologist, was the only State witness (PC-R. 1530). Merin testified that he had not conducted a comprehensive psychological evaluation of Mr. Rhodes (PC-R. 1533). He did not speak with Drs. Taylor or Afield about Mr. Rhodes' case (PC-R. 1534). He saw Mr. Rhodes in the courtroom at resentencing (PC-R. 1534). He could not explain why he did not see Mr. Rhodes despite a court order authorizing the evaluation (PC-R. 1535).

The defense objected to Merin's testimony since he had not evaluated Mr. Rhodes (PC-R. 1537). The court ruled that not seeing the defendant went to weight not admissibility (PC-R. 1538).

The only basis for Merin's opinion were records and

[4]The record misspelled Dr. Merin's name as "Marin."

transcripts provided by the State (PC-R. 1538). He had not changed his opinion since 1992 that Mr. Rhodes was not under the influence of an extreme mental or emotion disturbance at the time of the offense, or that he was not under duress at the time of the crime and that he could appreciate the criminality of his conduct and conform his conduct to the requirements of the law (PC-R. 1539). Merin said Mr. Rhodes was not "substantially impaired." (PC-R. 1539). He did not see any cognitive disorders, but possibly a learning disorder (PC-R. 1540). He found no post-traumatic stress disorder and no "major" depression, only a "down mood." (PC-R. 1540). Mr. Rhodes was walking around with a "little bit of a black cloud over you [sic] head." (PC-R. 1541). He agreed that Mr. Rhodes had a personality disorder with anti-social, narcissistic and borderline features, but was not paranoid (PC-R. 1541). Merin said he had "some suspiciousness." (PC-R. 1541). Merin did not know if Mr. Rhodes had any organic brain damage, but he would have viewed Mr. Rhodes as having a learning disability with hyperactivity (PC-R. 1542). He did not conduct neuropsychological tests (PC-R. 1543). He did not know whether Mr. Rhodes could read or write (PC-R. 1543). Merin did not believe that Mr. Rhodes had a substantial mental disorder (PC-R. 1550). Merin did not talk to anyone about Mr. Rhodes' background (PC-R. 1562).

B. Facts relevant to the <u>Brady/Giglio</u> claim

At the October 24, 2001 evidentiary hearing, the State disclosed for the first time that FBI Agent Michael Malone made

a “mistake” in his 1985 trial testimony when he said he tested hair in the victim’s hands twice and that the hair was her own (PC-R. 1178-80). In reality, Malone disclosed that the hair was not tested at all because it was “not suitable for comparison.” (PC-R. 1181). Counsel orally requested to amend the Rule 3.850 motion with this new Brady information, as Malone was scheduled to testify that day. The request was granted (PC-R. 1182).

Malone, a retired FBI hair and fiber analyst, testified that he was the primary examiner on Mr. Rhodes’ case (PC-R. 1212). He had testified in Florida approximately 50 times. He was responsible for taking the evidence and distributing it to other FBI examiners (PC-R. 1213). Technicians under his supervision handled the evidence (PC-R. 1214). After looking at his report and notes, he could not identify the technician in this case (PC-R. 1215; 1229). He issued an FBI lab report on May 18, 1984 and June 18, 1984 (PC-R. 1215), and he had a complete copy of his “bench” notes in his possession at the time of his testimony (PC-R. 1216). Malone took notes during his initial examination of the evidence and those became his bench notes (PC-R. 1217). They were not dated. He was also responsible for a June 18, 1984 report which included serology conclusions dictated by Mark Fabio (PC-R. 1219). He had no way of knowing whether the dictation was correct, he just added it to the report (PC-R. 1219). Malone’s initials on the report were “RQ.” The FBI did not use the agent’s initials because it “wanted to keep us anonymous.” (PC-R. 1220). The reports, however, were reviewed by the hair and fiber unit chief Mark

Sholberg (PC-R. 1230). Mr. Sholberg, however, did not actually look at the samples to verify Malone's conclusions, nor did he verify that the information in Malone's bench notes matched what was in the report (PC-R. 1230). Mr. Sholberg only verified the report complied with FBI policy (PC-R. 1230).

By the time Malone got the samples in this case, they had already been mounted on glass slides by his technician (PC-R. 1231-32). The hair samples were placed on microscope slides with a permanent mounting called perimount [sic] and were covered with a glass slip. Perimount becomes a hard resin that can stay on slides for 20 years (PC-R. 1235). Malone decided which hairs were to be mounted on slides (PC-R. 1233). All the hairs that were submitted to him were put on slides for his review (PC-R. 1234). He did not remove any hairs from slides before the evidence was returned to the Pinellas Sheriff (PC-R. 1235).

Malone testified that the FBI "likes" the technicians to have degrees or a science background but they are trained by other technicians in "on-the-job training," not hair examiners (PC-R. 1234). Malone did not know whether the technician involved in this case had a science degree because he did not know who it was (PC-R. 1234). FBI policy is not to disclose the technicians because they are not trained to testify (PC-R. 1240).

Malone was responsible for determine whether the samples were properly labeled and mounted (PC-R. 1241), but it was the technician who inventoried the items that were sent for

submission from the Pinellas Sheriff. Malone could not remember if he assisted in the inventory (PC-R. 1242).

At the time of his examination, a hair could be suitable for comparison if it matched 15 characteristics (PC-R. 1237). The standard was probably set by his unit chief or "whoever trained me." (PC-R. 1238). But, he did not find a probative match of any of the mounted hair samples with Mr. Rhodes' hair (PC-R. 1240).

Malone testified at trial that hair in the victim's hands was her own and in reviewing his bench notes on October 24, 2001 he discovered that he was "mistaken." (PC-R. 1245). The hair in the victim's right hand were "not suitable for comparison." (PC-R. 1246). Malone testified that his report was correct, but his testimony was "inaccurate." (PC-R. 1246). Malone tested every hair that was submitted to him (PC-R. 1275). Q10 in his report was from the victim's right hand which were six hairs that were consistent with the victim's hair (PC-R. 1275). Q13 was a "brown" hair from the victim's left hand that was "not suitable for comparison." (PC-R. 1275).

In his 1985 trial testimony, he said 99 times out of 100 the hair in the victim's hands is her own. This testimony was based on his own experience, and is consistent with what he learned at symposiums (PC-R. 1246-47). In 20 years, Malone had only had one case in which the hair in the victim's hands was not their own. Malone said that his previous testimony that the victim grabbed her own hair in the throes of death was based on what he learned from the lecture of a medical examiner at a

symposium (PC-R. 1248). He did not recall the medical examiner's name (PC-R. 1248).

In this case, he examined "each and every" strand of hair that was in the victim's hands and they were all the victim's hair (PC-R. 1249). He examined 63 hairs according to his bench notes (PC-R. 1251). He also examined "hundreds" of fibers (PC-R. 1251). When confronted with the 1997 report from the United States Office of the Inspector General ("OIG") which said Malone testified outside his area of expertise, the State objected to its relevance (PC-R. 1255). The judge ruled that unless the report specifically cited Mr. Rhodes' case in which improper testing methods had been discovered, it was irrelevant (PC-R. 1263).

Mr. Rhodes' proffered the answer. Malone said he was familiar with the report that said he testified outside his area of expertise about the tensile strength of a leather strap that was submittted to him in the Alcee Hastings case. Malone denied giving false testimony (PC-R. 1266) or being targeted by the OIG report. He said 13 other examiners also were criticized.

In response to the report, the FBI sent 13 or 14 of Malone's cases to the original prosecutors to see if they wanted to take any further action (PC-R. 1267). Even though the OIG recommended that the FBI take appropriate action, Malone did not receive any disciplinary action (PC-R. 1268).

Malone was told that two of his cases were reversed because there was insufficient evidence to convict the defendants (PC-R. 1268). He was familiar with the Bocal [sic] [Bogle] case in

which the OIG report said Malone wrongly identified a head hair as a pubic hair (PC-R. 1269). Malone said it was a “clerical error” in that he put the wrong Q number down in his report (PC-R. 1269). The proffer concluded.

As to possible contamination in the hair and fiber section of the FBI lab, Malone testified that contamination was the “number one” problem to be concerned with in hair and fiber section and that was why the hair and fiber evidence had come to their unit first (PC-R. 1232). Malone acknowledged that there was black soot at the ventilation duct, and the soot occurred in the same areas where he conducted hair and fiber analysis. The same ventilation system was used for the entire lab (PC-R. 1244).

Former FBI Agent, Frederic Whitehurst, testified that he worked in the FBI materials analysis unit and was then transferred to the hazardous materials response team (PC-R. 1308). He conducted dye analysis and paints and solvents. (PC-R. 1310). His office was next door to the hair and fiber unit (PC-R. 1310).

Mr. Whitehurst said the FBI was concerned that the ventilation in the building was not filtering contaminants from the air. His unit was concerned with “black rain” or fiberglass that had broken down over time and pushed out “particulate matter” through the ducts and ended up “all over everything” possibly contaminating the trace evidence (PC-R. 1311).

One day he found a fine dust on everything. He viewed it under a microscope and saw different kinds of fibers. The

implications were “very disturbing.” (PC-R. 1312). He said the “black rain” must have been in the hair and fiber unit next door because it was in the DNA, serology, and firearms sections (PC-R. 1313). In 1986, the unit chief proposed that they scrub the facility and install a positive-pressure system where the air goes out of the building, but the FBI decided against it (PC-R. 1313). Mr. Whitehurst said that the purpose behind not having technicians who assisted in lab work identified was that they were “vulnerable to cross examination” and the FBI did not want their names revealed. About eight or nine years later, the practice ceased and people who worked on evidence were named (PC-R. 1321).

On May 29, 2002, Teressa Kraft, a Pinella County deputy clerk, testified about custody of the trial exhibits from Mr. Rhodes’ case (PC-R. 1577). She said the exhibits had not been modified, changed or altered in any form (PC-R. 1578). Ms. Kraft identified Exhibit 7A as a brown bag that was to contain hair samples from a piece of wood near the victim’s body, however, the bag was empty (PC-R. 1581). Exhibit 7B was a sealed plastic container that had never been opened which contained a hair (PC-R. 1581-1582). Exhibit 8 was A and B of hair samples from around the victim’s body contained in a bag wiwth a “wad or mat of brown hair” and a small, plastic container with some brown hair (PC-R. 1582-83). Exhibit 9, a sealed single seamed bag did not appear to contain anything marked “Q-9" hair left leg (PC-R. 1583-84). Exhibit 10 was a hair from the victim’s right hand in a plastic bag with a “good

bit of hair and dirt and a plastic container of hair" marked "Q-10" (PC-R. 1584). Exhibit 11 was fiber from the victim's right hand marked "Q-11." (PC-R. 1585). Exhibit 12 was marked "yarn from victim's right hand" marked "Q-12." Exhibit 13 was a composite exhibit A and B marked "hair samples from the left side of victim" marked "Q-15" [sic] on both exhibits. The plastic container held a "big wad–a mat of hair." (PC-R. 1586-87).

On November 12, 2003, the lower court denied relief (PC-R. 1012). The court found that Swisher's decision not to contact mitigation witnesses was a tactical decision and that strategic decisions did not constitute ineffective assistance of counsel (PC-R. 1015).

The lower court found that Malone's testimony was false (PC-R. 1020). It found that while the OIG report did not qualify as newly-discovered evidence, the fact that Malone testified untruthfully at trial could constitute evidence that would entitle Mr. Rhodes to a new trial (PC-R. 1021). The trial court, however, found that Mr. Rhodes only "speculated" that the untested hair samples belonged to someone beside the victim, and he had not proved that Malone's ultimate conclusion was false (PC-R. 1021).

It found no Brady violation because the information was not withheld and no Giglio violation in that there was no evidence that the State knowingly presented false testimony (PC-R. 1022-23). The court found that Malone's testimony did not affect the jury's verdict, even if the State knew it was presenting false

testimony (PC-R. 1023). A motion for rehearing was filed on December 1, 2003 and denied on December 12, 2003 (PC-R. 1025; 1033).

SUMMARY OF ARGUMENT

1. Mr. Rhodes was denied a fair trial when the State withheld and refused to correct Brady/Giglio information that FBI Agent Malone gave false testimony at trial and in post-conviction. 2. Mr. Rhodes received ineffective assistance of counsel at resentencing when his counsel failed to investigate or prepare his mitigation case.

3. The trial court erred in failing to allow Mr. Rhodes to challenge the DNA test results and enter them into evidence for appellate review.

4. The trial court erred in summarily denying the remainder of Mr. Rhodes' claims in that the files and records do not show that he is not entitled to relief.

I. THE LOWER COURT ERRED IN DENYING MR. RHODES' BRADY/GIGLIO CLAIM.

On October 24, 2001, the prosecution disclosed for the first time that FBI Special Agent Michael Malone had given erroneous testimony at trial in 1985 (PC-R. 1178-80). This disclosure occurred 17 years after Malone testified at Mr. Rhodes' trial that he had analyzed "all" of the unknown hairs where the victim was found (R. 1873, 1877).

Malone concluded that the hairs were either the victim's hair or were "basically no good" because they were fragmented and could not be associated to anyone (R. 1873). He testified

that there were “no foreign hairs at all” from the victim or from the area where she was found, despite the fact that her body was discovered in debris from the demolition of a hotel (R. 1873, 1880). He said the fact that all the hair at the scene that could be identified was the victim’s hair did not indicate that Mr. Rhodes was not involved in the murder (R. 1879).

At trial, Malone also testified that he examined hair that came from the victim’s hands (R. 1873), and that the hairs clutched in both of the victim’s hands were “her own” (R. 1873). He testified that in his experience and “the experience of every hair examiner [he] ever talked with that the vast majority of hairs found in a dead victim’s hands are their own hairs” (R. 1876-77), and that, even though none of the hairs were consistent with Mr. Rhodes, he could not be excluded from being present at the crime (R. 2404). The State argued at Mr. Rhodes’ guilt phase:

> Mike Malone testified. He’s a special agent with the FBI. He analyzed the hair found. All the hair gathered from the victim was, in fact, the victim’s head hair or else could not be identified at all based upon limited amount of hair and quantity of hair. He found no foreign hairs. **Again, said that just by not finding any foreign hairs did not mean the defendant was or was not present at the scene.** And you can recall the photograph of the scene and just imagine how difficult it was to get any evidence at all at that particular location.
>
> He said that he also found the victim’s [sic] head hair in both the left hand and the right hand of the victim, indicating this is not uncommon in homicides and indicated that it’s usual in **a person who is in the midst of death’s throes where they would**

grab their own hair.

(R. 2404)[emphasis added].

In post-conviction, Mr. Rhodes' first trial attorney, Henry Andringa, could not recall whether he had been given the FBI report prior to Malone's appearance at trial (PC-R. 1197; 1204).

But at trial, Andringa objected to Malone testifying outside his area of expertise, and the objection was overruled (R. 1874-75).[5] He also asked that all physical evidence in the case be preserved for appeal (PC-R. 1198). When Andringa expressed concerns that he "was not clear on the parameters of this man's expertise anymore," the prosecutor replied, "FBI is amazing, Judge." (R. 1876). We now know just how "amazing" the FBI had been. The lower court admitted that Malone had given false testimony at trial, but failed to conduct the proper analysis in reaching the conclusion that the State had not withheld this information or had knowingly presented false testimony at trial.

A prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory and material evidence creates a reasonable

[5]On direct appeal, Mr. Rhodes alleged that Judge Hansel had erred when she allowed Malone to testify outside his area of expertise. This Court did not address the issue. Rhodes v. State, 547 So. 2d 1201, 1203 (Fla. 1989).

probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So.2d 1325, 1330, 1331 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

This Court must analyze this claim considering what impact this Brady/Giglio information would have had on the original jury with the errors this Court held harmless in 1984. These new disclosures would have put the case in a whole new light. This is particularly so when the original jury voted for death by a 7-5 vote. Had the jury known that Malone had given false testimony, it would have known that the hair in the victim's hand was **not** the victim's or Mr. Rhodes. Instead, Andringa could have argued that the hair clutched in the victim's hand could have been that of real perpetrator of the crime. This is the meaning of prejudice.

In Giglio v. United States, 405 U.S. 150 (1972), it held that due process precludes a prosecutor from knowingly presenting false or misleading testimony while seeking a conviction. A prosecutor is obligated to correct such false or misleading testimony if he knows that it is false. Post-conviction relief is warranted if such a violation of due process is revealed and if the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury."

Williams v. Griswald, 743 F. 2d 1533, 1543 (11th Cir. 1984). The standard for meeting the prejudice prong of Giglio is less onerous than for a Brady violation. United States v. Agurs, 427 U.S. 97 (1976). Under Giglio, where the prosecutor knowingly misleads the jury, the court, or defense counsel, the conviction must be set aside unless the error is harmless beyond a reasonable doubt. Gray v. Netherland, 116 S.Ct. 2074, 2082 (1996); Kyles v. Whitley, 115 S.Ct. 1555, 1565 n.7 (1995).

Here, the State knew its exhibits had not been tested by the FBI. The evidence Malone examined was mounted on glass slides. The State consciously and meticulously chose exhibits that were **not** mounted on glass slides to admit into evidence at trial.

After conducting his testing at the FBI lab, Malone said all of the hair and fiber exhibits including those still on glass slides were sent back to the State. The prosecutors chose their trial exhibits from those returned hair and fiber exhibits. It is obvious that the prosecution chose the exhibits with the greatest impact.

Deputy Clerk Kraft identified the FBI "Q" numbers that were written on the court's exhibits. There is no other explanation for how these State exhibits could be entered into evidence, without the prosecutors consciously choosing the evidence that would have the most impact. The evidence with the most impact were the "wads" of hair that Malone did not test, but falsely said he did.

In granting an evidentiary hearing on this claim, the lower

court recognized the importance of this issue to Mr. Rhodes (PC-R. 469-629). The trial court ordered a hearing on this claim **before** the State disclosed that Malone's 1985 trial testimony was false (PC-R. 2-7). Until that point, both the court and defense only knew the information that had been disclosed in the OIG report issued in 1997 that discredited Malone's practices in another case (PC-R. 345, 351). Only when Malone was called to testify at the October 24, 2001 evidentiary hearing, did he admit that he had made a "mistake" and testified "inaccurately" at the 1984 trial. (PC-R. 1245-1246)(emphasis added).

Thus, the hair admitted into evidence as State's Exhibit 13, which purported to be a brown hair from the victim's left hand, had not been examined at all and was "insufficient for comparison." Malone claimed that it was an inadvertent error in his testimony, but that his May 18, 1984 FBI written report was still correct, and only the bench notes, which were not disclosed to trial counsel, resentencing counsel or post-conviction counsel, would have shown that Malone was "mistaken." The bench notes indicate in Malone's handwriting "Q13 - 1 L. N, NSFC." (PC-R.Sup. 2, Def. ex. 7). From Malone's testimony, it is clear that NSFC meant "not sufficient for comparison." But Mr. Rhodes argued another motive for Malone's false testimony.

At the May 29, 2002 evidentiary hearing, Mr. Rhodes presented the testimony of Deputy Clerk Kraft, who said the exhibits that had been admitted into evidence during Malone's trial testimony had been under the control of the Clerk's Office

since the time of trial and resentencing (PC-R. 1577). She said when anyone reviewed the physical evidence there was always a deputy clerk present to make sure the evidence was not altered in any way (PC-R. 1579).

Mr. Rhodes asked the lower court to physically look at the court exhibits introduced into evidence by the State at the original 1985 trial (PC-R. 1602-09). Among those exhibits are booking photos that show that at the time of his arrest in 1985 Mr. Rhodes had black hair (R. State's exhibits 2-5AA). State's Exhibit 19 and various crime scene photographs show that the victim's hair was brown at the time of the crime. The hair contained in State's Exhibit 10B that Malone claimed was brown and not suitable for comparison was blond in color (PC-R. 1604; 1585).

At the May 29, 2002 evidentiary hearing, Mr. Rhodes argued that Malone knew at the time he testified at trial that the hair he identified could not have been analyzed by him because of the condition of the exhibit (PC-R. 1602-09).

At the October 24, 2001 evidentiary hearing, Malone testified that the only way he could analyze a hair was to mount it on a glass slide and to compare it under a stereoscope. There, he would visually compare the unknown hair with the exemplars from Mr. Rhodes and the victim (PC-R. 1233-1235).

The blond hair in State's Exhibit 10B that Malone identified at trial as the one that he **had** analyzed was in a round plastic container. Knowing that all of the hair he examined was mounted on glass slides, Malone knowingly gave

false trial testimony because he identified hair that was not on glass slides.

He also identified State Exhibits 7-13 as the samples he examined. The hair in those exhibits was in different containers and, in some instances such as Exhibits 8, 10A and 13, in bags containing large clumps of hair with crime scene debris still clinging to the strands (PC-R. 1578-87). These hairs were not mounted on glass slides. This was significant because in order for Malone to determine that a hair was not suitable for comparison he had to do "a three-part examination using three different microscopes" (R. 1866-67). Because the hair was not mounted on glass slides, Malone could not have known whether the hairs were "suitable for comparison" because he had not examined the hair under a microscope.[6]

Mr. Rhodes argued that the blond hair could not have belonged to the victim or Mr. Rhodes. Mr. Rhodes' hair color was black. The victim's hair was brown. A reasonable inference to be drawn from Malone's behavior was that, upon seeing that the color of the hair was not consistent with the State's case, he chose not to have it mounted on a glass slide so that he would not have to compare it under a microscope or testify that it could have belonged to the real perpetrator of the crime.

Mr. Rhodes' jury knew only that Malone had examined each and every strand of hair under three different microscopes (R.

[6]At the post-conviction hearing, Malone testified that none of the hair samples had been removed from the glass slides once they were mounted. (PC-R. 1235).

1866-67). Contrary to Malone's testimony at the post-conviction hearing, this was not the only instance of impropriety. Malone's report contained five other "mistakes." Malone's May 18, 1984 FBI report indicated that : no hairs like the hairs of the suspect were found in specimens Q1, Q3 through Q13 and Q15; no hairs like the hairs of the victim were found on specimen Q2; and no apparent transfer of textile fibers was found among the submitted items.(PC-R. Supp.2, Def. ex. 7-8, 11). But, Malone's report was not accurate. Contrary to his testimony, he did not mention that Q13 (hair from the victim's left hand) was insufficient for comparison. Nor did Malone ever acknowledge that Q13 wasn't the only hair that was "insufficient for comparison."

According to the bench notes submitted into evidence a portion of Q1 (victim's hair), a portion of Q2 (suspect's hair), Q4 (unknown), Q5 (unknown), and Q9 (unknown) were not suitable for comparison. Yet, the May 18, 1984 report does not reflect these "inaccuracies." (PC-R. Supp. 2, Def. Ex. 7-5/18/84).

In 1985, Malone had the reports and bench notes as he testified in court. He only acknowledged on October 24, 2001 that he had made a mistake as to Q13, the hair from the victim's hands. Even though multiple errors were on the same report, Malone neither acknowledged them under oath at the evidentiary hearing nor reported them. Those are five other instances in Malone's bench notes that show he did not just testify "inaccurately." Malone perjured himself at the 1984 trial and again at the 2001 evidentiary hearing (PC-R. Supp. 2, p. 11,

Def. Ex. 7). No one at the FBI Crime Lab besides Malone ever examined the hair and fiber submitted to them in 1985. Malone said he was the only person who reviewed his actual work (PC-R. 1230).

Malone's testimony also was inaccurate when he testified in 1985 that "all of the unknown hairs from the victim or the area where the victim was found turned out to be either her hairs or they were hairs that were basically no good...there were no foreign hairs at all (R. 1873). Malone could not have truthfully made this claim unless he had analyzed **all** of the hairs he identified in State's Exhibits 7-13. He did not. Malone led the jury to believe that he had tested all of the hair and fiber submitted to him at the time of trial.

At the 2001 evidentiary hearing, he again testified that he had examined all the hair and fiber that had been sent to him.

> Q. Who makes the determination as to which hairs are selected for your exam?
>
> A. That's my call.
>
> Q. So did you do that in this case?
>
> A. Yeah. It's pretty standard. **All the items were looked at.**
>
> Q. So you chose which hairs to place on the slides?
>
> A. Well, my technicians are very experienced. In other words, all those technicians are very experienced. They have extensive training before they go out on their own. **They took all the hairs** and basically put them on the slides.

Q. Okay. So **all the hair that was submitted to you** was placed on slides for you to review?August 30, 2006

A. That's correct(PC-R.1233-34)(emphasis added).

***

Q. All right, in this case, did you examine **all of the hair** that was in the victim's hand?

A. Yes, I did.

Q. **Each and every strand?**

A. Yes (PC-R. 1249).

***

Q. Okay, in this case, you did in fact look at **all the hairs that were submitted**?

A. Yes, I did (PC-R. 1275)(emphasis added).

***

Q. Mr. Malone, when you testified that the only hair in the victim's left hand - - And I believe that's Q13, that was the only hair in her left hand, you're relying upon the labeling provided by your technician and by the other people in your department to help make this determination, is that correct?

A. That's correct, but **they are trained to mount all the hairs** (PC-R. 1275)(emphasis added).

When asked how many hairs he had examined, Malone said he examined approximately "63 hairs" and "100s of fibers" (PC-R. 1251). But, the court exhibits contain more than that. Exhibit 13 contains hundreds of hairs and debris in one exhibit that Ms. Kraft described as a "big wad-mat of hair." (PC-R. 1586-87). Malone examined one hair numbered Q13. Q13 is the FBI number corresponding to State's Exhibit 13 (R. 1871). It was obvious

that Malone did not test all of the hair submitted to him, but took a few hairs from each sample and drew his conclusions based on a limited number of examinations.

Malone, however, did **not** tell the jury what he had done. Instead, the jury was left with the impression that the wads of hair shown in court had been analyzed by the FBI, and that no hairs from any other person besides the victim were in those exhibits.

No one knows what was in those bags of hair. No one knows whether all of those hairs are "not suitable for comparison" or whether the hair belong to the real perpetrator of the crime. What is known is that the hair from the victim's clutched hand does not belong to Mr. Rhodes and could not belong to the victim because it is blond. Despite physically looking at the blond hair and granting Mr. Rhodes' motion for DNA testing of the hair, the lower court still found that Mr. Rhodes had not "proved" that Malone's conclusions were wrong.

When the DNA results from FDLE were finally provided to the defense on March 11, 2003, Mr. Rhodes asked to depose the FDLE lab analyst (PC-R. 1008). The request was denied. The DNA results are not a matter of record and have never been subjected to an adversarial testing. Mr. Rhodes has been unable to retain an expert of his own to challenge the State's expert. At this point, the State has exclusive control over the DNA testing, results and experts. Mr. Rhodes has been denied due process in this regard.

In addition, the lower court disallowed Mr. Rhodes to

impeach Malone with the report. In the proffered report, Malone was criticized for conducting incomplete tests and exaggerating testimony to fit the government's version of the facts. See, Proffered Department of Justice Inspector General's Report on Laboratory Practices and Alleged Misconduct at the FBI Crime Laboratory dated April 15, 1997.

Even though the report was not been admitted into evidence, it was the triggering event that caused Mr. Rhodes to request information on Malone's conduct in his case (PC-R. 345-351). Based on this report, written inquiries were sent by the Department of Justice to state attorneys on cases in which Malone had testified in order to ascertain whether those cases should be reviewed by an independent expert. Such an inquiry was sent by the Department of Justice to the Pinellas County State Attorney's Office, but the prosecution responded that no such independent review was necessary in Mr. Rhodes case because Malone's testimony was not "material." Under a Giglio claim, Mr. Rhodes must show that he could not have known or found this information at the time of trial. Mr. Rhodes was informed only **afte**r he pled this claim that the prosecution had turned down an opportunity for an independent review by Malone's own peers. Mr. Rhodes was finally provided Malone's handwritten bench notes shortly before the October 24, 2001 evidentiary hearing when Malone finally admitted his "mistake." Mr. Rhodes could not have known about this Brady/Giglio information until it was disclosed by the government.

In Strickler v. Greene, 527 U.S. 263, 287-288 (1999), three

components of a true Brady violation were listed. They are: The evidence must be favorable to the accused; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The fact that foreign hairs were present in the victim's hands or in the area surrounding the body was information favorable to the defense, not only for impeachment purposes, but as exculpatory evidence that Mr. Rhodes was not the perpetrator of the crime. If the hair in the victim's hands was not hers or Mr. Rhodes, it could only have been from one person, the actual perpetrator. This information would have been critical. Hoffman v. State, 800 So. 2d 174, 179-180 (Fla. 2001)[hair found in the victim's clutched hand could tend to prove contact between the victim and a person present in that room at the time of her death. With the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have argued victim was clutching the hair of her assailant].

It was clear from the State's admission before Malone testified in 2001, that Mr. Rhodes had no reason to know before that moment that his testimony was "mistaken." It was also evident that without the 1997 OIG report, Mr. Rhodes had no reason to suspect that the testing did not occur. Andringa did not recall receiving the FBI report (PC-R. 1197; 1204). Both he and Mr. Eide thought they had been given all the discovery they were entitled to. Malone's bench notes and raw data were **not** provided to the defense until just before the evidentiary hearing. In fact, the FBI put fake initials on the reports so

that defense counsel could not know who the technicians or examiners were (PC-R. 1220; 1240). It is also painfully clear that no one besides Malone checked his analysis or results. The only oversight was done by the FBI unit Chief Sholberg who was to ensure the proper documents were stapled to the final report. Mr. Rhodes' jury was materially mislead about the testing done by the FBI crime lab and Malone. This is a Brady violation.

The lower court found that Malone had testified falsely at trial and his admission "could constitute evidence that would entitle Mr. Rhodes to a new trial," but that Mr. Rhodes had only "speculated" that Malone's conclusions were wrong (PC-R. 1021). That is not the correct standard for a Brady violation.

The lower court erroneously found that the State had not "withheld" the exculpatory information (PC-R. 1022). The court failed to recognize that the State is imputed to have constructive knowledge of its law enforcement agents and witnesses. Kyles v. Whitley, 115 S. Ct.1555 (1995). The State has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993). "The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones v. State, 709 So.2d 512, 520 (Fla. 1998). The FBI **was** a law enforcement agency assisting in prosecuting Mr. Rhodes. The lower court's reasoning here was

flawed.

The lower court found that even if there had been a Brady violation, Mr. Rhodes had not shown that "prejudice ensued." (PC-R. 1022). The court imposed a super standard on Mr. Rhodes to prove that "further testing would provide favorable evidence" and that "no subsequent test exclud [ed] the Defendant." (PC-R. 1022). This is not the standard for proving prejudice in a Brady violation.

Even if it was, Mr. Rhodes proved through the testimony of Ms. Kraft and by viewing the court exhibits that the hair clutched in the victim's hand was blond. The victim had brown hair and Mr. Rhodes has black hair. Moreover, Mr. Rhodes had requested DNA testing of the hair. That request was granted, but the lower court disallowed the results to be challenged or presented in Court. Yet, the lower court cited to the purported results of the DNA testing in its order, even though it has never been presented in open court or tested in any way by Mr. Rhodes (PC-R. 1022).

It is unclear how Mr. Rhodes was to challenge Malone's conclusions without questioning FDLE, the agency responsible for the DNA testing of the hair. The State holds all the cards and yet, Mr. Rhodes is being punished for not having definitive results. Moreover, whether definitive results have been presented is not the proper standard to prove prejudice under Brady.

Prejudice is present when "the cumulative effect of the suppression of the materials [ ] undermines confidence in the

outcome of the trial." Rogers v. State, 782 So.2d 373 (Fla. 2001). As held in Kyles v. Whitley, 514 U.S. at 436, "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." Accordingly, this Court must evaluate the failure to disclose the false and misleading testimony of Malone along with errors from the 1985 guilt phase and the errors and ineffective assistance of counsel from the 1992 resentencing. The lower court conducted no such cumulative analysis and failed to analyze this claim in the context of what occurred at trial.

The 1984 jury recommended death by only one vote, even though it had heard prejudicial prosecutorial closing argument, prejudicial testimony of a another victim on a tape recording, and improper jury instructions on the heinous, atrocious and cruel and cold, calculated and premeditated aggravating factors. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). This undisclosed information casts Mr. Rhodes' case in a new light. The lower court never addressed that had this information been disclosed, Andringa would have argued that the hair clutched in the victim's hands was from the real perpetrator of the crime and not Mr. Rhodes. With this information, Andringa could have impeached Malone on his false testimony, unscientific methods of recording his results and the inferences from his omissions. He would have exploited that Malone had not analyzed all the hair as he said he had. Malone would have been forced to admit that technicians chose a few hairs to be tested and that he

extrapolated his conclusions based on those hairs. He would have been forced to say he did not test all of the hair submitted to him and had no way of knowing whether foreign hairs were present at the scene or in the victim's hands.

Andringa knew to challenge Malone's expertise, and it was an issue he preserved for direct appeal. Andringa could have discredited Malone and the hair evidence to such an extent that the jury would disbelieve his testimony and discount the thoroughness of the State's investigation in the case. Had Andringa known that there were foreign hairs in the victim's hands and at the crime scene, he could have argued that someone other than Mr. Rhodes was present and he would have had proof. This information was not only material, it was crucial. The prejudice lies in not being able to challenge the State's case.

The lower court admitted as much when it granted a hearing on this claim:

> The fact that Agent Malone's testimony did not directly implicate the Defendant does not entirely negate its potential prejudicial effect. By testifying that the hair found in the victim's hands belonged to her, he not only excluded the Defendant as the source of the hair but necessarily excluded any other unknown third party. If the testimony of Agent Malone is unreliable or exaggerated, and that fact had been available to the Defendant, there was the potential for casting doubt upon whether the hair in the victim's hands really did belong to her. This is

particularly significant since the Defendant, in an interview with law enforcement, suggested that the murder was committed by an acquaintance known to him as "Crazy Angel."

(PC-R. 469-629). Prejudice has been proven here.

Cumulative consideration of the failures to disclose favorable evidence to Mr. Rhodes' trial counsel undermines confidence in the reliability of the outcome. See, Roberts v. State, 840 So. 2d 962 (Fla.2002). Malone's false testimony at trial cut off any ability to suggest that someone else had committed this crime.

Even if this Court believes the prosecutors here did not know what was happening, the law deems them to have "constructive" knowledge of what law enforcement is doing. Gorham v. State, 597 So. 2d at 784. In Gorham, the prosecutors claimed that police did not tell them about a witness' confidential informant status in other cases. This Court held that the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers. This Court granted a new trial stating that the standard for determining "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Gorham v. State, 597 So. 2d at 785. Consequently, "information within the possession of the police is considered to be in possession of the prosecution." State v. Alfonso, 478 So. 2d 1119, 1121 (Fla. 4th DCA 1985); see also, Tarrant v. State, 668 So.2d 223, 225 (Fla. 4th DCA 1996)(mere

fact prosecutor had no actual knowledge does not relieve the state of its obligation to disclose); Moore v. State, 623 So. 2d 608, 609 (Fla. 4th DCA 1993)(jury cannot adequately assess credibility of witness when misled).

Malone was crucial in obtaining a conviction against Mr. Rhodes because of the lack of physical evidence linking him to the victim. Mr. Rhodes had possession of the victim's car and professed to have the permission of the victim to drive it. The State could not rebut this at trial. No physical evidence linked Mr. Rhodes to this crime. No weapon was found and the only cause of death Medical Examiner Joan Woods could justify was strangulation based on a broken hyoid bone, but even she had to admit this conclusion was absent "other causes of death." The lower court recognized the prejudice that Malone's false testimony precluded the defense from "casting doubt upon whether the hair in the victim's hands really did belong to her. This is particularly significant since the Defendant, in an interview with law enforcement, suggested that the murder was committed by an acquaintance known to him as "Crazy Angel." The nondisclosures here, "shake[] the confidence in the verdict." State v. Huggins, 788 So. 2d 238, 243-4 (Fla. 2001).

The undisclosed evidence would have not only been of value on its face, but exposed law enforcement's investigation techniques to attack and the results of that investigation as unreliable. This was the State's purpose in presenting Malone's testimony in the first place. Despite the fact that he could not conclusively establish Mr. Rhodes as the perpetrator, the

State used Malone to demonstrate to the jury what a thorough and complete investigation had been done. This is borne out in the State's closing argument.

Mr. Rhodes' jury was entitled to make their decision after hearing all of the evidence. Light v. State, 796 So. 2d 610 (Fla. 2nd DCA 2001)(judge is not examining whether he believes the evidence presented as opposed to contradictory evidence, but whether nature of evidence is such that a reasonable jury may have believed it); Cardona v. State, 826 So. 2d 968 (Fla. 2002).

In United States v. Agurs, 427 U.S. 97, 103 (1976), the Supreme Court explained that where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." A conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady, no intent to suppress is required. A "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. Although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous." United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996).

Despite the State's attempts to minimize the due process

violation under Giglio, the State knew or should have known that an FBI law enforcement agent lied in his trial testimony. The lower court failed to address how the State could not have known the exhibits it was introducing into evidence were not the ones that had been tested by the FBI. Malone testified that the evidence he examined was mounted on glass slides. The State consciously and meticulously chose exhibits that were **not** mounted on glass slides to admit into evidence at trial. The State's failure to disclose this information had the effect of, not only depriving Mr. Rhodes of impeachment of an FBI agent, but allowing the jury to hear the false testimony unchallenged and masked as truthful. Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). The prosecution allowed Malone to give false testimony because little glass slides are not as compelling to a jury as plastic baggies filled with wads of hair. The State hoped no one would notice. A new trial is warranted.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING

Mr. Rhodes received ineffective assistance of counsel at resentencing. In 1994, this Court addressed counsel's performance when it held that resentencing counsel failed to preserve several issues for review.[7] The result was that these issues were procedurally barred, but counsel's failures went

[7]This Court found that resentencing counsel "acquiesce[d]" to a hearsay reading of the informants' testimony into the record; failed to rehabilitate or object to the excusal for cause of two jurors; failed to object to hearsay in the reading of a doctor's report; and failed to object or preserve numerous jury instruction errors, such as Caldwell error. Rhodes v. State, 638 So. 2d 920 (Fla. 1994).

much deeper than failure to preserve the record.

Resentencing counsel operated under the erroneous assumption that the client determined the strategy of the case (PC-R. 16). Trial counsel filed a total of four (4) motions at resentencing. They were an entry of appearance, July 25, 1991; a motion for continuance, July 25, 1991; a motion for appointment of confidential expert, August 26, 1991; and a motion in limine, February 12, 1992. (PC-R. Supp. 2, pg. 15,16,18). Swisher did not file motions challenging the statutory aggravators or the constitutionality of the death penalty. He did not ask for additional jury instructions. He did not hire an investigator. He relied exclusively on Mr. Rhodes to provide witnesses for his resentencing (PC-R. 13-14).

Resentencing counsel did not contact mitigation witnesses with the exception of asking Dr. Taylor to call Mary Vailes, Mr. Rhodes' grandmother. Because he had never spoken to Mrs. Vailes, neither Swisher nor Dr. Taylor knew that Mrs. Vailes had the **least** amount of contact with Mr. Rhodes than any other relative. Catherine Brossard, Mr. Rhodes' aunt, lived with Mrs. Vailes and knew much more about Mr. Rhodes' upbringing, but Swisher never spoke to her. Dr. Taylor relied on Swisher to tell him what to review and who to contact. Swisher did not know who to contact because he had spoken with no one. At resentencing, Mr. Rhodes complained that Swisher failed to uncover mitigating evidence:

> THE DEFENDANT: Your Honor, until yesterday, I didn't really have any, you know, any reason to make this claim, but Mr. Swisher has attempted to produce before the jury a statement that I have been physically,

> sexually and mentally abused as a child. Mr. Swisher has absolutely no documents whatsoever to substantiate this claim. The documents do exist. And by Mr. Swisher's own -- you know, his own fault, he has never attempted to secure these documents. There's documents that exist in the Sonoma County Juvenile Department, documents that exist in the -- you know, in the orphanage, Child Welfare Department documents throughout the entire California juvenile system. You know, and if Mr. Swisher has it, I've never seen it because he never showed it to me.

(R.S. 1009-10).

Instead of asking for a continuance to obtain mitigation witnesses, Swisher asked for an in-camera hearing. The lower court then forced Mr. Rhodes to choose two mitigation witnesses he wanted and the court would order the State to present those witnesses.

Resentencing counsel's failures resulted in a conflict of interest with his client. Resentencing counsel felt his client was setting him up. He denied that Mr. Rhodes had ever given him the names of Mr. Betterley or his brother, James. But, Mr. Rhodes' records in Swisher's possession contained the names and addresses of family members and Mr. Betterley. Resentencing counsel failed to recognize that it was not Mr. Rhodes' responsibility to investigate and defend himself. Mr. Rhodes did the only thing he knew to do when witnesses were not subpoenaed in his defense--he made it known to the court. Mr. Rhodes knew what his original attorney had done 1985. Andringa testified that in 1985 Mr. Rhodes was cooperative and had no problems giving him information about his background. Even Swisher admitted he had no problems with Mr. Rhodes until the

resentencing began.

An abundance of information was available had resentencing counsel looked for it. At the evidentiary hearing, Mr. Rhodes presented the testimony of family members, a nurse from Napa State Hospital, investigators and mental health experts who had the independent information Dr. Taylor wanted but did not get. By the time of Mr. Rhodes' 2002 evidentiary hearing, many witnesses had died, but were alive in 1991 at the time of resentencing.

The lower court denied relief on this claim, stating that Swisher's decision not to contact mitigation witnesses was tactical and that strategic decisions did not constitute ineffective assistance of counsel (PC-R. 1015).

Even though the witness' names appeared in Mr. Rhodes' medical, prison records and trial counsel's previous file, the trial court put the responsibility for his defense on Mr. Rhodes. The lower court found it "simply not reasonable" for an attorney to attempt to ascertain the identity and relationship of every person in Mr. Rhodes' records (PC-R. 1017).

The lower court found that Mr. Rhodes was not prejudiced by his failures because the 1992 jury already heard evidence of Mr. Rhodes' childhood (PC-R. 1018) and additional witnesses were merely cumulative (PC-R. 1019).

Contrary to the court's order, the resentencing jury did not hear all of the mitigation that was available. The jury only heard from Dr. Taylor and James Rhodes, Richard Jr.'s younger brother who had very little contact with him. James had

no recollection of his parents. He did not know they were divorced (RS. 962-63). He did not know where the children had been abandoned or how long he had lived with his brothers before they were sent to foster homes (RS. 962-63). He was unaware of any molestation, but then said Richard Jr. had told him he was abused, but he did not know by whom (RS. 961; 964-65). The last time he had seen Richard Jr. was in 1970 for a "couple of months." (RS. 967).

James' testimony was contradictory and outright false when he testified that Richard Jr. had hung his younger brother, Kenny, over a bridge (RS. 966). It was later revealed by Kenny Rhodes in post-conviction testimony that it was James who had hung him over a bridge, not Richard Jr. (PC-R. 1090). Had counsel prepared and investigated his case, he would have known that a wealth of mitigation existed, but he simply failed to investigate it.

During the 1992 resentencing, the lower court held an *in camera* hearing in which the deficiencies of counsel's preparation were abundantly clear. Mr. Rhodes and Mr. Swisher developed a conflict of interest because Mr. Swisher had not contacted any witnesses with the exception of Dr. Taylor (RS.1220, 1222).

During the February 11, 1992 *in camera* hearing, Mr. Swisher said that he intended to focus on Mr. Rhodes's childhood and explained that he had not contacted the prison ministries because he did not want the jury to know Mr. Rhodes had been on death row (RS. 1208). Swisher said that he did not want to call

Mr. Betterly whom Mr. Rhodes assumed would testify about the amount of drugs he was given at Napa State Hospital because Swisher "didn't know if he could find him. (RS. 1217, 1218).

Swisher acknowledged that Mr. Rhodes had given him witness addresses (RS. 1211). He also admitted that he was "neglectful" and made a "bad judgment call" in failing to find and interview witnesses (RS. 1210, 1218, 1228). Swisher said that Mr. Rhodes was "throwing up roadblocks" so the case would come back and that Mr. Rhodes could not do more to help him than give him names and states where the witnesses lived (R. 1228).

The lower court told Mr. Rhodes that he had placed Swisher in a very difficult position (RS. 1231). Without knowing what the other witnesses would say, both Swisher and the lower court had Mr. Rhodes agree to call only two witnesses (RS. 1236-38).

Swisher was appointed to represent Mr. Rhodes on July 22, 1991 (PC-R. 1349). He retrieved "most" of the background materials on Mr. Rhodes from Mr. Denhardt on July 26, 1991. On August 10, 1991, he reviewed volumes 1-7 of Mr. Rhodes's trial transcripts. Swisher assumed he had reviewed other files after that date. But Swisher's bill shows that he reviewed medical records provided by the State Attorney's Office for the first time on January 27, 1992 (PC-R. Supp 2, Def. Ex. 6 p. 19). He did not finish reading the transcripts of the original trial until January 26, 1992 (PC-R. Supp. 2, Def. Ex. 6, pg. 19). Trial began less than two weeks later on February 12, 1992 (RS. 508).

In the five months before Mr. Rhodes's resentencing,

Swisher filed no motions challenging the aggravating circumstances, the constitutionality of the jury instructions, or the death penalty. He did not hire or request an investigator (PC-R. 1358).

Swisher prepared for the resentencing by talking to the client, reading the records, speaking with Dr. Taylor and trying to speak with Mary Vailes, Mr. Rhodes's grandmother (PC-R. Supp. 2, p. 19). Swisher "imagined" that he spoke with the state's expert, Dr. Merin or read his testimony from the first trial, but his bill reflects no such meeting (PC-R. Supp. 2, p. 19).

Swisher did not recall speaking with any doctors listed in Mr. Rhodes's voluminous medical records. He did not recall asking Dr. Taylor to speak with any of Mr. Rhodes's previous treating physicians, except Dr. Afield who testified at the first trial. Swisher gave Dr. Taylor the testimony of Dr. Afield from the first trial, but did not recall asking him to contact Dr. Afield or any other expert (PC-R. 1365-66). Swisher could not recall speaking with Mrs. Vailes, but Dr. Taylor did (PC-R. 1366).

Despite the extensive records provided by the State, Swisher did not speak with any other family members, friends, doctors, or nurses about Mr. Rhodes's background (PC-R. 1367), even though his theory of defense was statutory mental health mitigation. He intended to prove his case solely through Dr. Taylor and the cross-examination of Dr. Merin (PC-R. 1367). The pivotal witness was to be Dr. Taylor. But Dr. Taylor's lack of preparation and independent corroboration was obvious on cross-

examination. The State repeatedly asked Dr. Taylor if he had any independent corroboration of the sexual abuse, poverty and general family history he had taken from Mr. Rhodes (RS. 1028-1030). He did not. The State questioned Dr. Taylor about Mr. Rhodes's statements purportedly given to Detective Porter and to cellmates which rebutted Dr. Taylor's finding that Mr. Rhodes had no memory of the offense. But Swisher had not given Dr. Taylor those statements. As a consequence, he did not know Mr. Rhodes had given statements (RS. 1031, 1032-34). Dr. Taylor was severely impeached by his lack of knowledge of the facts of the case, and his inability to support his conclusions with independent evidence. He was impeached about the fact that he had received no new information after he completed his December 23, 1991 report (RS. 1028). As a result, even though the lower court found "some" mental health mitigation, the court found Dr. Taylor's testimony to be "conjecture" and gave the mitigation little weight.

After the available independent mitigation was presented at the evidentiary hearings in 2001-2002, the lower court attempted to ameliorate its earlier findings by saying that more mitigation would have been "merely cumulative." This is simply untrue.

Had Swisher done a cursory review of the records that he possessed, he would have found family members, doctors and nurses who treated Mr. Rhodes or had personal knowledge of his upbringing. Without an explanation as to what mitigation was supposed to be, Mr. Rhodes was forced to choose two mitigation

witnesses.\ Swisher's felt he was being "set up" by Mr. Rhodes because he had withheld the names of people he wanted contacted until the day of the trial (PC-R. 1377). But, the record belies that fact.

Had Swisher reviewed Mr. Rhodes's records, he would have found the names and the addresses of family members, doctors and nurses. Family member names and locations were listed in a two-page report on family background in the Oregon State Prison records. In another report, Mr. Betterley's unlisted phone number was listed (PC-R. Supp. 2, Def. Ex. 10, pg. 23).

Contrary to Swisher's interpretation of the law, it is not the mentally-ill client who is the "captain of the ship" when it comes to investigating and preparing a defense. Cf. Washington v. Smith, 219 F. 3d 620, 631 (7th Cir. 2000)["telling a client, who is in custody awaiting trial, to produce his own witnesses falls painfully short of conducting a reasonable investigation, especially given that the witnesses do not have a telephone. Perhaps Washington could have dispatched a pigeon from his prison cell with a message for the Browns, but short of this, it is wholly unreasonable for a lawyer to instruct his incarcerated client to get in touch with people who don't have a phone"].

Dr. Taylor said that he and Swisher agreed that he would not render an opinion on Mr. Rhodes's state of mind at the time of the offense because Mr. Rhodes said that he did not remember the crime. Dr. Taylor asked for collateral materials from Swisher, but they were never provided. Dr. Taylor was directed by Swisher not to consider statements purportedly made by Mr.

Rhodes to the police (PC-R.1409-12). Yet, Dr. Taylor opined that Mr. Rhodes was under duress at the time of the offense. Swisher withheld the very documents from Dr. Taylor that could have fortified him from devastating cross examination by the State (PC-R. 1413).

When provided with these statements and other information, Dr. Taylor changed his opinion and could not say Mr. Rhodes was under duress at the time of the crime (PC-R. 1413). Dr. Taylor testified that the information would have been helpful before he saw Mr. Rhodes because he could have questioned him about those statements. Had he been provided with this information, he would have been able to respond to the State's cross examination (PC-R.1423).

Dr. Taylor identified bills for his work on the case. One showed a one-hour consultation with Swisher after Dr. Taylor saw Mr. Rhodes for the first time. A second bill showed a one-hour consultation with Swisher on February 13, 1992, the day before Dr. Taylor testified. Dr. Taylor had a half-hour conversation with Mr. Rhodes' grandmother, but that call was not reflected on Dr. Taylor's bill (PC-R. Supp. 2, pg. 21). Swisher's preparation of Dr. Taylor lasted two hours. (PC-R. Supp. 2, pg. 19).

The extent of Dr. Taylor's independent information about Mr. Rhodes's family background came from Mary Vailes. However, Dr. Taylor admitted that Mary Vailes, though she was Mr. Rhodes's grandmother, spent very little time with Richard, Jr. as he was growing up (PC-R. 1422). She could only corroborate a

portion of the family history (PC-R. 1406). Dr. Taylor testified that he was given the name of Catherine Broussard, Mr. Rhodes's aunt, by Mrs. Vailes (PC-R. 1406; 1422). But Ms. Broussard was not home when Dr. Taylor called Ms. Vailes, and he did not place another call or leave a message for her to call him.

Despite Swisher's insistence that Mr. Rhodes had been "setting him up," it was obvious that Mr. Rhodes had given him at least two names (Ms. Vailes and Ms. Broussard) because Dr. Taylor had them (PC-R. 1406; 1422). Mr. Swisher also admitted that Mr. Rhodes gave him the names of his two step-brothers in the Marines, but he did not contact them either (PC-R. 1397; 1399).

Had Swisher or Dr. Taylor made a another phone call, they would have found Catherine Broussard, Richard Jr.'s aunt. Ms. Broussard is now dead, but was alive at the time of trial in 1992. Dorothy Ballew, an investigator, testified that she interviewed Ms. Broussard in 1995 or 1996 when Ms. Broussard was in her eighties (PC-R. 1281). Ms. Brossard described Richard Jr.'s mother, Bessie, as an alcoholic with a low IQ. She believed Bessie was retarded, and who drank alcohol during her pregnancy with all of the children, including Richard, Jr., who was the first born (PC-R. 1285). Ms. Broussard described her brother, Richard, Sr. as a pedophile who had been in prison in San Quentin and elsewhere in California and Arizona (PC-R. 1285). She said he was also a migrant farm worker (PC-R. 1285).

Ms. Brossard witnessed the extreme deprivation that Rhodes

children experienced, and also the physical and sexual abuse of Richard, Jr. She called child protective services in Sonoma when Ms. Broussard realized that Richard Sr. had chained Richard, Jr. with a dog chain and was feeding him dog food out of a bowl (PC-R. 1286). Richard Jr was 5 or 6.

Ms. Broussard knew that the children were abandoned in a home in Sonoma County and she reported it to the child welfare services. Ms. Broussard received a letter from Richard Jr.'s mother informing her that she had left the children and that no one was going to be caring for them (PC-R. 1286). Ms. Broussard did not intervene because she feared her brother, who she described as an abusive alcoholic who was on drugs most of the time. She tried to keep an eye on the family and reported incidents to protective services (PC-R. 1286). Even if defense counsel chose not to call this witness, he still could have asked Dr. Taylor to speak with her, as he had done with Ms. Vailes. Instead, this valuable information was ignored. Contrary to the lower court's order, the resentencing jury did not know the extent of Mr. Rhodes' abuse and this information was not cumulative.

Eileen Meis also had first-hand information about Richard Jr. She knew that he had been sexually abused. She experienced the abuse and with her own daughter. Mr. Rhodes, Sr. was a convicted pedophile, but the resentencing jury never knew that fact.

The resentencing jury also never knew that Richard Sr. hit Richard, Jr. with a closed fist, that he had lived in a hay pod

in the middle of a field, or that he had not been taught to use silverware. Simply saying that Mr. Rhodes had been abandoned as a child is not the same as the jury hearing the magnitude of the abuse from someone who witnessed it, as Mrs. Meis did.

The jury never heard from Lorraine Armstrong, a nurse at the children's unit at Napa State Hospital and a friend of Catherine Broussard, who testified about her attempts to look out for Richard, Jr. while he was in her unit. Ms. Armstrong's testimony at the evidentiary hearing was compelling. She was available to testify at the evidentiary hearing and would have done so in 1992, but no defense attorney or investigator had asked.

Had counsel sought her out, he would have learned of her efforts to look out for Richard, Jr. and her taking him home on holidays because he was alone. She saw him as a young boy who would do anything the other kids asked him to do to be accepted, and sometimes he would get into trouble for it.

She knew he was diagnosed a schizophrenic and had been prescribed Thorazine. She remembered that Richard Jr. worked in a coffin factory with the mentally retarded patients.

Ms. Armstrong read a letter into the record from Catherine Broussard thanking her for her efforts with Richard Jr. and speaking of the lone visit made by Richard Sr. to his son at Napa State Hospital (PC-R. 1128). She would have testified at Richard Jr.'s resentencing had she been asked.

Kenny Rhodes, Richard, Jr.'s younger brother, testified about being raised by Richard Sr. and being sexually abused by

him. Although Kenny did not have a memory of his older brother, he vividly recounted what it felt like to be sexually abused by his pedophile father. He testified about his anger and his inability to control it. He testified about the good fortune he had in having a good foster family. Even though Kenny has been convicted of crimes and is continually unemployed, he credits his foster father for saving his life (PC-R. 1058-1080). Kenny also spoke with Dr. Faye Sultan about his experiences and testified that he would have come forward and testified on his brother's behalf had he been contacted by defense attorneys at the time of trial.

Had any of these witnesses been contacted, Mr. Rhodes would have had a compelling mitigation case at resentencing. Defense counsel's failure to investigate this information was deficient performance and rendered Dr. Taylor's evaluation and testimony deficient under Ake v. Oklahoma, 470 U.S. 68 (1985). Even if Mr. Swisher did not want these witnesses to testify, he could have provided the names to Dr. Taylor, just as post-conviction counsel did with Dr. Faye Sultan.

For example, Dr. Sultan spoke with Don Betterly. She found that he corroborated that Mr. Rhodes had been abused and medicated at Napa State Hospital but she also learned that Mr. Betterly was "intimate" with Mr. Rhodes and brought him home after he was released from Napa State Hospital (PC-R. 1470-1473).

Mr. Betterly described the "wet sheet treatment" Mr. Rhodes had been subjected to as a boy and that it was a usual

occurrence for the weakest boy to perform oral sex on the toughest boy in the unit (PC-R. 1470). No other witness had that information, and it corroborated Dr. Taylor.

Yet, Swisher testified that he spoke to Mr. Betterly and did not want to call him. He feared Mr. Betterly's negative description of Mr. Rhodes as manipulative and a liar, but that information had already come out through multiple law enforcement witnesses. This "strategic" decision could not have been reasonable because the mitigating value of the testimony outweighed any negative facts that were already before the jury.

Contrary to the State's contention that it was sufficient for Swisher to put Dr. Taylor on the stand to mention family background, Dr. Sultan emphasized:

> ...What didn't happen was a real in depth exploration of what that [sexual abuse] might be, or corroboration from other family members about their knowledge of it. In this case the family members actually knew a good bit more about the physical abuse of these children, neglect of the children than I'm accustomed to having corroboration for, so there was really quite a lot of information available.

(PC-R. 1521).

This independent information goes to the weight of the evidence presented. Williams v. Taylor, 120 S. Ct. 1495 (2000).

Under Ake, Mr. Rhodes was entitled to effective assistance of his mental health expert. Dr. Taylor's two-hour discussion with Mr. Rhodes and his one-hour conference with Swisher was woefully inadequate when viewed in light of the massive amount of available information. Dr. Taylor relied primarily on Mr.

Rhodes's self report for his background information and was severely impeached because of it. He was impeached because the State tried to prove that Mr. Rhodes was a manipulator and a pathological liar. That being the case, it was even more important for the defense to obtain and present independent proof from Mr. Rhodes's background as to why he was that way. The mere mention that abuse may have happened based on self report is not an adequate mental health evaluation. See, Ake v. Oklahoma, 470 U.S. 68 (1985); cf. Williams v. Taylor, 120 S. Ct. 1495 (2000).

Dr. Sultan conducted a thorough examination of Mr. Rhodes. She interviewed Kenny Rhodes, Richard Rhodes Jr's wife, Rebecca, Helen Greco, Mary Vailes and Don Betterley. Dr. Sultan interviewed by telephone Eileen Meis and Lorraine Armstrong(PC-R. 1442). She read documents that had been provided to Dr. Taylor and reviewed independent evidence of Mr. Rhodes's background.

What Dr. Sultan found most compelling was in the Oregon State records. It showed that in 1963, an EEG had been performed on Mr. Rhodes when he was in the 3rd or 4th grade, and showed possible organic brain damage with convulsive seizures. The records said Mr. Rhodes was "unable to control his behavior." In those records, Don Betterly described himself as Mr. Rhodes' foster parent. Mr. Betterly described Richard Rhodes as a pathological liar with an unusual sex drive and that Mr. Rhodes lived with him for several months after his discharge from Napa State Hospital (PC-R. 1447). The records also chronicled a long

list of behavioral problems before the age of ten. Dr. Sultan said the significance of this kind of behavior at such an early age was an indication of an extraordinary emotional disturbance that was "quite far from the norm of even a mildly disturbed boy of that age and are indications of very serious early abuse in his own life."

Dr. Sultan found that sex play with other children at the age of 8 was an indication that Mr. Rhodes suffered from sexual abuse and the trauma he lived through. Dr. Sultan said it was clear from the records that Mr. Rhodes was given heavy doses of antipsychotic medication–-Melaril and Trilafon--for the entire duration of his hospitalization and that he was considered psychotic (PC-R. 1452). These behaviors were recorded when Mr. Rhodes was between 11 to 18 years of age. Dr. Sultan saw no reference to psychotherapy, or that Mr. Rhodes participated in treatment programs. She only saw that he was medicated and worked for the hospital (PC-R. 1451).

Dr. Sultan explained those differences were a product of the times when the categories for mental illness, such as schizophrenia, were not as specific as they are today. Once Mr. Rhodes was returned to a structured environment, his thinking became "more clear" over time. He needed less medication and was more frequently described as anti-social, but also described as disturbed or depressed. Mr. Rhodes's self-destructive behaviors continued, which indicated that mental illness was still present. Dr. Sultan testified that when Mr. Rhodes was on the street he faced stress and dilemmas of life

that he was not equipped to handle because he had lived in institutions all of his life. When stress increased, psychiatric symptoms increased (PC-R. 1478-79). The jury was never told this information.

Dr. Sultan found a "surprising degree" of corroboration. Richard Rhodes Sr. was a convicted pedophile and was a mentally disordered sex offender and declared untreatable. He went to prison in the early 1960s for his behavior. (PC-R. 1440). Dr. Sultan said that current research into child abuse shows that it produces changes in brain structure and that an abused child's brain physically looks different. These brain changes are not changeable and can produce abnormal brain wave function as was shown in Mr. Rhodes Jr.'s abnormal EEG (PC-R. 1477). Dr. Sultan did not see any records that indicated that Mr. Rhodes was treated for sexual abuse.

Dr. Sultan's interview with Kenny Rhodes also corroborated that sexual abuse occurred in the home. He described to Dr. Sultan the rapes by his biological father and described several instances where his father invited drunken friends to their home who also raped him. Mr. Rhodes said his father threatened to kill him on several occasions and one time drove down the wrong side of the road telling him he was going to kill Kenny. Kenny described seeing his brother James having sex with his mother, Bessie, and with his half-sister, Jackie. He witnessed his father having sex with his step-sister, Sherry. She was the victim in the case for which Mr. Rhodes, Sr. was convicted and sent to prison.

Dr. Sultan found the children's living conditions as described by Eileen Meis and Helen Greco to be significant. Ms. Greco found the children were not well cared for, were unkempt and did not use silverware when they ate. Dr. Sultan was aware that much of Ms. Greco's information came from Catherine Broussard who had contact with Lorraine Armstrong at Napa State Hospital. Dr. Sultan was also told that Richard Rhodes, Jr.'s job at the hospital was to build caskets and that he was a very sad and institutionalized person (PC-R. 1469).

Eileen Meis confirmed much of the sexual abuse stories given by Kenny and Richard, Jr. She described Richard, Sr. as "sexually perverted" and that he had touched her inappropriately after she had married his brother. She also described that her daughter, Cheryl, had been molested by Richard Sr., but she had not known that fact until Cheryl was a grown woman.

Dr. Sultan concluded that at his resentencing in 1992, Mr. Rhodes suffered from a personality disorder not otherwise specified. She found that Mr. Rhodes had characteristics of anti-social personality disorder, narcissistic personality disorder, border line personality disorder and paranoid personality disorder, but did not fit one specific diagnosis (PC-R. 1475-1478). She found a cognitive disorder as was borne out by the references to organicity and the abnormal EEG in the records. Dr. Sultan found Mr. Rhodes suffered from post-traumatic stress disorder, flashbacks and vivid memories of torture he was subjected to, and a depressive disorder which was borne out in self destructive and suicidal tendencies outlined

in the institutional documents (PC-R. 1476). She found no indication in the records or in her interviews that Mr. Rhodes's condition has improved (PC-R. 1477).[8]

Dr. Sultan said Mr. Rhodes was mentally ill in 1982 and 1992 because his symptoms existed long before he knew how to fake them. She said he committed the crime under the influence of an extreme mental or emotional disturbance, and he could not conform his conduct to the requirements of the law at the time of the crime. Had Mr. Rhodes' mental health expert conducted a fraction of what Dr. Sultan did, the jury would have been able to give Mr. Rhodes' mental health mitigation defense more weight because it was simply more credible.[9] Much of Dr. Sultan's opinion rested on records that Swisher and Dr. Taylor had not read or ignored. Had this elementary preparation been done, Dr. Taylor's testimony would have been able to withstand impeachment by the State. That is why Mr. Rhodes became upset during the resentencing because, contrary to Swisher's belief,

[8]When asked about the discrepancy among doctor's opinions that Mr. Rhodes was schizophrenic, Dr. Sultan explained that several doctors had seen different symptoms during different periods in his life. To some extent, the definition of schizophrenia used at the time was too broad, but she insisted that "everyone who sees him, and he sees a lot of doctors, talks about the fact that he has a thought disorder." In the records she reviewed, she found indications that Mr. Rhodes heard voices when he was 8 or 9 years old and he was too young to make up. It was not until Mr. Rhodes became older that he became more manipulative (PC-R. 1478-79).

[9]This is significant in that during deliberations, the jury sent a question to the judge as to whether they could sentence Mr. Rhodes to 99 years plus one. When they learned that they could not, the jury came back 10-2 for death (RS. 1177-79).

it was defense counsel's responsibility to investigate and prepare his defense, not Mr. Rhodes. See, Rompilla v. Beard, 545 U.S. 374 (2005).

The State's only rebuttal evidence to the mental health mitigation was Dr. Sydney Merin. In 1992, the State called Merin and, despite a court order allowing him to see Mr. Rhodes, he did not. He testified again in 2002, without ever seeing Mr. Rhodes. Merin never spoke with a single doctor. The sum total of Merin's "work" was observing Mr. Rhodes in court in 1992. Merin testified at this proceeding over defense objection.

Merin said Mr. Rhodes was not "substantially" impaired. He saw no post-traumatic stress disorder or mood disorder. Mr. Rhodes might have been depressed, but not enough to be medicated. Instead, Mr. Rhodes was simply "walking around with a little bit of a black cloud over [his] head." (PC-R. 1541).[10] When asked his opinion as to whether Mr. Rhodes suffered from a personality disorder, Merin said he was not "diagnosing," but then proceeded to give his diagnosis--that Mr. Rhodes did not have a paranoid personality disorder, but "could see" anti-social and border line personality disorder and narcissistic personality disorder (PC-R. 1541). He gave no explanation for these opinions.

On cross-examination, Merin said it was not unethical for him to testify without seeing the client because he was not

[10]Merin did not mention the numerous suicide attempts listed in Mr. Rhodes'Oregon State Prison and other medical records.

rendering a diagnosis. He had not spoken with any witnesses or doctors. He admitted that the only records he reviewed before testifying was that of Dr. Taylor, his own 1992 testimony, and Dr. Sultan's report. Merin did not know if Mr. Rhodes could read or write. Merin suggested that Mr. Rhodes should have learned a value system from the time "he got up on his hind legs and started to move around." Yet, he could not say where or from whom Mr. Rhodes was to have learned this value system.

Merin assumed that Napa State Hospital had rules that would teach Mr. Rhodes right from wrong. He did not believe that a person's value system was based on "whether or not you've been chained to a dog house." It was clear from Merin's testimony that he was unaware of how long Mr. Rhodes had been in institutions. He thought Mr. Rhodes entered the institution at age 12 and got out at age 18. Although Merin could point to nothing in the record that supported his position, he said Mr. Rhodes was merely a hyperactive child who misbehaved and that doctors had misdiagnosed him as schizophrenic just to get him into the hospital. Merin admitted he could not confirm this nor anything else. His testimony was useless.

The Law–Deficient Performance

Swisher believed that Mr. Rhodes was the "captain of the ship." But, the captain of the ship had been diagnosed as psychotic, schizophrenic, and depressed with a myriad of personality and behavioral disorders. Swisher was unaware that counsel cannot blindly follow the commands of a client.

Even when a capital defendant's family members and the

defendant have suggested that no mitigating evidence is available, his lawyer is **required** to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. Rompilla v. Beard, 545 U.S. 374 (2005). In Rompilla, the defense failed to review a court file of a prior conviction that they knew was going to be used as an aggravating circumstance at trial. This was found to be deficient performance and prejudicial, despite the fact that the attorneys presented mitigation evidence from five family members who testified that the jury should have mercy, that he was innocent and that his 14-year-old son loved his father and would visit him in prison.

Swisher's obligation was critical. The State was going to present violent prior offenses as aggravating circumstances in the case. Instead of contacting the witnesses who could put the prior offenses in context, Swisher blamed Mr. Rhodes for his omission. Swisher admitted he had Mrs. Vailes' phone number and the names of two step-brothers in the Marines, but he never spoke with any of them. Mr. Rhodes claimed he gave a list of witnesses to Swisher, but Swisher gave contradictory testimony as to whether he received the list. Swisher could not remember if he had a list of family members from Andringa's trial file, yet Andringa had no problem finding witnesses or gaining Mr. Rhodes' cooperation. No reasonable attorney would have conducted a death penalty case without contacting family members, or doctors listed in the medical records when a

defendant had such an extensive mental health history. Wiggins v. Smith, 539 U.S. 510(2003).

Swisher had no excuse for why he did not provide adequate documentation to Dr. Taylor, especially when Dr. Taylor was to be the only witness he intended to call. A criminal defendant has a right to an adequate and professional conducted mental health evaluation. Ake v. Oklahoma, 470 U.S. 68 (1985). The doctor made findings and conclusions that were not supported by the facts. Dr. Taylor was impeached and his testimony had little credibility with the jury.

Swisher's performance fell below the objective for reasonableness. Mr. Rhodes' attorney failed to present evidence of his background that would have the given the jury an alternative to death. Instead, the only mitigation witness besides the ill-prepared Dr. Taylor was James Rhodes. He was located and transported to the resentencing by the State because Swisher purportedly did not know where he was. Oddly, the State had no trouble bringing him to court and previous counsel, Andringa had no trouble locating witnesses. Ragsdale v. State, 798 So. 2d 713 (Fla. 2001); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1999).

Trial counsel had a road map from the State to mitigation witnesses including names, addresses and phone numbers. Swisher's defense strategy was to avoid the death penalty by presenting a mitigation case. With the exception of Dr. Taylor, Swisher inexplicably did nothing to prepare his mitigation case. The only family member he arranged to have Dr. Taylor speak with

was Mrs. Vailes. Of all of Mr. Rhodes's family, Mrs. Vailes had so little contact with her grandson as to make her testimony meaningless.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

In Williams v. Taylor, 120 S. Ct. 1495 (2000), trial counsel did not begin to prepare for the penalty phase until a week before trial. Trial counsel failed to uncover extensive records describing the client's background. While the Court said that not all the evidence was favorable to Williams, the failure to introduce the voluminous amount of material in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Id. at 1515.

As in Williams, Swisher's preparation for resentencing was not done until shortly before trial. Had it not been for Mr. Rhodes' insistence and the lower court's intervention, no one

other than Dr. Taylor would have testified. Even then, the mitigation presented only scratched the surface of what was quantitatively and qualitatively available.

Had Swisher looked at the records provided by the State and interviewed family members alone, a range of mitigation not available from any other source would have opened up. These leads revealed evidence that Mr. Rhodes' father was a convicted pedophile; His mother drank during her pregnancy with Richard Jr., had a low I.Q. and may have been retarded; he had organic brain damage; numerous suicide attempts; corroboration of sexual abuse by Richard Sr., other inmates at Napa State Hospital and Don Betterly;

evidence of horrific physical abuse including being tied to a dog house and made to eat out of a dog dish at age 5 or 6; subjected to wet sheet treatments at Napa State Hospital; being hit with a closed fist by his father; living in a hay pod; wetting his pants at age 8; not knowing how to eat with utensils; forced to drink from a toilet; ate from a garbage can; deprived of loving foster parents; raised in unsanitary filthy clothing; malnourished; and

building caskets at Napa Hospital with mentally retarded patients.

Like Rompilla, this evidence would have revealed a mitigation case bearing no relation to the "few naked pleas of mercy actually put before the jury." The undiscovered mitigation might well have influenced the jury's appraisal of Mr. Rhodes' culpability. Wiggins v. Smith, *supra*. The

likelihood of a different result had the evidence been presented is sufficient to undermine confidence in the outcome.

III-THE LOWER COURT ERRED IN FAILING TO ALLOW MR. RHODES' TO CHALLENGE THE STATE'S DNA EVIDENCE.

Before the close of the evidentiary hearings in May 29, 2002, Mr. Rhodes filed a Motion for DNA Testing pursuant to Fla. R. Crim. P. 3.853 and a motion to establish the condition of forensic evidence and chain of custody (PC-R. 701-702; 703-709). The motions were granted on July 19, 2002 (PC-R. 770). The evidence was sent to FDLE. An FDLE report on the DNA results was not provided to the defense until January 27, 2003 and the full file was not disclosed until March 11, 2003 (PC-R. 1008).

Mr. Rhodes filed a motion to depose the State's DNA expert on July 7, 2003 (PC-R. 1008), but the request was denied. None of the DNA results or procedures have been tested in open court or admitted into evidence for this appeal. As of this date, Mr. Rhodes has been unable to challenge the State's results, and the State has control and unlimited access to the results, the samples and the FDLE expert. Mr. Rhodes does not. This is a denial of due process and was not anticipated under Fla. R. Crim. P. 3.853.

The lower court did not deny Mr. Rhodes' motion for post-conviction relief until November 12, 2003 (PC-R. 1033-1035). There was adequate time for a deposition and a challenge to the DNA testing. Even though the defense was foreclosed from discovery pursuant to Rule 3.853, the lower court cited to the results in its order denying relief (PC-R. 1022). This was

improper as the results were inconclusive and never challenged or entered into evidence. Mr. Rhodes is entitled to due process and should be allowed discovery on this evidence. See, Fla. R. Crim. P. 3.853.

IV--THE LOWER COURT ERRED IN SUMMARILY DENYING VARIOUS CLAIMS.

A Rule 3.850 movant is entitled to present evidence in support of his constitutional claims. These factual allegations "must" be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). In 3.850, a defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). Accord Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). **A. Ineffective Assistance of Resentencing Counsel–Jailhouse Informants**

Mr. Rhodes alleged in his motion that his resentencing counsel was ineffective for failing to adequately challenge the trial testimony of three jailhouse informants. He did not investigate their failure to appear at the penalty phase. Three inmates, Edward Cottrell, Harvey Dureanseau and Michael Allen, acting as State agents purportedly elicited statements from Mr. Rhodes when he was in Pinellas and Citrus County jails. Trial counsel moved to suppress the testimony of Edward Cottrell (R. 164). The trial court denied this motion, and Cottrell testified for the State (R. 982, 2027). Cf. Miranda v. Arizona, 384 U.S. 436 (1966). The State knew that Mr. Rhodes was represented by counsel. See, Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264, 274 (1980).

Harvey Duranseau and Mr. Rhodes shared a cell in the Citrus County Jail (R. 1834). At the time, Mr. Duranseau communicated

with detectives about the case against Mr. Rhodes. During cross-examination, Duranseau acknowledged his prior statements against Mr. Rhodes were coerced (R. 1851, 1853). When questioned about the coercion, he changed his story and said he was not coerced (R. 1859). Swisher never spoke with Mr. Duranseau.

Edward Cottrell was a trustee and became friendly with Mr. Rhodes (R. 2031). Jail Officers arranged a meeting for Cottrell with Detective Porter (R. 2838, 2839). Cottrell expected something in return for testifying against Mr. Rhodes (R. 229-30). He knew his sentencing depended on his trial testimony and his sentencing was delayed until he testified in Mr. Rhodes' trial. Cottrell entered a guilty plea in October, 1984 (R. 2842). In July, 1985, he testified at Mr. Rhodes' trial. Detective Porter admitted to making veiled promises to Cottrell (R. 2855) and admitted to using Cottrell as a State agent. This is a Massiah violation.

Andringa objected to the testimony of informant Michael Allen, but was overruled (R. 2087-88). In 1984, Allen was serving a life sentence in the Marion Correctional Institution on a robbery charge (R. 2078). Allen was in the Pinellas County Jail on September 19, 1984, which was nearly three months after Mr. Rhodes was indicted (R. 2086). Pinellas County detectives spoke to everyone in Mr. Rhodes' cell block (R. 2086) and made an open offer to anyone in the cell block who wanted to make a deal with the State (R. 2086-87). In exchange for his testimony, Allen expected to receive a letter of recognition

from a prosecutor stating that Allen assisted in the case (R. 2078). The effect of the letter was for Allen to be paroled early (R. 2078).

Other than testimony by three confessed snitches, the State had no physical evidence directly linking Mr. Rhodes to the victim's death. Trial counsel failed to adequately challenge these snitches and allowed their trial testimony to be read into the record. He did not interview the jailhouse informants or question them regarding the deals they received. Unlike the original trial by the time of the resentencing, the deals were long over. Swisher should have known that the Pinellas County Sheriff's Office and State Attorneys were notorious for using jailhouse informants in death penalty cases. Swisher failed to speak to the informants, who were incarcerated and easy to find. He never asked about the benefits they received for their testimony. When Andringa cross examined them about their deals, they were not yet final. By the time of the resentencing, Swisher could have learned what deals had been made. He did not.

Instead, Swisher "acquiesced" to the State's hearsay reading of the snitches' testimony in the record. This Court recognized that Swisher's failure to properly object waived the claim in Mr. Rhodes' direct appeal. Rhodes v. State, 638 So. 2d 920 (Fla. 1994). This was ineffective assistance of counsel. The witnesses' testimony violated Rule 4-3.4(b) Florida Rules of Professional Conduct, which prohibit offering inducements to witnesses in exchange for testimony. The deals rendered the snitches' testimony unconstitutional. The record does not

conclusively rebut this claim.

B. Ineffective assistance of counsel-other errors

This Court found that Swisher failed to rehabilitate or object to the excusal for cause of two jurors; failed to object to hearsay in the reading of a doctor's report; and failed to object or preserve numerous jury instruction errors, such as Espinosa v. Florida, 112 S. Ct. 2926 (1992) and Caldwell v.Mississippi , 472 U.S. 320 (1985) error.

Mr. Rhodes' sentencing jury was improperly instructed on the in the course of a sexual battery aggravating factor in violation of Espinosa, *supra*; Stringer v. Black, 503 U.S. 222 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). Swisher's failure to object or argue this issue is ineffective assistance of counsel. At resentencing, the trial court failed to instruct the jury on an essential element of the crime of sexual battery--consent. The proper instruction for sexual battery included:

> ...3. The act was committed without the consent of (victim).
>
> "Consent" means intelligent, knowing and voluntary consent and does not include coerced submission.

Sec. 794.011(5) Florida Standard Jury Instructions In Criminal Cases; Cf. Robles v. State, 188 So. 2d 789, 793 (1966).

Under Florida law aggravating circumstances must be proven beyond a reasonable doubt. Hamilton v. State, 547 So. 2d 528 (Fla. 1989); Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Rhodes' jury received no instructions on the "consent" element of the in the course of a sexual battery.

This error is particularly prejudicial in Mr. Rhodes' case because there was no evidence that a sexual battery had taken place. Mr. Rhodes was not charged with sexual battery or attempted sexual battery (RS. 16-17). The medical examiner could not determine whether the victim had engaged in sexual intercourse prior to her death (RS. 497-948) because there was no physical evidence of it. The fact that the body was found clad only in a brassiere was not probative (R. 949).

Mr. Rhodes was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. The error cannot be harmless. Stringer v. Black, 112 S. Ct. at 1137. Swisher inexplicably failed to preserve these errors. Rhodes v. State, 638 So. 2d 920 (Fla. 1994). **C. Ineffective Assistance of Counsel– Guilt Phase**

Mr. Rhodes was entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The State had an obligation to disclose any exculpatory and impeaching evidence. Brady, *supra*. The deficiencies in trial counsel's performance and/or the failure by the State to disclose impeachment evidence undermined confidence in the outcome of the proceedings, depriving Mr. Rhodes of a reliable adversarial testing. This Court reviews this issue *de novo*, See Stephens v. State, 748 So. 2d 1028 (Fla. 1999), and should reverse.

After exhausting the first jury panel, the State and defense counsel agreed to a jury. The judge brought in another panel for alternate juror positions (R. 1261JJ, 1261LL). After

initial questioning of several members of the new jury panel, defense counsel exercised a preemptory challenge against prospective juror Sparks (R. 1349). The State then backstruck against a member of the regular jury that already accepted (R. 1350). Defense counsel objected, and argued vigorously that the State could not backstrike into a jury it had already accepted (R. 1349-1378). The defense argued that in striking prospective juror Sparks as an alternate, they had relied on the State's acceptance of the regular jury (R. 1357). Counsel argued that they relied on the trial court's statement that the jurors from the new panel would be chosen only as alternates (R. 1357-58). Defense counsel believed their preemptory strike against Sparks was misplaced. Counsel's ignorance of the law directly affected their strategy of choosing jurors. Fla. R. Crim. P. 3.310 at the time of Mr. Rhodes' trial stated that a juror could be challenged before he is sworn or even after, if good cause is shown before any evidence presented. Jackson v. State, 464 So.2d 1181 (Fla. 1985); Cf. Ault v. State, 866 So. 2d 674, 683 (Fla. 2004) (in order to prevent waiver or juror challenge issue, opponent must call court's attention to its earlier objection before jury is sworn); Arnold v. State, 775 So. 2d 696, 698 (Fla. 4th DCA 1999). Here, trial counsel did neither. The prejudice resulting from counsel's deficient performance is that juror Sparks could have made a difference to the outcome (R. 1367). There is a reasonable probability that a difference of one juror would have resulted in a different outcome, especially with a 7 to 5 jury vote. Because of trial counsel's

ineffectiveness this issue was not properly preserved for appeal.

Trial counsel also failed to impeach State witness Margaret Tucker. The State argued that the crime occurred between February 29, 1984 and March 2, 1984. Ms. Tucker testified that Mr. Rhodes arrived late for work one morning (R. 1583). Tucker testified that the reason Mr. Rhodes gave for his tardiness was that he had been detained by police because they had found his girlfriend's body (R. 1583). Although Ms Tucker did not remember the date, she remembered that it was a Friday in February, and that Mr. Rhodes only came to work late once (R. 1585). June Blevins, who maintained employment records for the Clearwater Sun, said Mr. Rhodes only arrived late for work on February 24, 1984 (R. 2559). The day Mr. Rhodes actually arrived late for work was **five days** before the crime could have occurred. Mr. Rhodes was arrested on March 2, 1984 (R. 2817). He never returned to work after his arrest. Trial counsel failed to cross examine the witnesses on these discrepancies, although the information was readily available. No tactical reason exists for this omission. The discrepancy goes directly to the credibility of the witness, and the actual innocence of Mr. Rhodes.

Another important issue was the voluntariness of statements detectives elicited from Mr. Rhodes. Trial counsel failed to object to improper testimony by detectives. Law enforcement was repeatedly questioned by the State about the voluntariness of Mr. Rhodes' statements (R. 1894, 1945, 1955, 2008). Counsel's

failure to object permitted the jury to rely on a witness's improper testimony. Trial counsel should have objected the first time the State asked whether Mr. Rhodes' statements were given voluntarily. Had he done so, the jury would never have heard a law enforcement officer testify that Mr. Rhodes' statements were made voluntarily. There is a reasonable probability that the jury could have concluded Mr. Rhodes' statements were involuntary.

Trial counsel failed to object and cross examine Detective Porter when it became apparent that Mr. Rhodes' Miranda rights had been violated (R. 1896). At trial, Porter said Mr. Rhodes' invoked his right to counsel. At the suppression hearing, Porter said the opposite (R. 2838). Trial counsel did not object or cross examine Porter. This was prejudicial and ineffective.

Trial counsel was prevented from providing effective assistance by interference of the trial court. Trial counsel objected to the admission of irrelevant collateral crimes, and requested a curative instruction (R. 1912 - 1917). The court advised counsel against using curative instructions and he withdrew the request (R. 1916). This was improper.

Trial counsel was ineffective for failing to object to the testimony of anthropologist, William Maples, and failing to obtain an expert in forensic anthropology. Because the medical examiner could find no other cause of death, Dr. Maples attempted to ascertain when the victim's hyoid bone was broken (R. 1739). Before trial, Dr. Joan Woods said all the bone

fractures, except the left wing of the hyoid bone, occurred postmortem (R. 603, 604). Without an opinion stating that the hyoid bone had been broken before death, there was no cause of death attributable to a crime. Testimony about the victim's broken bones, except the hyoid bone, was irrelevant. Dr. Maples, however, testified in detail about the other broken bones that had been caused after the victim's death, presumably by the demolition of the hotel or the transport of the debris to the gun club (R. 1739-40). The State's theory was that the victim had been strangled. The State made no allegation that the victim had been beaten or had in any other way caused bone breaks. Because postmortem injuries are not relevant to any material issue in either phase of a capital murder trial in Florida, postmortem injuries were irrelevant.

Dr. Maples' testimony was prejudicial and caused confusing. Dr. Maples' testimony was the State's way of introducing collateral matters which did not prove any element. Trial counsel failed to depose Dr. Maples prior to trial and only had a copy of Dr. Maples' report (R. 603). Defense counsel also failed to obtain a forensic anthropologist to discredit Dr. Maples' techniques. Had he done so, he would have learned that carving a body and boiling its bones does not meet the Frye test for determining timing of bone fractures. Trial counsel failed to obtain a defense expert or object to the relevance, methods or prejudice of this testimony.

Counsel was prejudicially ineffective in failing to argue for the exclusion of Dr. Maples' testimony and allowing the jury

to hear that the victim's body had been cooked for days to determine when certain bones were broken. This error was compounded when the State reminded the jury of Dr. Maples' testimony in its closing argument (R. 2403). The resulting prejudice is that the jury likely convicted Mr. Rhodes for the ethically questionable and gruesome actions of Dr. Maples. Mr. Rhodes was entitled to an evidentiary hearing on this claim.

D. Other Errors

Mr. Rhodes' final 3.850 raised other allegations that have been rejected in death penalty cases, but are being raised here to preserve them. See Sireci v. State, 773 So. 2d 34, 41 n.14 (Fla. 2000). Mr. Rhodes submits the following claims for preservation: Claim XXX,failure to object to various comments and arguments by the State which diminished the jurors' sense of responsibility, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) (PCR.157); Claim XVII and XXVIII, Mr. Rhodes is innocent of first-degree murder and the death penalty(PCR.110; 153); Claim XXXI, penalty phase instructions improperly shifted the burden to the defense to prove that death was the inappropriate sentence and trial counsel failed to object (PCR.160); Claim XXVII, jurors received inadequate guidance on the aggravating factors and Florida's statute is unconstitutionally vague (PCR. 151); Claim XIII, denial of constitutional rights and right to collateral counsel due to rules prohibiting juror interviews (PCR.95); Claim X, State improperly introduced gruesome and prejudicial photographs, videos and a skeleton at trial(PC-R. 76); Claim XI, Mr. Rhodes

was denied effective and adequate mental health assistance(PC-R. 79);Claim XIV, State violated Miranda v. Arizona and Mr. Rhodes' statements were improperly admitted(PC-R. 98);Claim XVI, Police lacked probable cause to arrest Mr. Rhodes(PC-R. 107); Claim XIX, trial court erroneously instructed on judging expert testimony(PC-R. 124); Claim XX and XXIV, State's use of misleading and improper argument(PC-R. 126; 136); Claim XXII, trial court failed to sequester jury)(PC-R. 130; Claim XXIX, jury was misled and incorrectly informed of its function(PC-R. 155);Claim XXV, State improperly introduced non-statutory aggravating circumstances (PCR.142); Claim XXXII, failure to find mitigation in the record(PC-R.165); and Claim XXXVI, electrocution is unconstitutional (PCR.327).

CONCLUSION

The foregoing authorities, in conjunction with the allegations on which Mr. Rhodes did not get a full and fair hearing, show that a new trial or resentencing is warranted. Mr. Rhodes requests that his conviction and sentence of death be vacated and/or any other relief which this Court may deem just and proper.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief was typed in Courier New, 12 pt. type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to Ms. Katherine Blanco, Asst. Attorney General,Concourse Center #4, 3507 Frontage Rd., #200, Tampa, FL 33607, this 30th day of August, 2006.

/s/Terri L. Backhus

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