IN THE SUPREME COURT OF FLORIDA

RICHARD W. RHODES,

Appellant,

v. CASE NO. SC04-31

STATE OF FLORIDA,

Appellee.
_____/

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

_____

ANSWER BRIEF OF APPELLEE

_____

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PRELIMINARY STATEMENT

References in this brief are as follows:

Post-conviction appeal record (FSC Case No. SC04-31) will be cited as "R" followed by the appropriate volume and page numbers.

The supplemental appeal record volume (FSC Case No. SC04-31) containing the Huff hearing transcript will be cited as "SR" followed by the page number.

Resentencing appeal record (FSC Case No. 79,627) will be cited as "RS" followed by the appropriate volume and page numbers.

Direct appeal record (FSC Case No. 67,842) will be cited as "DAR" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE

Rhodes filed his initial direct appeal following his first degree murder conviction and this Court affirmed the conviction but remanded to the trial court for a new sentencing hearing. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). The facts of the case are recited at 547 So. 2d at 1202-1203:

> On March 24, 1984, the decomposing body of an approximately forty-year-old female, missing her lower right leg, n1 was found in debris being used to construct a berm in St. Petersburg. The debris in the immediate area where the body was found came from the Sunset Hotel in Clearwater, which had been demolished on March 15, 1984. The body was identified by fingerprints as that of Karen Nieradka. The Pinellas County medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. No evidence was found of sexual intercourse, sexual molestation, or rape.
>
> n1 The lower right leg was found several days later a few yards away from the discovery site of the body.
>
> On March 2, 1984, Rhodes was stopped by the Florida Highway Patrol in Hernando County while driving a white 1983 Dodge registered to the victim. Rhodes was arrested for driving without a valid driver's license and taken to the Citrus County Jail. On March 26, 1984, Rhodes was interviewed in the Citrus County Jail by detectives from the Pinellas County Sheriff's Department. During this and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed Karen Nieradka.
>
> On April 27, 1984, during the ride from the Citrus County Jail to Pinellas County following his arrest for first-degree murder, Rhodes offered to tell Detective Porter how the victim had died if he could be guaranteed he would spend the rest of his life in a

mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in the Sunset Hotel.

At trial three of Rhodes' fellow inmates at the Pinellas County Jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing Karen Nieradka.

The jury found Rhodes guilty of first-degree murder. Upon conclusion of the penalty phase of the trial, the jury recommended that the trial court impose a sentence of death.

A sentencing hearing was held on September 12, 1985. The trial judge sentenced Rhodes to death and orally stated her findings of aggravation and mitigation. Written findings in support of the imposition of the death penalty were not filed until September 24, 1986.

Guilt Phase

Rhodes raises eleven issues concerning the guilt phase of the trial, of which only two merit discussion: the improper remarks made by the prosecutor during his final argument to the jury and the instruction on flight given to the jury by the trial court. n2

n2 The remaining nine issues concerning the guilt phase, which we find to be without merit, are: (1) the failure to suppress statements made by Rhodes incident to his arrest; (2) the failure to suppress statements made by Rhodes to a fellow inmate; (3) the trial court's error in permitting a state witness to testify to statements made by Rhodes which were allegedly prejudicial and irrelevant; (4) the trial court's error in admitting into evidence color photographs and a color videotape of the victim; (5) the trial court's error in allowing testimony of an FBI agent that was allegedly outside the agent's area of expertise; (6) the trial court's error in admitting a statement referring to Rhodes' prior incarceration; (7) the trial court's error in excluding on hearsay grounds testimony of a defense witness regarding a statement made by the victim alleged to be admissible under the state of mind exception; (8) the trial court's error in allowing the state to present rebuttal evidence; (9) the trial court's instruction to the

> alternate jurors to remain in the courtroom in the event they were needed for a penalty phase hearing.
>
> Rhodes argues that several remarks made by the prosecution during closing argument of the guilt phase were prejudicial, and thus his motions for mistrial should have been granted. We held in State v. Murray, 443 So.2d 955, 956 (Fla. 1984), that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." While some of the comments made by the prosecutor were objectionable, we do not find the remarks compromised the fairness of the trial proceedings. Under the totality of the circumstances of this case, the remarks were harmless, and no mistrial was warranted.

On remand, following a jury recommendation of death by a vote of ten to two, the trial court imposed a sentence of death, relying on three aggravators: (1) Rhodes committed the murder while on parole; (2) Rhodes was previously convicted of a violent felony; (3) the murder was committed while Rhodes was engaged in the commission of an attempted sexual battery. This Court affirmed the sentence imposed. Rhodes v. State, 638 So. 2d 920 (Fla. 1994).

Rhodes filed a Motion to Vacate Convictions and Sentences on or about April 12, 1996. (R1, 1-176). CCRC sought to withdraw from representation and be replaced by substitute counsel Ms. Backhus (R2, 283-286) and the trial court granted CCRC's Motion to Withdraw (R2, 309-310). Appellant filed an Amended Motion to Vacate on January 8, 1999 (R2, 327-367) with Rhodes' verification filed on March 8, 1999.

The State filed a Response to Motion to Vacate on August 23, 1999 and a Supplemental Response on September 8, 1999. (R3, 366-455). The trial court conducted a Huff hearing on October 5, 1999 pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). Thereafter, on March 13, 2000, the lower court entered its Order Denying Defendant's Motion and Amended Motion To Vacate Judgments of Conviction and Sentence In Part and Order For Evidentiary Hearing. (R4, 469-629). The court granted an evidentiary hearing on claim II (ineffective assistance of trial counsel at resentencing) and claim XXI (newly-discovered evidence pertaining to FBI Agent Malone). (R4, 470, 479-480).[1]

On December 19, 2001, Appellant filed a Motion for DNA Testing (R5, 703-711) and the lower court granted the motion in an order filed July 19, 2002 (R5, 770-772).

Following an evidentiary hearing conducted on May 1 and October 24, 2001 and February 25 and May 29, 2002, the lower court entered an Order Denying Defendant's Motion To Vacate Conviction and Sentence on November 10, 2003. (R6, 1012-1024). The lower court thereafter entered its Order Denying Defendant's Motion For Rehearing. (R6, 1033-1035).

Rhodes now appeals.

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[1] The court additionally granted a hearing on claim XXXIII, ineffective assistance of counsel during voir dire of his resentencing jury (R4, 485). Resentencing trial attorney Swisher testified at the hearing but was not asked about voir dire (R9, 1348-1403). This claim has been abandoned.

STATEMENT OF THE FACTS

The Huff Hearing:

At the Huff hearing on October 5, 1999, defense counsel briefly mentioned that the ineffective assistance of counsel claim was an important area. (SR, 11-12). The court inquired about the claim there were "releases" that would prove the lab work and testimony of FBI Agent Malone was inadmissible and Rhodes answered that there was information about FBI crime lab practices and practices by Mr. Malone in testifying and exaggerating about results instead of doing an independent examination and letting the results speak for themselves. (SR, 15-19). The prosecutor responded that Malone's testimony was not prejudicial to the defendant since the hair in the case was not linked to the defendant, and the complaint that certain testimony was beyond his expertise had been an issue on direct appeal and was no longer available for collateral review. (SR, 20). The defense responded that Malone testified at the guilt phase and the prosecutor tried to show at sentencing that the victim suffered extraordinary torture by pulling hair out of her head - the defense agreed it was the victim's hair. (SR, 21-22). The defense acknowledged that this Court on direct appeal had addressed the issue of his allegedly testifying beyond his expertise but claimed that was before allegations had been made against the FBI crime lab and Mr. Malone. (SR, 23). When the

trial court indicated difficulty in understanding the argument the defense explained that Malone's having testified about the victim having pulled her hair out of her head was really an aggravating factor against Rhodes and the fact that none of the hair in her hands belonged to Rhodes was irrelevant. Counsel argued that Malone exaggerated his expertise to such a degree he was giving an aggravating fact. (SR, 23-25). The court noted that there had been a different jury at resentencing than served when Malone testified at guilt phase and wondered how the resentencing jury had received prejudicial testimony since they were not exposed to Malone. The defense answered that prejudice lay in the fact that the guilt phase jury heard him. The trial court again wondered what the prejudice was since this Court had affirmed the conviction on direct appeal. The defense responded that it didn't affect the second jury and "It affects the first jury as to guilt phase, and the new evidence goes to Mr. Malone's testimony as to guilt phase because it -- as I said, it's an aggravating fact to prove guilt against Mr. Rhodes." (SR, 26-27). The lower court thought it was missing something and inquired why an issue that had been affirmed on appeal pertaining to guilt phase was now relevant at a resentencing second penalty phase by a jury that did not hear the questioned testimony. (SR, 28). The defense replied that it was not contesting that the hair was in her hands but Malone's allegedly

exaggerated testimony as to why it was in her hand, that Malone gave an opinion outside his field and it was only years later this pattern of exaggeration came to light. (SR, 28). Undaunted, the trial court further inquired why the issue was not resolved as the appellate court ruled on the issue and the defense asserted the claim is not resolved because new evidence shows this was a pattern. (SR, 30).[2]

The defense also urged that trial counsel should have done a more thorough job and given mental health experts all the information they were required to have. (SR, 32). The court indicated it would review the material and make a determination. (SR, 41).

Evidentiary Hearing:

At the evidentiary hearing Kenneth Williams Rhodes, one of Appellant's four or five brothers, testified that the memory of his big brother was destructive. (R7, 1058). His parents were the worst things on the planet who ruined the children's lives. (R7, 1059). The father liked to destroy the children mentally and the mother closed her eyes to what was going on. The father liked to sexually molest boys. (R7, 1060). At age seven the

[2] The record reflects that in the resentencing proceeding the prosecutor in the closing argument made no reference to FBI Agent Malone's testimony and as to aggravating circumstances cited only the sentence of imprisonment, the prior violent felony convictions and during a sexual battery. (RS10, 1123-1145).

witness was taken out of this home; the parents had abandoned them and they drank water out of the toilet for two days until child protective services arrived. (R7, 1062). The first foster home involved good people. The witness grew angrier and more hateful each day. His brother James was put in the same foster home, but he was the unruly one and tried to kill Kenneth twice. (R7, 1063-1064). The Appellant was committed to the Napa Hospital. Later, Kenny and James agreed to go back to his father to be part of a family. (R7, 1065). When Kenneth was twelve years old his father wrapped his arm around his throat and told him he'd kill him on the spot if he didn't do what he wanted. His father raped him several times and allowed his step-wife's older sons to beat him whenever they wanted to. (R7, 1066). Eventually, Kenneth was put in juvenile hall as an uncontrollable child. His brother James also was in juvenile hall and would also terrorize him. (R7, 1067). With the help of Mr. Gray at juvenile hall, the witness was able to be sent back to the foster home. (R7, 1068). Kenneth basically raised himself. (R7, 1069). The father was abusive to all the kids. (R7, 1070). Kenneth has a temper and a judge felt it appropriate for the military to deal with him. (R7, 1072). He received an honorable discharge for his mental situation. He has taken medications like Dilantin and went to a mental hospital. (R7, 1072-1073). He attempted suicide by overdose;

he married his first wife and his life started turning around - but she tried to have him killed three times and that didn't work out. (R7, 1073). His baby daughter was taken away because of unfitness, his history with his family. He did drugs to control his temper. (R7, 1074). His foster father who similarly came from an abandoned family taught him right from wrong. (R7, 1075). He described an incident when he saw his brother James making love to his mother. (R7, 1078).

On cross-examination, he admitted that he did not know if the statement made in his affidavit that the last time he saw Appellant was at age six was true. (R7, 1081). The witness claimed that he swore to the affidavit to the investigator whose name he didn't know. (R7, 1083). He claimed not to have seen the abuse to Appellant because Appellant was the first child. In his affidavit the witness referred to himself as a "nut." (R7, 1084). He claimed to be a nurse but did not have a nursing license from California or any other state. (R7, 1085). He has not had any contact with Appellant. (R7, 1087). The witness did not know whether his family members knew where he lived. (R7, 1088). He has received a misdemeanor ticket for pushing a shopping cart full of food home and lives on SSI disability. (R7, 1089). Kenneth claimed it was James not Richard who tried to throw him over an overpass onto a freeway. (R7, 1090).

Eileen Yvonne Mease was married to Appellant's father's

brother; her mother-in-law is Appellant's grandmother Mary Vails. Her husband died in a 1959 car accident. (R7, 1094). She described what Appellant's father was like - he asked her husband to let him go to bed with her. (R7, 1096). Appellant's parents had a drinking problem and Bessie was a battered wife. (R7, 1096-1097). Appellant was taken into protective custody and put into a foster home shortly after birth. (R7, 1098-1099). Appellant was returned to the family when his mother came back from the sanatorium (tuberculosis) and Bessie was a terrible housekeeper. (R7, 1099-1101). The children had behavioral problems; they had been battered. (R7, 1102). She suspected sexual abuse but didn't witness it. (R7, 1103). When Mease's daughter was forty years old she told her she had been sexually abused by Appellant's father. Appellant said he had been sexually molested by his father (R7, 1104) before he was six years old (R7, 1117). The children were put in foster homes after abandonment. (R7, 1107). Appellant was placed back with his father at age twelve (R7, 1107) and she was told Appellant was chained to the bed for wetting his bed (R7, 1108).

Lorraine Armstrong knew Appellant as a patient in Napa, California when he was aged twelve to sixteen; she was the charge nurse in the children's section of the Napa State Hospital. (R7, 1121-1122). Appellant was placed there because he was supposed to be out of control. Appellant was compliant

and did not get into any trouble. (R7, 1124). He would interact with the other kids, wanting to be liked. (R7, 1125). Appellant was able to control his behavior - he didn't lie, steal or get into fights. (R7, 1136).

CCRC investigator Dorothy Bellue spoke with Rhodes' relative Kathleen Broussard (an aunt) in 1996 and Broussard is now deceased. (R8, 1282). The court allowed the witness to testify as to Broussard's information over the State's objection on hearsay grounds. (R8, 1284). Bellue was told Appellant's mother was an alcoholic with a low IQ, that Appellant's father was a pedophile who had been to prison, and the children were abused and abandoned. (R8, 1286). She did not take a taped statement from Broussard, nor did she prepare an affidavit for Broussard to sign. She has made no attempt to confirm that Broussard is dead. (R8, 1289-1290).

Investigator Cheryl Smith interviewed Merco and Kate Piazza, Appellant's foster parents from the time he was a baby until full age; they are now 82 and 74 years old. (R8, 1295). They refused to sign affidavits she prepared for them after taking their statements. (R8, 1296). The lower court permitted a proffer but would not allow the evidence to be admitted. (R8, 1298-1301).

Resentencing trial defense attorney John Swisher testified at the hearing below on February 25, 2002. (R9, 1348-1403).

Mr. Swisher was an experienced capital defense litigator with experience in probably more than five death penalty cases at the time of his representation of Rhodes. (R9, 1350). Swisher received files from the previous defense team Andringa and Denhardt. (R9, 1352). Swisher identified a number of exhibits, including a Motion for Appointment of Confidential Expert and Motion in Limine. (R9, 1354-1357). He reviewed the testimony of the witnesses in Rhodes' prior trial, contacted Dr. Taylor to testify, read through Dr. Merin's prior testimony and talked to his client. (R9, 1357). He had assistance of co-counsel Daryl Flanagan. (R9, 1358). Prior to the resentencing, Rhodes was cooperative. Swisher was aware of a couple of half-brothers, step-brothers in the Marine Corps. (R9, 1359). He was aware that statutory mitigators were listed in the statute and that non-statutory mitigators included "anything and everything." (R9, 1360). He thought the client was the captain of the ship. Swisher testified that he presented the testimony of mental health expert Dr. Taylor and provided a thick stack of background information or materials to him. (R9, 1361).

Prior to resentencing, he tried to contact Appellant's grandmother Mary Vails and later learned that she was elderly and didn't respond to the phone quickly but Dr. Taylor indicated that he talked to her. (R9, 1366). His strategy was to establish statutory mental mitigators through the testimony of

Dr. Taylor, the records and through the cross-examination of Dr. Merin addressing Dr. Afield's views. (R9, 1367). He was also going to use death row inmates provided by Rhodes and didn't know they had a disagreement about that until February 11, and using Dr. Taylor. He wanted the jury to know of the abuse and horrible life he had. (R9, 1368).

There was an in-camera hearing involving Judge Baird, Rhodes, Swisher and the court reporter. (R9, 1365). The upshot of it was Rhodes indicated he would be satisfied if they got in touch with two people; his brother James and Mr. Betterly and they would be contacted to see what they could offer. (R9, 1370). The two witnesses were provided. They went over James Rhodes' testimony which Swisher thought corroborated what Appellant said about his past concerning his childhood and that testimony was given to the jury. (R9, 1372).

Swisher talked to Mr. Betterly and decided not to call him as a witness - Betterly said Rhodes was a manipulator and a liar. When Appellant was informed of the communication, Rhodes said "that's what I thought he would say because he sexually abused me." (R9, 1373). Betterly did not corroborate information Rhodes had given to Swisher at the in-camera hearing. (R9, 1374).

Swisher intended to have Dr. Taylor testify about the medical records but not put the records in themselves. (R9,

1373). They subsequently put in the records to show that Rhodes wasn't making things up. (R9, 1375). During Dr. Taylor's cross-examination, Rhodes became unhappy and grabbed him; Swisher felt concern that he was being set up by Rhodes (forcing him to put in records Swisher didn't want to use and Rhodes giving and not giving witnesses). (R9, 1377).

Swisher had been aware of allegations that Rhodes and his brothers had been sexually assaulted. (R9, 1379). He recalled that Rhodes had horrible experiences in childhood. (R9, 1380).

Over the course of the years Swisher has handled twelve to fifteen death penalty cases and two defendants have received a death sentence. (R9, 1384). When he first started as a criminal defense attorney, he worked with Mr. Dillinger for six or seven years prior to the latter's becoming Public Defender. (R9, 1389).

On cross-examination, Swisher stated that Appellant provided the name of his grandmother as a person to contact, that he made several attempts to contact her and Dr. Taylor did contact her. The first time Appellant provided the names of his brothers James and Kenny was at the in-camera hearing. (R9, 1385). He did know about two step-brothers in the Marine Corps stationed in Europe. After talking to Betterly, he felt it would have been "disastrous" to use him. (R9, 1386).

Swisher was aware that in the first trial, defense counsel

had used Dr. Afield and Janet Folts whom Appellant knew through a prison ministry. Swisher didn't believe it would be helpful to use what had been unsuccessful in the past or to remind the jury he had received a death sentence. Swisher didn't see any point in calling death row inmates as witnesses. (R9, 1387). Rhodes had input in the strategy of not calling the inmates or Folts. (R9, 1388). Swisher had his own box of records as well as the Andringa/Denhardt material, which he gave to Appellant's girlfriend Ms. Meissner, at Rhodes' request. (R9, 1390).

At penalty phase, Swisher put on the testimony of James Rhodes, Dr. Taylor and Dr. Afield through Dr. Merin's cross. (R9, 1391). Betterly told him that Rhodes was a pathological liar and should not be believed. (R9, 1392). Rhodes did not mention his brothers James and Kenny prior to the in-camera hearing. (R9, 1392-1393). He had previously discussed possible mitigation with Appellant. Rhodes had plenty of time to give him names of people that would be helpful. (R9, 1393). Rhodes' main idea at the in-camera hearing was to locate and talk to James Rhodes and Don Betterly. James Rhodes did testify before the jury at penalty phase. Dr. Taylor was into his cross-examination and Swisher was given time to compose himself for closing argument when Appellant decided not to continue his presence in the courtroom. (R9, 1394-1395). Although Swisher asked about family members, Appellant only mentioned his step-

brothers, the Marines. (R9, 1397). Swisher gave him the option and apparently Appellant did not disagree on the prison ministry witnesses. (R9, 1399). His intake interview was in the box of things sent off to Appellant's girlfriend and Swisher has not seen it since. (R9, 1401). Swisher repeated that using Betterly would be disastrous. (R9, 1402).

Psychiatrist Dr. Donald Taylor, who had testified at the resentencing hearing, also testified below. (R9, 1404-1426). He identified the documents provided by attorney Swisher he used in addition to his evaluation. (R9, 1405). Taylor testified that Swisher had provided the phone number for Mary Vails, Appellant's maternal grandmother, in January 1992, who informed him that her son had mistreated Appellant and when Appellant was a little boy he was disturbed and on medication. She did not have knowledge of sexual abuse but did have knowledge he had been physically abused. Another family member, Catherine Broussard, had the same phone number but she was unavailable when he called. (R9, 1406). When asked about a note in his report concerning information about the events surrounding the crime, Taylor recalled they reached a consensus that since Appellant was not able to recall what happened and since the witness was not going to give an opinion regarding his mental state at that time anyway, they would forego reviewing documents pertaining to the events and they would focus on what his life

had been like prior to the event. (R9, 1409).

Taylor indicated that he has received additional materials several years later. (R9, 1410-1411). While he has now changed his opinion on whether at the time of the offense he was intoxicated and in the midst of an alcoholic blackout, the "remainder of my opinions are unchanged." (R9, 1411). On cross-examination Dr. Taylor testified that he was able to corroborate some of the things Appellant said about his childhood from the grandmother. (R9, 1417). It was possible he had the Catholic Services report at the time of his penalty phase testimony in 1992. The witness did not notice that the "affidavits" of Americo Piazza, Kate Piazza, and Steven Fox were never actually sworn to. (R9, 1419). He retains the same opinions now that he had in 1992 that Appellant was emotionally disturbed, that his ability to conform his conduct to the requirements of law was impaired, that Appellant was acting under extreme duress (that he was intoxicated at the time). (R9, 1420-1421). The witness acknowledged getting information from Appellant about his life, previous psychiatric and medical problems or treatment, family relationships, the physical and sexual abuse and abandonment, drug use diagnoses and warehousing. (R9, 1425-1426).

Former FBI Agent Michael Malone was assigned as the primary examiner in the Rhodes case (R8, 1212). Technicians in the lab

process or prepare the evidence for the agent looking at it. (R8, 1214). He identified Defense Exhibit 7 as the FBI laboratory report dated May 18, 1984, giving the results of the hair and fiber exam in the Rhodes case. (R8, 1215). Malone identified Defense Exhibit 8 containing three pages of his notes. (R8, 1216). The two exhibits were introduced into evidence. (R8, 1217-1229). Notes from his technician were included in the exhibit. (R8, 1229). The technician takes the samples out of the package from the sheriff's department and mounted the samples on slides for Malone. Malone looked at all the samples. (R8, 1231). Older experienced technicians train the technicians, not hair examiners. (R8, 1234). Malone testified that the unknown hairs he was presented with were indistinguishable from the microscopically matched hairs on the victim. They did not come from the suspect Rhodes. But one cannot absolutely, positively say they were the victim's hairs. (R8, 1239). If he had matched a hair to Rhodes, policy would require him to put in a conclusionary statement but there was no match to the hair and fiber in this case so he was not required to put the statement in. It is FBI policy not to disclose the technician since technicians are not trained, and the FBI does not make them available to testify. (R8, 1239-1240). Malone recalled there was black soot at the ventilation duct but was not familiar with the term "black rain." (R8, 1244).

Malone reviewed his testimony in this case and stated that his prior statement - that the hairs from both hands of the victim were her own - was mistaken. (R8, 1245). The correct statement should be that the hairs from her right hand matched hers and those on the left hand were not suitable for comparison. His report was correct; he changed nothing in the report - it is just that his prior testimony was inaccurate. (R8, 1246). Malone has not changed his opinion - which he learned at symposium on homicide investigations where several medical examiners gave lectures that people in the throes of death have a tendency to grab their own hair. (R8, 1248). Malone testified below that he examined all of the hair in the victim's hand and concluded - with the exception of one hair in the other hand, that they were all microscopically matched to the victim. They did not come from or match Rhodes' hair. (R8, 1249). Malone reviewed hundreds of fibers. (R8, 1251).

On a proffer, Malone stated that he was familiar with the criticisms in the Inspector General's report in 1997. It involved a leather strap in the Alcee Hastings case. Malone had tested the strap but did not acknowledge putting it on a machine testing tensile strength and the report said Malone had submitted false testimony. (R8, 1264-1267). They also said he gave false testimony when he met with Mr. Dorn (when Dorn said he could not recall the meeting ten years later). (R8, 1266-

1267). No disciplinary action was taken by the FBI or IG. (R8, 1268, 1270). Malone mentioned that a reviewer found in another case that he made a clerical error by putting the wrong Q number down in his notes but it was correct in the report. (R8, 1269).

Malone explained that it is proper to say that hairs match; what you can't say is that hair came from one person to the exclusion of all others. It's different than matching something microscopically. It is not an absolute means of positive identification like a fingerprint. (R8, 1272-1273). Malone did look at all the hairs that were submitted, that the hairs in the victim's right hand (Q10) were indistinguishable from the victim's hair. One hair, the only hair found in the victim's left hand, (Q13) was not suitable for comparison. (R8, 1275-1276). As to any black soot, it would not make any difference because many times the hairs and fibers were in his office in pill boxes. When transferred to the slide, that room where the processing was done, that air was filtered. It did not have any impact on the exams he did. (R8, 1278).

Forensic consultant and former FBI employee Frederick Whitehurst testified that a study was made of the ventilation system at the FBI building; something he termed "black rain" from insulation breakdown became a concern. (R8, 1311-1312). He didn't remember "black rain" in the hair and fiber unit.

(R8, 1325). The FBI report of Mr. Malone was May 18, 1984 and Mr. Whitehurst went to the unit on June 6, 1986. (R8, 1332, 1337). Whitehurst was not there in 1984 when the evidence in this case was analyzed by Malone and he was not involved at all in the Rhodes' prosecution. He is not a hair analyst, nor did he discuss the case with Malone. (R8, 1337-1338).

Psychologist Fay Sultan testified that she was licensed in Florida. (R9, 1431). She is not board certified in forensic psychology and has not tried to be certified in that area. (R9, 1433). Sultan reviewed materials and examined Rhodes at the request of collateral counsel. (R9, 1434). Sultan interviewed Appellant's younger brother Kenneth Rhodes, cousin Helen Greco, grandmother Mary Vails and rehabilitation counselor Don Betterly; she also telephonically interviewed Eileen Mease, and a nurse at Napa Hospital (Lorraine Armstrong) and Appellant's wife Rebecca. (R9, 1441-1442). Records when Appellant was seven or eight years old described him as disturbed, disruptive in school and hyperactive. There was a description of the instability in his early life. (R9, 1443). The foster parents, the Piazzas, sponsored his baptism. Appellant ran away from a School for Boys. (R9, 1445). In a letter Appellant talks about his rage at having been abandoned by his parents. (R9, 1446). An EEG was described as diffusely abnormal. Records indicated that Appellant listed Don Betterly as his father on the visiting

records in 1974 and Betterly described Appellant as a pathological liar with an unusual sex drive (R9, 1447) and claimed that Appellant fathered a child in 1973. Oregon state records indicate discussions about shoplifting, thievery, pets found dead, severe temper tantrum, destructive of property, his being cruel to other foster children (even endangering the life of a small child), stomping a live kitten and dissecting a live lizard. Rhodes attempted to electrocute a four-year-old child and tried to strangle another child. (R9, 1448). There was very disturbed behavior including sex play with younger children. (R9, 1449). At the Napa State Hospital Appellant was given heavy doses of antipsychotic medication and was considered psychotic. His behavior was very anti-social. (R9, 1450-1451). Several diagnoses appear: organic impairment, bizarre, sadistic, undifferentiated schizophrenia. (R9, 1452). Schizoid personality disorder and anti—social personality disorders are mentioned. (R9, 1454). Appellant's father was a convicted sex offender. (R9, 1459). Kenneth Rhodes described brutal rapes by his father and his rage problems during life. (R9, 1461). Sultan also reviewed the testimony of James Rhodes who also described being raped by his father. (R9, 1463). Appellant's grandmother stated she was abandoned by her husband when she became pregnant with Appellant's father. (R9, 1464). The grandmother Mary Vails didn't know Appellant at all. (R9,

1466). Sultan interviewed rehabilitation technician Don Betterly who told her the boys in the unit made a show of making the weakest boy in the unit have oral sex with the toughest boy. (R9, 1470). Sultan added that Betterly was obviously quite disturbed psychiatrically himself and appears to be quite aroused by young boys. (R9, 1472). Betterly corroborated that he had a relationship with Appellant and described him in unflattering terms, calling him a manipulator and liar and psychiatrically disturbed. (R9, 1473). Sultan opined that Appellant suffers from a cognitive disorder, post-traumatic stress disorder, a mood disorder, personality disorder, and the statutory mental mitigators were present. (R9, 1476-1489).

On cross-examination Sultan agreed that Rhodes was a very manipulative person and perhaps capable of contacting family members about what to say about his background. (R9, 1493). Sultan conceded that if Appellant did not provide the names of people that might have some knowledge about his background to defense attorney Swisher, concealing such knowledge would be manipulative. (R9, 1494). Sultan has never testified for the State in Florida or in post-conviction cases but has testified for the defense in numerous cases (Cooper, Walton, Hannon). (R10, 1495). Sultan did not look at any Florida DOC records from any other period of time than 1989 to 1990; she has been told that Rhodes had many disciplinary write-ups in his early

years of incarceration, including assaults to himself and others. Sultan did not receive copies of testimony of witnesses in this post-conviction proceeding or depositions or sworn statements. She did not do any testing of Appellant. (R10, 1499-1501). She acknowledged that the aggravators in this case included engaged in a sexual battery at the time of the crime and being on parole. (R10, 1502). Despite her lengthy clinical interviews with Rhodes, she didn't talk to him about the crime. (R10, 1502). She was instructed not to talk to Appellant about the crime. Sultan admitted that Appellant exhibited an escalating pattern of violence in the crimes he was committing, as reflected by his several arrests in Oregon, his arrest and attempt to kill somebody in Nevada prior to the murder in this case. (R10, 1503). Kenneth Rhodes stated he didn't remember Appellant at all and described himself as having a multiple personality disorder. (R10, 1508-1509). Sultan did not talk to the Piazzas and she had the impression that Appellant had spoken to his grandmother Mary Vails prior to her interview. (R10, 1511). Attorney Backhus was present when Sultan talked to Mrs. Vails, Helen Greco and Mr. Betterly. (R10, 1510-1513). Betterly had quoted Appellant as saying "I just open my mouth, and the lies come out, and I've done that all my life." (R10, 1513). Betterly stated that Rhodes' chief weakness was that he's a con artist and a pathological liar. Sultan did not ask

Betterly if he had had a sexual relationship with the Appellant because she did not wish for him to stop talking. (R10, 1514). Although Sultan had talked to Appellant for eight hours in March and June of 2001, he did not tell her about his relationship with Betterly; he only admitted it after she asked him directly subsequently. (R10, 1515-1516). When Sultan spoke to Napa nurse Lorraine Armstrong, the latter reported that Rhodes had been compliant and not any trouble at all. Armstrong did not tell her that when she knew him at Napa he never lied, or stole and had very controlled behavior. (R10, 1517). Sultan did not find out from investigator Cheryl Smith that the Piazzas had refused to sign the affidavits prepared for them. Sultan agreed Appellant was not incompetent to stand trial and was not insane at the time of the offense. She agreed with Drs. Afield and Taylor on the mental mitigators. (R10, 1518-1519). Sultan has not testified for the State in a capital case. (R10, 1526). Dr. Sultan is opposed to the death penalty. (R10, 1527).

Dr. Sidney Merin testified for the State in rebuttal. (R10, 1530-1562). Dr. Merin had testified previously in the resentencing proceeding and here reviewed claim 2 of the post-conviction motion, a transcript of the penalty phase testimony from 1992, the penalty phase testimony of Dr. Taylor and a report of Dr. Fay Sultan. (R10, 1538). There is nothing that he has reviewed that would change his previous opinion and

testimony that Rhodes was not under the influence of extreme mental and emotional disturbance at the time of the commission of the crime, that Rhodes did not act under extreme duress or substantial domination of another person, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. (R10, 1539). On the basis of what he read Merin didn't see any cognitive disorder other than what might be a learning disability nor post-traumatic stress disorder; there was some depression, in the form of a deficit or down mood. (R10, 1540). Merin added that a personality disorder happens to be a description of the features he had read that would be associated with this behavior. Merin could see the anti-social, borderline and narcissistic factors alluded to by Dr. Sultan but not paranoid. (R10, 1541). On cross-examination, Dr. Merin indicated there were probably some neuropsychological deficits but not necessarily those having to do with executive function - an ability to control behavior, to initiate, be motivated, plan, reason, think abstractly, recognize consequences of one's own decisions. (R10, 1543). Appellant did take an MMPI. (R10, 1544). The records would indicate there was hyperactivity and that Rhodes was misdiagnosed at an early age. (Dr. Taylor felt the same way.) It would not be uncommon for a hyperactive child who is

misbehaving to be misdiagnosed as having schizophrenia; he was given medications for schizophrenia at that time which didn't work because it was the wrong diagnosis. (R10, 1545). Rhodes knew the difference between fantasy and reality based on his lifestyle. He had a semblance of reasonable conscience and came out of a conflicted, bad sort of environment. (R10, 1548). Although his father is a sexual predator, people internalize the values of society; by the time he interacted with the outside world he had a great degree and awareness of what was right and wrong and what the rules of society were. (R10, 1549-1550). Merin didn't think he had a mental disorder. He had some impairment but not substantial. (R10, 1550). Rhodes has a behavioral disorder, a problem with character, little bit of an emotional disorder. He is not schizophrenic. Behavioral disorders are very difficult to get over. (R10, 1551). The only personality disorders that can create some problem for an individual are borderline and anti-social, and sometimes narcissistic personality disorders. (R10, 1553). Rhodes has never had any history of seizures; he is able to motivate himself to inhibit his behavior, to reason beautifully, as he did at the resentencing by talking the judge into letting him out of the courtroom. (R10, 1554).

Trial counsel in the original trial (now Judge) Henry Andringa testified that he requested discovery from the

prosecution, had no independent recollection but felt he received what he was entitled to. (R8, 1192-1197). Had he felt that he had not received something he would have made additional motions to compel discovery and he had no reason to believe he did not receive such material. (R8, 1200).

At a hearing on May 29, 2002 Deputy Clerk Teresa Kraft identified and described a number of exhibits in the custody of the Clerk's Office. (R10, 1576-1602).

1992 Resentencing Proceeding:

In this Court's last appeal affirming the judgment and sentence on Rhodes's resentencing (FSC Case No. 79,627), the record reflects that trial counsel Swisher presented the testimony of James Rhodes (RS9, 960-1003) and Dr. Donald Taylor (RS10, 1011-1073).

James Rhodes testified that he was Appellant's brother and Appellant had told him when he was a teenager that he had been sexually abused (but did not say by whom). (RS9, 961). James Rhodes went into a foster home at age eight - the parents had abandoned them and their siblings. (RS9, 962). James was with Appellant until they were split up and put into foster homes. (RS9, 961). The witness was aware that Appellant had been placed in a psychiatric unit in Napa State Hospital in California, for possibly five years. (RS9, 964). He had contact with Appellant after the release from the Napa

Psychiatric Unit - when James was eleven or twelve - Appellant was holding their little brother on a bridge over the freeway, ready to drop him. (RS9, 965-966). Appellant offered no explanation; he put him down when James told him to do so. (RS9, 966). The little brother was mentally disabled and James speculated Appellant figured he might be doing him a favor. James next saw Appellant when he came and stayed with James in Oregon after he was out of prison in the 1970's. He stayed in his room with the lights off all the time and moved on after a couple of months. (RS9, 966-967). There was not much communication; Appellant told him it was hard to handle life. Appellant's girlfriend worried about him because of the way they had sex; he would enter from the back side and James explained to her that Appellant was always in prison. (RS9, 968). The last James heard of him, Appellant held up a liquor store at gunpoint and went back to prison. (RS9, 969). Appellant had interpersonal problems with everybody. James acknowledged - based on his own experiences - the impact of institutionalization for a long period of time - one begins to believe one is no good and when you are released from prison and need help, there is nobody to help. (RS9, 970). James testified that he himself had been in over a dozen foster homes, was beaten, went to juvenile hall when he fought back, went to another foster home where the parents were drunks, returned to

juvenile hall and another foster home. (RS9, 971-972). James ran away at age twelve or thirteen, was caught and placed in a boys ranch and escaped. (RS9, 973). James was sent to the California Youth Authority (a small prison for those aged nine to eighteen) at age thirteen or fourteen until age eighteen; he had twenty-five fights in three months. (RS9, 974). He has been stabbed six times and shot twice. He was released at age eighteen and met his parents for the first time. After a three or four month period he punched both of them out and left. (RS9, 975). James committed an armed robbery and ended up in prison for five years - he did fifteen months. (RS9, 976-977). In his life there was always gang activity which provided protection and food. (RS9, 977). James admitted that when he got out of prison he was abusive to his wife and now goes to anger management. (RS9, 978). James Rhodes acknowledged about a dozen felony convictions, assault and battery related. (RS9, 979). He claimed that his explosive temper was related to his upbringing - the foster homes, abuse, fights. (RS9, 980-981). He testified that the youngest brother Kenny was violent in his own way - he is volatile but doesn’t have what it takes to strike back and is on government disability. (RS9, 982-983). Similarly, he felt there had been no one to help Appellant, being pushed into institutions and mental hospital. (RS9, 984). James also related that when his mother visited him six years

ago, the first thing she wanted was to go to bed and have sex with him. (RS9, 1002). He told her to pack her stuff and leave. (RS9, 1003).

Psychiatrist Dr. Donald Taylor conducted an examination of Appellant Richard Rhodes and took a complete history and mental status examination. (RS10, 1014). Taylor ascertained that Appellant was born in California of two migrant workers who both physically and sexually abused him prior to the age of five. They divorced and abandoned him and two brothers. Appellant was found either several days or several weeks later by the Social Service Agency, placed in different foster homes, group homes for boys and sometimes placed back with his father until he was eight or nine years old. He was often physically or sexually abused by people in that home and at age ten was permanently removed from the home. Psychiatric and psychological evaluations at ages ten and twelve indicated that he was severely disturbed at that time. (RS10, 1014-1015). Taylor added that he had an abnormal EEG which can be consistent with a seizure disorder, placed on Dilantin and stimulants for hyperactive child diagnosis. When the foster parents couldn't afford it he was taken off the medications. He spent from ages twelve to eighteen in a state hospital. (RS10, 1015-1016). In the state hospital he was diagnosed as a paranoid schizophrenic and treated with such medication as Thorazine or Mellaril. Dr.

Taylor testified that since he is not actually a schizophrenic the effect of the medications would have been simply to sedate him and not do anything for the underlying problems. (RS10, 1016-1017). Taylor opined that Appellant was under the influence of extreme mental or emotional disturbance, that he was operating under duress (intoxicated by alcohol) and that it was a possibility that his capacity to conform his conduct to the requirements of law were impaired. (RS10, 1018-1020). The defense introduced as Defense Exhibits 1 and 2 medical and other records. (RS10, 1021). Taylor testified that Appellant was the product of his environment - physical and sexual abuse, abandonment, drugs and mental hospital. Taylor added that he was also the product of his genes, that anti-social behavior runs strongly in families. Appellant has an IQ of 82. (RS10, 1022-1025). When punishment is unpredictable, inconsistent and cruel, it tends to make people mistrustful and angry and they will displace it at a later time.

The resentencing record also reflects that the State called Dr. Merin as a rebuttal witness. (RS10, 1073-1110). During attorney Swisher's cross-examination of Dr. Merin, he elicited favorable testimony from the Catholic Social Services (RS10, 1095-1097) and also elicited information from Dr. Afield's transcript and interview, i.e., that Appellant had been raised in institutions from the age of five or thereabouts, that his

parents had been in prison, that Appellant had been in and out of foster homes and orphanages, that he had received several diagnoses such as undifferentiated schizophrenia, that institutions don’t really replace the family, that Afield reported Rhodes was seriously disturbed and disturbed most of his life, that he was under an extreme emotional or mental disturbance in February of 1984, and under extreme duress at the time, and that his capacity to appreciate the criminality of his conduct or to conform to the requirements of law was severely impaired and that Dr. Afield had the opportunity to interview Rhodes. (RS10, 1100-1102).

SUMMARY OF THE ARGUMENT

Issue I: The lower court correctly denied Appellant's claim of a Brady or Giglio violation in the minor misstatement by FBI Agent Malone in his trial testimony. The State did not withhold or suppress favorable testimony which was material to the case, nor was the State aware of any false testimony, nor could it have affected the jury verdict.

Issue II: Resentencing trial attorney Swisher did not render ineffective assistance at the penalty phase. Rhodes did not provide information relating to the witnesses called at the post-conviction hearing. Counsel was neither deficient nor was the prejudice prong satisfied since the evidence offered was largely cumulative to that presented at the penalty phase.

Issue III: The trial court granted Appellant's motion for DNA testing and has not erred in failing to authorize a further fishing expedition.

Issue IV: The lower court correctly denied relief summarily on other claims which were insufficiently pled, procedurally barred or meritless.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S BRADY/GIGLIO CLAIM.

In his amended claim XXI below, Rhodes asserted that there was newly-discovered evidence showing that Appellant was entitled to a new trial. He contended that as a result of the investigation of the FBI laboratory the lab work and testimony of Agent Malone was inadmissible and unreliable. (R2, 351-352). The lower court granted Appellant an evidentiary hearing. (R4, 469-487). Following an evidentiary hearing at which the court heard testimony of Agent Malone and Mr. Whitehurst, the lower court entered its order denying relief. The court ruled that Rhodes "has not demonstrated that Agent Malone's ultimate conclusion was false. Additionally, the Defendant has not shown that Agent Malone's trial testimony was damaging to the Defendant because he did not implicate the Defendant in any way." Thus, Appellant failed to demonstrate that Malone's testimony "affected the outcome of the guilt phase of the trial." (R6, 1021-1022). In denying Appellant's Motion for Rehearing the court found Malone's erroneous testimony "harmless beyond a reasonable doubt" pursuant to Guzman v. State, 868 So. 2d 498 (Fla. 2003). (R6, 1034-1035).

Appellant contends that FBI Agent Malone's testimony at the

evidentiary hearing that he had given erroneous trial testimony (that a hair in the left hand was really unsuitable for comparison rather than being the hair of the victim as he had earlier stated) along with the testimony of Deputy Clerk Kraft demonstrates a violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) entitling him to post-conviction relief. Appellee submits that he is mistaken and that the claim is meritless.[3]

Legal Standard for Brady and Giglio Violations:

In Archer v. State, 934 So. 2d 1187, 1202 (Fla. 2006) this Court reiterated that to establish a Brady violation a petitioner must show (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice to the defendant has ensued. The petitioner must demonstrate the prejudice

[3] While the lower court recited in its Order Denying Defendant's Motion to Vacate Conviction and Sentence that Malone admitted that his trial testimony in this case was false (R6, 1020), it is more accurate to state that Malone instead admitted that a portion of his testimony was mistaken or erroneous on one part, i.e., that he had mistakenly stated at trial that the hairs in both of the victim's hands matched her hairs when he should have said the hairs from her hand matched her while that on the left hand were not suitable. (R6, 1245-1246). That was Malone's only admission as to "false" testimony and Appellee submits that his mistake is not false as used in the context of a Giglio violation - and to the extent that the lower court made a finding of "false" testimony for purposes of Giglio, such a finding is not supported by the record.

prong, i.e., whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000).

The Court in Archer also explained the requirements of a Giglio violation: (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the testimony was material. Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996). Citing Ventura v. State, the Court noted that the "thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)." Archer at 1199. Accord, Melton v. State, 31 Fla. L. Weekly S 811 (Fla. November 30, 2006)("To establish a Brady violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. [citations omitted]. To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict. Strickler, 527 U.S. at 289. A reasonable probability is a probability sufficient to undermine

confidence in the outcome. … A claim under Giglio alleges that a prosecutor knowingly presented false testimony against the defendant; a Giglio violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. [citation omitted]. Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict.").[4]

The Lower Court's Ruling:

The lower court found the claim of a Brady violation to be meritless:

> ". . . as there is no indication that favorable evidence was withheld or that prejudice ensued. Tomkins [sic] v. State, 2003 WL 22304578 (Fla. Oct. 9, 2003). As previously noted, the Defendant has failed to demonstrate that further testing of the hair samples would provide any favorable evidence. Unlike Hoffman [sic] v. State, 800 So. 2d 174 (Fla. 2001), there was no exculpatory hair analysis here because there has not been a subsequent test excluding the Defendant as a potential source of the hair. In this case, there are only inconclusive test results that do not exclude the Defendant, the victim or a third person as a potential source of the hair. The Defendant's conclusion that the victim's hands

[4] Trial defense counsel in the original guilt phase, Mr. Andringa, testified that he could not recall what had been provided by the State in discovery but that he had no reason to believe that anything had been withheld and if he had believed so he would have taken the appropriate action to remedy the situation. (R8, 1197, 1200). Mr. Andringa's testimony does not establish that the State suppressed evidence.

> contained foreign hairs unrelated to the Defendant or the victim is simply not supported by any evidence presented to this court.

(R6, 1022-1023).

The lower court also explained its reasons for rejecting the Giglio claim:

> The Defendant's claim that a Giglio violation occurred is also without merit because there has been no evidence presented to suggest that the State knowingly presented false or misleading testimony. Additionally, as previously noted, this court finds that Agent Malone's testimony did not affect the judgment of the jury and therefore, even if the State knew it was presenting false testimony, any error was harmless beyond a reasonable doubt.

(R6, 1023). See also Order Denying Defendant's Motion for Rehearing, noting that pursuant to Guzman v. State, 868 So. 2d 498 (Fla. 2003) the correct Giglio standard was applied and "the court finds no reasonable likelihood that Agent Malone's testimony affected the jury's verdict." (R6, 1034).[5]

[5] The lower court's order recites that "In 2001, Agent Malone admitted, after checking his handwritten bench notes, that he did not actually test all of the hair samples in this case." (R6, 1021). However, Malone's 2001 testimony was that he did review all the hairs selected for exam:

> 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 the slides for you to review?
>
> A. That's correct.

As to the Brady claim, the lower court's conclusion is fully supported by the record. As to Malone's recent discovery that he was mistaken in his testimony about the hair in the victim's left hand, the prosecutor explained during the evidentiary hearing on October 24, 2001 that he had received a copy of Malone's notes and reports that had been sent to collateral counsel on July 5, 2001, that they did not receive the complete notes until October 15, that Malone told him only that morning that the Q13 hairs from the victim's left hand was not suitable for comparison purposes, that Malone recognized the discrepancy in his trial testimony and the prosecutor immediately notified collateral counsel. (R8, 1178-1180). It is very questionable that this disclosure is "favorable to the accused"; it is not exculpatory that the hair in the left hand is unsuitable for comparison rather than that of the victim, although it perhaps can be said to impeach minimally Malone's trial testimony. With regard to the second prong of Brady the evidence was not suppressed by the State - rather Malone's error in his testimony was discovered for the first time during the evidentiary hearing

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(R8, 1233-1234). He later noted that he reviewed about sixty-three hairs and hundreds of fibers. (R8, 1251). Then,

> Q. Okay, in this case, you did in fact look at all the hairs that were submitted?
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> A. Yes, I did.

(R8, 1275). The trial court's statement may simply reflect the interpretation that there were other hairs among the debris that the technicians did not prepare for Malone's review by placing on microscopic slides.

below and the prosecutor immediately notified Appellant.

Finally, Rhodes cannot satisfy the prejudice prong; this evidence cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. At trial, testimony from witnesses established that on March 24, 1984 the decomposing body of a white female was found in debris including carpeting being used to construct a berm in the Wyoming Antelope Gun Club in St. Petersburg. (DAR13, 1454-1455, 1485-1486, 1489-1492). The lower right leg was missing but was located on March 30, 1984, a few yards from where the body had been found. (DAR13, 1492, 1521-1522). Debris from two buildings that had been torn down was being used to construct the berm but debris in the immediate area of the body came from the Sunset Hotel in Clearwater which was demolished on March 15. (DAR13, 1453, 1455, 1463, 1465, 1467). The body was identified as that of Karen Nieradka through fingerprints; her known prints were on file with the Pinellas County Sheriff's Office as a result of her arrest in February 1984. (DAR13, 1546, 1551-1559, 1567, 1570-1572; DAR15, 1888). Medical Examiner Dr. Joan Wood determined the cause of death to be manual strangulation (DAR14, 1701) and she had been dead from two to eight weeks (DAR14, 1705).[6]

[6] Any suggestion now that there may be doubt as to the identification of the victim is frivolous. Testimony at trial,

On March 2, 1984 Rhodes was stopped by a Florida Highway Patrol Trooper in Hernando County driving a white 1983 Dodge registered to the victim. Rhodes initially said the car belonged to his girlfriend Linda whose last name he could not pronounce because it was Russian. Documents in the glove compartment showed the car was registered to Karen Nieradka whom Appellant claimed was another one of his girlfriends. There was also a note in the glove compartment giving Rhodes permission to drive the car, purportedly signed by Nieradka and Appellant. (DAR15, 1779-1789). Rhodes was arrested for driving without a valid driver's license and taken to Citrus County jail. (DAR15, 1789). Rhodes' cellmate Harvey Duranseau testified that generally Rhodes was not interested in watching the news but when there was a broadcast on the evening news of a woman's body found in a landfill, he asked Duranseau questions if the police could determine the cause of death by strangulation or obtain fingerprints from a dead body. (DAR15, 1836-1837). Rhodes mentioned that the only people that know what occurred was him and he wasn't talking and the girl - and he gestured a strangling motion with his hands. (DAR15, 1840).

When Detectives Porter and Kelly of the Pinellas County Sheriff's Department interviewed Rhodes at the Citrus County

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including fingerprint evidence, established that she was Karen Nieradka.

jail on March 26, 1984, upon introduction Rhodes volunteered "I know why you're here. You're here on a murder investigation." (DAR15, 1896; DAR16, 2007). Rhodes provided a number of different and conflicting statements. He claimed he had rented the victim's car from her (DAR15, 1897-1898), that he had taken Karen and her boyfriend "Bear" to the Sunset Hotel and dropped them off (DAR15, 1898-1903), and mentioned that the police couldn't prove he did it since too much time had elapsed and he "studied forensic lobotomy in prison" (DAR15, 1912). In a second interview Rhodes indicated that he was with Crazy Angel and waited in a car when Crazy Angel killed her at the Sunset Motel. (DAR15, 1924). In another statement he witnessed Angel strangling her and Karen was not fighting. (DAR16, 2012). In yet another version Rhodes claimed he did not learn about the murder until Kermit Villeneuve later told him he killed Karen. Rhodes admitted lying to the officers. (DAR16, 2013-2014). He also claimed to be present when Kermit attacked her. (DAR16, 2019-2022). Rhodes offered to tell Detective Porter how the victim died if he would promise Rhodes would spend the rest of his life in a mental facility and told him he would not get the truth out of him until he was convicted. (DAR15, 1956-1957). Rhodes described himself as a vampire who preyed upon others. (DAR15, 1956).

At the Pinellas County jail Rhodes told cellmate Edward

Cottrell that he had gone with a girl named Karen to the Sunset Fort Harrison Hotel which was being torn down, that he tried to get into her pants and she resisted, that he choked her and hit her head with a board and hid her body in some rubbish under some carpet. (DAR16, 2032-2033). Rhodes told inmate John Bennett that he had "bruised more than a grape, but they can't prove it." (DAR16, 2060). Rhodes told cellmate Michael Guy Allen that he was partying with a girl and tried to break her neck. (DAR16, 2080-2081). An FDLE expert opined that Rhodes was the author of the document purportedly containing the victim's signature. (DAR16, 2104-2109).

FBI Agent Michael Malone testified in Appellant's first trial at guilt phase. (DAR15, 1862-1880). He compared known hair samples of Appellant Rhodes and those furnished from the victim. (DAR15, 1865). After explaining the three-part examination of hairs using three different microscopes (DAR15, 1866-1870), Malone testified that unknown hairs were compared against the hairs of Mr. Rhodes and the victim. The results were 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 were hair fragments that couldn't be associated to anybody. He stated that hairs from the victim's hands were her hairs. (DAR15, 1873). Based on his training and learning, Malone testified that in the death throes people have a tendency to

grab their own hair. (DAR15, 1876-1877). On cross-examination, Malone agreed with defense counsel that the "bottom line" was there were no other hairs than the victim's. (DAR15, 1879). Thus, in essence the Malone testimony was non-inculpatory to Rhodes, i.e., Malone did not testify (and still does not) that any of the hair evidence he examined belonged to Appellant Rhodes. The State's evidence connecting Appellant to the homicide came from elsewhere.

Just as there is no Brady violation since the Malone error in testimony about the hair in the left hand is not exculpatory nor suppressed by the State nor resulting in prejudice to Appellant, so also there is no Giglio violation since the prosecutor did not know of any false testimony and Malone's now corrected testimony that the hair in the left hand was not suitable for comparison was not material and could not have affected the jury verdict. Any such assertion that Malone's erroneous statement about the hair in the left hand belonging to the victim rather than unsuitable for comparison affecting the jury's verdict is - to put it bluntly - frivolous.

At the evidentiary hearing, Malone testified that upon review of his prior testimony he noticed an inaccuracy. Whereas the prior testimony was that the hairs in both victim's hands were hers, the correct statement should be that the hairs from her right hand matched hers but that the hair in the left hand

was not suitable for comparison. (R8, 1245-1246). The report was correct; he changed nothing in the report - his testimony was simply inaccurate at that point. (R8, 1246). Malone testified that he examined all of the hairs in the victim's hand - and with the exception of one hair in the other hand - they were all microscopically matched to the victim. They did not come from or match Rhodes' hair. (R8, 1249, 1275-1276).

While Malone admitted - and the record reflects - that the witness was mistaken and had erred in testifying at trial that hairs in both hands of the victim belonged to her rather than the hair in the left hand was unsuitable for comparison, that does not constitute false testimony or error under Giglio v. United States, 405 U.S. 150 (1972) to warrant relief in a collateral challenge. In Ventura v. Attorney General, State of Florida, 419 F.3d 1269, 1276-1277 (11th Cir. 2005) the Court explained:

> Giglio error is a species of Brady error that occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).
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> The origins of the Giglio doctrine lie in the Supreme Court's decision in Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), which held that a prosecutor's failure to correct false testimony by the principal state witness that he had received no promise of consideration in return for

> his testimony violated the defendant's Fourteenth Amendment due process rights and required a reversal of the judgment of conviction. The Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Id. at 269 (citing Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935)).

Merely because a witness errs or is mistaken in his testimony of course does not mean that the witness has given false or perjured testimony. See United States v. Bailey, 123 F.3d 1381, 1395-1396 (11th Cir. 1997) ("Instead of showing perjury, we conclude that Bailey has demonstrated nothing more than a memory lapse, unintentional error, or oversight by Agent Hudson."); Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000); United States v. Michael, 17 F.3d 1383, 1385 (11th Cir. 1994) ("It is entirely plausible that Agent Dyer's recollection of what transpired at the IHOP was incorrect. We refuse to impute knowledge of falsity to the prosecutor where a key government witness' testimony is in conflict with another's statement or testimony."); United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989).

While it is correct that Agent Malone acknowledged making an erroneous statement in his testimony, it is wrong to assert that he knowingly gave false testimony and such an assertion is unsupported by the record at the evidentiary hearing.

The instant case is similar to the recently-rejected

challenge to the trial testimony of Agent Malone in Hannon v. State, 31 Fla. L. Weekly S 539, 2006 Fla. LEXIS 1826 (Fla. August 31, 2006):

> Hannon next asserts that FBI Special Agent Michael Malone provided unreliable and false testimony during trial. Hannon further claims that the State withheld an FBI Crime Laboratory investigation by the U.S. Department of Justice, wherein Malone was criticized for conducting incomplete tests and exaggerating testimony to fit the government's case, and the report recommended that Malone be subject to disciplinary action. The record indicates that Malone testified during the trial here that there "were no hairs like Mr. Hannon anywhere in the residence or on the victims." Malone testified that he compared a fabric impression made on a door with a pair of Hannon's trousers, which were taken from Hannon when he was arrested, and that Hannon's pants did not match the impression on the victims' door. Malone further testified that the particular pattern of the impression made on the door was consistent with the type that would be made by an item such as a blue jean fabric. However, Malone did not testify that Hannon was wearing a blue jean fabric or that he tested any blue jean fabric belonging to Hannon.
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> Hannon has not presented any facts to show that Malone's testimony was unreliable or false. Moreover, Hannon was not prejudiced by Malone's testimony because his testimony--that hair and fiber collected at the scene did not match Hannon's, and that Hannon's pants did not match the fabric impression made on the victim's door--was not damaging to Hannon. Hannon, however, claims that Malone's testimony was significant because of its implication that Hannon was in the victims' apartment the night of the murders, but failed to leave any hairs as evidence. Hannon highlights that the State during its closing argument emphasized Malone's testimony that the fiber impression on the outside of the victims' front door was consistent with a blue jean type material, and that all the witnesses identified the three who left the victims' apartment as wearing blue jeans. The

> State further argued during closing that Richardson identified Hannon as wearing blue jeans on the night of the crimes. Notwithstanding these arguments, it is not likely that had trial counsel had the FBI report relating to Malone, trial counsel would have used it to challenge Malone's expertise or testimony. During the postconviction evidentiary hearing, trial counsel testified that in his view Malone had in fact helped or advanced Hannon's alibi defense. Therefore, it is not likely that evidence that Malone was investigated would have been presented even if it was available. Moreover, even if the jury had heard the information found in the FBI report, it is not of such a character that it would probably produce an acquittal on retrial. *See* Mills, 786 So. 2d at 549. There is no merit to this claim and it is also denied.

Appellant's contention that the prosecutor must be deemed responsible for Agent Malone's erroneous trial testimony about the hair in the left hand misstatement under the theory that law enforcement actions are imputed to the prosecutor is meritless. That principle may not be applied so mechanistically. The federal courts have declined to impute the knowledge of improper testimony from state expert witnesses to the prosecutor. In Smith v. Massey, 235 F.3d 1259 (10th Cir. 2000), the court explained that chemist Ede overstated his qualifications as a blood spatter expert in certain regards and the court accepted the assertion that his testimony regarding this specific aspect of his training and qualifications was false for purposes of analysis under Napue v. Illinois, 360 U.S. 264 (1959). Additionally, many of Ede's explanations of blood spatter analysis in general and most of his specific conclusions were

scientifically inaccurate. The court noted, however, that it was unclear whether the scientific inaccuracies were the result of negligence, recklessness or intentional misconduct on the part of Ede and because "there is a dearth of case law applying Napue in the context of allegedly false expert testimony" the court would assume, without deciding, that the scientific inaccuracies qualify as "false" statements for purposes of Napue.

Turning to the question of whether the prosecution knew Ede's testimony was false, the court declined to accept the argument that as an agent Ede's decision to provide inaccurate testimony should be imputed to the prosecution, the court noted that the Supreme Court has not directly addressed the issue. See Briscoe v. LaHue, 460 U.S. 325, 326 n.1 (1983)("The Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights."). The Smith court acknowledged a split among the circuits and the Fifth and Tenth Circuits have refused to impute the knowledge of a law enforcement officer to the prosecution where there has been an alleged Napue violation; citing Smith v. Sec'y of New Mexico Dep't of Corrections, 50 F.3d 801, 831 (10th Cir. 1995) and Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990). Smith v. Massey, at 1272.

In the instant case there has been no testimony or any other competent substantial evidence introduced that would support a finding that the prosecutor knew that any false or perjurious testimony of Malone or anyone else was submitted to the jury.

Rhodes' contention that there were multiple errors in Agent Malone's trial testimony is meritless. Appellant reiterates the complaint that Malone testified at trial beyond his area of expertise that victims pull their own hair in the throes of death. Rhodes states that this Court did not address the issue on direct appeal. More accurately, the Court considered and rejected the claim as meritless in a footnote observation that presumably did not merit further discussion. Rhodes v. State, 547 So. 2d 1201, 1203 n.2 (Fla. 1989). And Agent Malone has not receded from his trial testimony on this point. (R8, 1247-1248). Rhodes hypothesizes that the prosecutor in selecting the exhibits to be entered into evidence chose that which would have the most impact, that is the "wads" of hair. Appellant ignores the prosecutor's explanation below that he inadvertently omitted the slides that were at the Sheriff's Office and the material mentioned by Deputy Clerk Kraft included debris found around the body. (R10, 1608-1610).[7]

[7] While Appellant advances his speculation that the State chose exhibits not on glass slides to introduce for the "greatest impact," there is no testimony supporting it and there is no evidence of willful prosecutorial conduct to rebut the

Rhodes argues that the hair contained in State's Exhibit 10B was blond whereas the victim's hair was brown (R10, 1604-1605), but the lower court declined to accept collateral counsel as a hair expert or to be one, noting that people can have blond, brown or gray hair (and collateral counsel agreed) (R10, 1615). Notably, Rhodes did not make any inquiry of Agent Malone on this point when he testified - preferring instead to allow the court to look at the exhibits.[8]

Rhodes argues that Malone knowingly gave false testimony at trial because Exhibit 10B was in a round plastic container although Malone had examined the hairs he did when they were put on glass slides. But Malone's trial testimony explained that when hair samples come to this office, the hairs have to be removed from those items and put on glass slides. The Q exhibits were compared against the known samples of Rhodes and the victim. (DAR15, 1872-1873). Deputy Clerk Kraft described Exhibit 10 as a composite of hair from the victim's right hand - a small plastic bag containing hair and dirt and a plastic

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explanations that the prosecutor inadvertently omitted the slides that were at the sheriff's office.

[8] Rhodes argues that Malone's error on the State Exhibit 13 on the victim's left hand demonstrated another motive for Malone to give false testimony, i.e., that the State Exhibit 10B hair from the victim's right hand was blond and that Malone claimed it was unsuitable for comparison. But Malone did not testify that the State Exhibit 10B hair from the right hand was unsuitable for comparison; rather, he testified it was indistinguishable from the victim's hair. (R8, 1275).

container of hair (R10, 1584, 1598-1599). Rhodes argues that Malone gave false testimony because Exhibit 10B was in a plastic container rather than on a glass slide that Malone used for his examination. But there is no major inconsistency here. Malone testified at trial and below that the technicians prepare the material for review putting them in plastic containers and on glass slides. (DAR15, 1872; R8, 1233). That a portion of the hair from the plastic containers was put on a glass slide for his review does not demonstrate that the hair in the plastic container was not of the same material reviewed.

Rhodes appears to argue that since there was a clump or wad of hair in the exhibit bags Malone did not examine them since they were not on a glass slide. However, Malone explained at the evidentiary hearing that technicians remove the samples from the package sent by the Sheriff's department, processed in scraping rooms and placed on glass slides for his review. (R8, 1231-1233). Malone stated that he reviewed all the hairs on the slides and indicated there were about sixty-three hairs examined. (R8, 1234, 1251). Agent Malone presumably was referring to the hair processed by his technicians and placed on slides for microscopic review rather than the large amount of debris that was available - and which the lower court apparently considered in making the conclusion that not all hairs were examined.

Appellant contends that there were several other errors Malone made. Rhodes complains that Malone's bench notes reflect that a portion of Q1, Q2, Q4, Q5 and Q9 were not suitable for comparison - but Malone testified at trial:

> 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. They were just hair fragments and they couldn't be associated to anybody. So, again, the bottom line as far as the hair from the victim or area where she was found is that there were no foreign hairs at all.

(DAR15, 1873)(emphasis supplied).

* * *

> Q You indicated that all the hairs found that were given to you from combing around the victim's body were the victim's hairs or not able to be identified, is that correct?
> A That is correct. Yes.
> Q What would make a hair not be able to be identified?
> A If you were dealing with either a damaged hair or a hair fragment and you weren't able to find fifteen characteristics that I alluded to earlier, then basically the hair is just no good. You can't make any type of assumption about the hair. You can't eliminate it. You can't eliminate somebody, you can't associate anybody.

(DAR15, 1877)(emphasis supplied). There is little wonder that trial defense counsel in the brief cross-examination succinctly noted the non-inculpatory nature of the testimony and quickly obtained an acknowledgement that the witness "can't shed any

light on this at all." (DAR15, 1879).[9] Rhodes repeats a complaint that he has not been awarded a belated deposition of the FDLE lab analyst. This is meritless. See Issue III, *infra*.

Appellant next complains that the lower court disallowed his impeaching Malone with the report of the Inspector General. The proffer submitted below conclusively demonstrates no entitlement to relief. Below, Rhodes acknowledged to the court that the report did not refer to this case or the methods Malone used in this case. (R8, 1255-1256). After the prosecutor relied on the decisions in Cruse v. State, 588 So. 2d 983 (Fla. 1991), Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), and Schwarz v. State, 695 So. 2d 452 (Fla. 4th DCA 1997), Rhodes represented to the court that the testimony of Mr. Whitehurst would "talk about" whether the method Malone used was beyond his expertise. (R8, 1256-1261).[10] The court ruled that Rhodes could not challenge Malone's credibility or method in the manner attempted - by reference to unrelated cases; there had to be a specific reference to the this case or the method used in this case.

[9] At trial technician Barnes identified a number of exhibits introduced at trial. He identified Exhibits 13A and 13B as "hair sample collected from the left side of the victim's body marked 15A." 15B was a sample collected from 13A and was marked with Q number 15. (DAR13, 1521). Similarly, the May 18, 1984 report of the FBI Lab described Q15 as hair from around the body. See Defendant's Exhibit 7, R.2nd Supp. Vol. 1, p.11.

[10] Whitehurst subsequently testified. He was not at the FBI lab when Malone worked on this case, had no expertise on hair and fibers, and had no opinion on Malone. (R8, 1337-1338).

(R8, 1262-1263). In a proffer, Malone described the criticism of him the 1997 report pertaining to his involvement in the Alcee Hastings case. (R8, 1264-1267). No disciplinary action of any kind was taken by the IG or the FBI. (R8, 1268-1270). In another case he put the wrong Q number down in his notes. (R8, 1269).

The trial court properly declined to award any relief on the claim that Agent Malone must be deemed a witness that has been discredited and unworthy of belief. As stated above, Malone acknowledged that he had been in error about the hair found in the victim's left hand and for the reasons stated herein that error - along with any other - does not warrant the grant of postconviction relief.

ISSUE II

WHETHER RESENTENCING COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

The lower court denied relief on this claim following an evidentiary hearing. (R6, 1013-1020). The standard of review regarding the trial court conclusion that counsel did not render ineffective assistance is two-pronged: the appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

The Lower Court's Order:

The lower court's order properly articulated the standard of Strickland v. Washington, 466 U.S. 668 (1984) that a claimant must demonstrate specific acts or omissions of counsel that are "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment" Id. at 687, and also must demonstrate prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. (R6, 1013-1014).

The lower court determined that Rhodes failed to demonstrate

that counsel should have known that unpresented witnesses were available and would have provided beneficial testimony. Resentencing counsel Swisher testified that he asked Appellant to give him a list of potential witnesses and that Appellant gave the names of people involved in the prison ministries program, his grandmother Mary Vails, and two half-brothers. Swisher also testified that prior to the resentencing proceeding during an in-camera hearing Rhodes stated that he wanted counsel to contact Don Betterly and James Rhodes. Those were the only names provided by Appellant to counsel prior to resentencing. Defense counsel spoke with Mr. Betterly but decided not to have him testify as Betterly told counsel that Appellant was manipulative and a liar. Swisher testified that it would have been disastrous to have Betterly testify. As to the prison ministry witnesses, Swisher testified that he did not want to use them because he did not want the jury to learn that Appellant was previously sentenced to death. (R6, 1014-1015).

The lower court found that attorney Swisher "made an informed strategic decision to not call Mr. Betterly or the prison ministry witnesses" and such a reasonable strategic decision was not subject to second-guessing on collateral attack. (R6, 1015).

The lower court also found with respect to Appellant's half-brothers serving in the military overseas that "there has been

no evidence presented as to what their testimony would have been if called to testify." (R6, 1015). Accordingly, no prejudice was shown by trial counsel's failure to contact these two witnesses. (R6, 1015).

The lower court added that counsel contacted James Rhodes and introduced his testimony at the resentencing trial; attempted to contact Appellant's grandmother Mary Vails but was unsuccessful but asked Dr. Taylor to contact her. Dr. Taylor did contact Vails as part of the background investigation into mitigating evidence and through Dr. Taylor's analysis her statements and input were presented to the jury. The lower court concluded that Appellant had not demonstrated a reasonable probability that Vails' live testimony would have yielded a different result. (R6, 1015-1016).

Three witnesses - Eileen Mease, Kenneth Rhodes, and Lorraine Armstrong - testified at the evidentiary hearing and provided specific details of Appellant's childhood, but there was no testimony presented showing that Appellant told his counsel he wanted these witnesses contacted, nor is there anything in he records that would have alerted a reasonable attorney that these people should have been contacted. (R6, 1016). Counsel's task was made even more difficult since Appellant grew up in a migrant farming community in California and he had not been in contact with these witnesses in many years. (Kenneth Rhodes

even testified that he forgot Richard Rhodes was his brother until contacted for purposes of this motion.) Counsel conducted a reasonable investigation into mitigation given the information he was provided. (R6, 1017). The lower court relied on and cited Thomas v. State, 838 So. 2d 535, 540 (Fla. 2003) (approving trial court's finding that counsel's testimony was more credible and persuasive than the defendant's allegations); Carroll v. State, 815 So. 2d 601, 614 (Fla. 2002) (rejecting ineffective counsel claim where counsel asserted that client did not provide him with names of mitigating witnesses and counsel was led to believe defendant did not have a close family relationship anymore); Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) ("Cherry did not provide him [defense counsel] with names of any witnesses who could have provided mitigating evidence" and "By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Cherry may not now complain that trial counsel's failure to pursue such mitigation was unreasonable."). Consequently, Appellant failed to establish that he satisfied the first-deficiency-prong of Strickland. (R6, 1018).

The lower court proceeded with its analysis and concluded that even assuming *arguendo* deficient performance, no prejudice was shown by the alleged deficiency. Appellant's brother James Rhodes testified at the penalty phase and told the jury that he

and his brother were abandoned at a very early age, they suffered from malnutrition and went long periods with no adult supervision. He also testified that Appellant spent approximately five years in the Napa State Hospital psychiatric ward and that his father was an alcoholic and he confirmed that Appellant complained as a teenager that he had been sexually abused. (R6, 1018).

Additionally, Dr. Donald Taylor testified at the resentencing penalty phase and informed the jury that Rhodes had been physically and sexually abused before he was five years old, was abandoned at the age of five and spent the next three years in and out of foster homes. Dr. Taylor testified that Appellant lived with his father for the next two years and was continually sexually and physically abused until he was permanently removed from the home. Dr. Taylor testified that previous psychological testing revealed that as early as ten years old Appellant was diagnosed as being severely mentally disturbed; his childhood and adolescent medical records were entered into evidence for the jury to consider. Dr. Taylor confirmed that Appellant's mental condition was misdiagnosed by the doctors at the Napa State Hospital and that Appellant had been mistreated by doctors at the hospital. The jury learned that Appellant's father was incarcerated at least three times and his mother was incarcerated once. Dr. Taylor also stated

that early tests had predicted Appellant would grow up to have aggressive tendencies if he did not receive proper treatment and he stated that this was the worst case of child abuse he had ever seen. (R6, 1018-1019).

While the lower court noted Kenneth Rhodes, Eileen Mease, and Lorraine Armstrong may have provided details of Appellant's childhood, "the jury was made aware that the Defendant was abused, misdiagnosed and neglected, and was able to consider this information prior to reaching its verdict" and "these witnesses would have provided only cumulative testimony and therefore the Defendant has not demonstrated prejudice." (R6, 1019). See Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (Dr. Toomer's testimony represents not only a recent and more favorable defense expert opinion, but a cumulative opinion to one that was already presented to the trial court).

Appellant expressed criticism at resentencing counsel Swisher's statement that his client was the "captain of the ship." But this Court has repeatedly echoed that theme. See Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) (". . . in the final analysis, all competent defendants have a right to control their own destinies."); Boyd v. State, 910 So. 2d 167, 190 (Fla. 2005) ("Boyd was exercising his right to be the 'captain of the ship' in determining what would be presented during the penalty phase. See Nixon v. Singletary, 758 So. 2d 618, 625 (Fla.

2000)).

Appellant complains that counsel did not file motions challenging the statutory aggravators or the constitutionality of the death penalty. However, this Court upheld the sentence finding that the three aggravators rendered his death sentence proportionate and counsel cannot be deemed ineffective for not raising meritless challenges to the death penalty that this Court has rejected. See, e.g., Rutherford v. State, 940 So. 2d 1112 (Fla. 2006); Hodges v. State, 885 So. 2d 338, 359 & n.9 (Fla. 2004); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003); Schoenwetter v. State, 931 So. 2d 857, 877 (Fla. 2006).

Appellant Has Failed In His Burden To Demonstrate Deficient Performance:

Attorney Swisher, an experienced capital defense litigator, had received the files from the previous defense team (Andringa and Denhardt), reviewed the testimony of witnesses in Appellant's prior trial, contacted Dr. Taylor to testify, read through Dr. Merin's prior testimony and talked to his client. He had the assistance of co-counsel Daryl Flanagan (R9, 1350-1358, 1384-1389). Swisher was aware of a couple of step-brothers in the Marines, was aware that non-statutory mitigation included everything and, prior to presenting the testimony of mental health expert Dr. Taylor, presented him with a thick

stack of background information material. (R9, 1359-1361). Swisher spoke telephonically with Dr. Afield before the resentencing hearing, he tried to contact Appellant's grandmother Mary Vails but Dr. Taylor was able to talk to her. (R9, 1365-1366). Swisher intended to establish the statutory mental mitigators through Dr. Taylor, the records and the use of Dr. Afield's prior testimony through Dr. Taylor and/or Dr. Merin -- he wanted the jury to know of the horrible time he had growing up. (R9, 1367-1368).

Counsel didn't think there was a problem between them until February 11 when Appellant complained to the judge that he wanted his lawyer to contact James Rhodes and Don Betterly. (R9, 1369-1372). Swisher presented the testimony of James Rhodes which corroborated what Appellant told him regarding his childhood and what Dr. Taylor would say. Swisher spoke to Mr. Betterly and decided not to call him as a witness since he said Rhodes was manipulative and a liar. When he communicated this to Appellant, Appellant responded that he thought he would say that because Betterly sexually abused him. (R9, 1372-1373). Originally, counsel did not intend to enter the medical records and other background materials - instead simply allow Dr. Taylor to testify about the records - but Betterly did not corroborate the information Appellant had given at the in-camera hearing. Consequently, Swisher put in the records to show Appellant just

wasn't making it up. (R9, 1374-1376). Swisher didn't think Appellant provided the name of Betterly or his brother prior to February 11, they were "last minute things" and Swisher recalled feeling that he was being set up. (R9, 1377).

Swisher was aware of the allegations that Appellant and his brothers were sexually assaulted and his childhood experience was horrible. (R9, 1379-1380). Appellant did not provide the names of his brothers James or Kenny prior to the in-camera hearing; Swisher did know about step-brothers in the military in Europe. After talking to Betterly, it would have been "disastrous" to use Betterly as a witness. (R9, 1385-1386). Swisher was aware that in the first penalty phase, prior counsel had used Dr. Afield and Janet Folts. Swisher didn't feel it would be useful to use prior unsuccessful witnesses and he didn't want the jury to hear he was on death row. (R9, 1387-1388). Appellant had input on the decision of not calling inmates or people from the prison ministry. Swisher's records and those he received from Andringa were subsequently given to Appellant's girlfriend Ms. Meissner at Appellant's request. (R9, 1388-1390).

This Court has previously ruled that counsel cannot be deemed to have been deficient in performance where the client does not provide information to counsel about his background or is otherwise uncooperative. See Brown v. State, 894 So. 2d 137,

146 (Fla. 2004) (counsel's ability to present sufficient mitigation was limited by the defendant's desire not to involve his family); Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) (the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions); Cummings-El v. State, 863 So. 2d 246, 252 (Fla. 2003) (approving trial court's finding that defendant made it extremely difficult for counsel to obtain mitigating evidence); Griffin v. State, 866 So. 2d 1, 8-9 (Fla. 2003) (with regard to lay witnesses, Griffin did not provide information about these claims to trial counsel, despite proper inquiry by counsel); Mitchell v. Kemp, 762 F.2d 886, 889-890 (11th Cir. 1985); Johnston v. Singletary, 162 F.3d 630, 642 (11th Cir. 1998); Sims v. Singletary, 155 F.3d 1297, 1316 (11th Cir. 1998) (counsel not ineffective where defendant would not provide counsel any information); Fotopoulos v. State, 838 So. 2d 1122, 1131 (Fla. 2002); Porter v. State, 788 So. 2d 917, 925 (Fla. 2001). See also Melton v. State, 31 Fla. L. Weekly S 811 (Fla. November 30, 2006) ("Melton seems to suggest only that these witnesses existed, and that perhaps they could have been called at trial. However, he presented no evidence suggesting how counsel would have been aware of these witnesses or their testimony. Further, as noted above, both individuals expressly testified at the evidentiary hearing below that they would not have cooperated or

given any testimony against Lewis at that time, essentially making them "unavailable" for the purposes of Melton's trial. We find no error in the lower court's conclusion that trial counsel was not ineffective in failing to pursue these witnesses in preparation for the guilt phase of Melton's trial.").

The lower court credited the testimony of resentencing counsel Swisher that Appellant furnished the names of people involved in the prison ministries program, grandmother Mary Vails and two half-brothers, that at the in-camera hearing Appellant wanted to have Don Betterly and his brother James contacted and "[t]hese are the only names of potential witnesses given to sentencing counsel prior to the sentencing trial, as far as this court has been made aware." (R6, 1015).[11] Counsel's decision not to use Betterly (who would have been "disastrous"), to use Dr. Afield's views through other witnesses and not to use prison ministry or death row inmates as witnesses was a deliberate trial strategy. See Henry v. State, 31 Fla. L. Weekly S 651, 2006 Fla. LEXIS 2368 (Fla. October 12, 2006) ("We have repeatedly rejected claims of ineffective assistance of counsel when the allegedly improper conduct was the result of a deliberate trial strategy."); Lawrence v. State, 831 So. 2d 121,

[11] The lower court subsequently explained there is no evidence what the testimony of the half-brothers in the military would have been, Betterly was not called for strategic reasons and James was, and Dr. Taylor used the grandmother's input. (R6, 1015).

129 (Fla. 2002); Shere v. State, 742 So. 2d 215, 220 (Fla. 1999); Patton v. State, 878 So. 2d 368, 373 (Fla. 2004); Lamarca v. State, 931 So. 2d 838, 849 (Fla. 2006); see also Mungin v. State, 932 So. 2d 986, 1002 (Fla. 2006) ("Cofer chose to submit all relevant information to the mental health expert to allow the expert to make a diagnosis. This method of presenting Mungin's mental health mitigation cannot be automatically considered deficient performance, especially given Dr. Krop's conclusion that Mungin did not suffer from any major mental illness or personality disorder. It was an informed strategic decision well within professional norms."); Trotter v. State, 932 So. 2d 1045, 1052 (Fla. 2006) (trial counsel's failure to present two nieces as penalty phase mitigation witnesses or to provide them to Dr. Krop failed to establish either of Strickland's requirements).

The Court need pay little attention to alleged "evidence" proffered that has not been submitted to the ordinary standards of oath-taking and cross-examination that lawyers and judges routinely encounter. Perhaps it was more convenient for collateral counsel to dispense with such niceties and rely on defense team opinions. For example, CCRC investigator Bellue was permitted to testify about her conversation with Appellant's aunt Kathleen Broussard over the State's objection on hearsay grounds. (R8, 1284). The witness did not take a taped

statement from Broussard nor did she prepare an affidavit for her to sign and although she claimed Broussard was now deceased she made no attempt to confirm that she was dead. (R8, 1289-1290). Appellant sought to have investigator Cheryl Smith relate what she heard from the foster parents Mr. and Mrs. Piazza; Mr. Piazza refused to sign an affidavit prepared by Smith and Mrs. Piazza stated that she couldn't be involved. (R8, 1296-1297, 1303). Collateral counsel attempted to repeat what "Mr. Betterly talked about . . . with us" (R10, 1560) but Betterly was not called as a witness to testify at all. (R10, 1561).

Reduced to its fundamentals, the claim that resentencing counsel rendered ineffective assistance rests on the dubious proposition that attorney Swisher should have found and used Appellant's brother Kenny (although Appellant never mentioned him and who didn't even know Appellant was alive until recently) instead of using brother James - whom Appellant wanted and did testify about their earlier horrible lives. It certainly seems clear in retrospect that even if Swisher had discovered Kenny, he could not have used <u>both</u> Kenny and James; whatever value each may have provided alone, the jury undoubtedly would not have embraced the discordant view of Kenny (James tried to kill me) and James (Appellant tried to kill Kenny) simultaneously. Appellant's current counsel casually dismisses any problem,

blithely asserting that James lied. The fact is that we don't know which one lied (or perhaps both did) but in order to prevail Appellant must seek for this Court to determine as a matter of law that it is preferable to embrace Kenny as a witness (this despite Kenny's admission below calling himself a "nut"). (R7, 1084).

The remaining witnesses who testified below who had known Appellant provided inconsequential testimony. Lorraine Armstrong, a nurse at Napa State Hospital, described Appellant as compliant and not troublesome; she presumably was unaware of any abuse or mistreatment there. Eileen Yvonne Mease merely described Appellant's father and discussed the physical abuse of the children that James Rhodes and Dr. Taylor testified about at penalty phase.

Appellant Has Failed In His Burden To Demonstrate Resulting Prejudice:

The lower court also ruled that even if counsel's performance were deemed deficient, Appellant had not shown that he was prejudiced by such alleged deficiency. Appellant's brother James Rhodes testified to the jury about their abandonment, that their father was an alcoholic, the five years Appellant spent in the Napa State Hospital psychiatric ward, and that Appellant complained as a teenager of sexual abuse.

Additionally, Dr. Taylor had testified at the resentencing penalty phase about Appellant's physical and sexual abuse prior to age five, that he was abandoned and spent the next three years in and out of foster homes. Dr. Taylor testified that Appellant lived with his father for the next two years and was continually sexually and physically abused until permanently removed from the home. Dr. Taylor reported that previous psychological testing revealed that as early as age ten Appellant was diagnosed as being severely mentally disturbed. His childhood and adolescent medical records were entered into evidence for the jury to consider. Dr. Taylor testified that Appellant was misdiagnosed by doctors at the Napa State Hospital and that he had been mistreated by doctors there. The jury learned that Appellant's father was incarcerated at least three times and his mother once. Dr. Taylor stated that early tests predicted Appellant would grow up to have aggressive tendencies if he did not receive proper treatment and stated that this was the worst case of child abuse he had ever seen. (R6, 1018-1019).

Dr. Taylor testified again at the evidentiary hearing and acknowledged that his opinion on the mental mitigators he presented in his earlier testimony to the jury remains unchanged. (R9, 1420-1421).

This Court has repeatedly recognized that the prejudice

prong of Strickland remains unsatisfied where the collaterally offered mitigation is merely cumulative. Brown v. State, 894 So. 2d 137, 148 (Fla. 2004) ("Moreover, even if there was some deficiency, there is no prejudice because the additional testimony presented at the evidentiary hearing contributes virtually no new information and is merely cumulative to the testimony presented at trial. [citations omitted] Much of this testimony simply corroborated the background information presented at the penalty phase through Brown's mother and Dr. Dee."); Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002); Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000) ("Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury."); Evans v. State, 31 Fla. L. Weekly S 628 (Fla. October 5, 2006) (Claim that trial counsel was ineffective for failing to adequately investigate background for mental health mitigation to present at penalty phase rejected as "Evans has failed to demonstrate that he was prejudiced by counsel's failure to present the mitigation evidence presented at the evidentiary hearing." There the mitigation presented collaterally establishing mental health problems also displayed a long history of behavioral problems and escalating violence throughout his school career and likely would have been more

aggravating than mitigating.); Hannon v. State, 31 Fla. L. Weekly S 539 (Fla. August 31, 2006) ("Hannon has failed to demonstrate that if the mental health and lay witness testimony presented during the postconviction evidentiary testimony had been offered at trial 'the result of the proceeding would have been different'"); Ponticelli v. State, 31 Fla. L. Weekly S 561 (Fla. August 31, 2006) (although trial counsel's penalty phase investigation and presentation were deficient - he was inexperienced - post-conviction relief denied for the failure to demonstrate prejudice where both the lay and mental health testimony offered in the post-conviction proceeding was largely cumulative to that presented at penalty phase); Raleigh v. State, 932 So. 2d 1054, 1063 (Fla. 2006) ("However, even assuming a deficiency in performance, Raleigh has failed to establish prejudice. He has not established that Dr. Upson's testimony would have been more favorable or materially more credible if Dr. Upson had been provided with these facts. At the penalty phase proceeding, Dr. Upson testified that he was comfortable with his opinion and that he was not sure if additional facts would change it. Moreover, Dr. Upson was not called to testify at the evidentiary hearing to establish that the additional facts would indeed have changed his opinion. Thus, based on the record, Raleigh has failed to establish prejudice, and we affirm the denial of this claim."); Mungin v.

State, 932 So. 2d 986, 1002 (Fla. 2006) ("Even if Cofer's decision not to present evidence of Mungin's suicide attempt directly to the jury could be considered deficient performance, Mungin has failed to establish prejudice."); Lott v. State, 931 So. 2d 807, 816 (Fla. 2006) (rejecting claim of ineffective assistance of counsel in providing background information to psychologist Dr. Dee, noting "Even if Lott had preserved the claim, however, we would reject it for lack of prejudice. Dr. Dee admitted that the new information he received from the postconviction investigator would have 'bolstered' his testimony, but would not necessarily have 'change[d] my diagnosis or opinion.' Thus, our confidence in Lott's sentence is not undermined."); Branch v. State, 31 Fla. L. Weekly S 573 (Fla. August 31, 2006) ("Again, we can find no error in the trial court's analysis, which relies in large part on the failure of Branch to demonstrate that substantial mitigation evidence existed that counsel failed to discover. . . . As the trial court's order makes clear, most of the evidence put forth at the postconviction hearing was cumulative to evidence that was presented earlier and considered as mitigation, was not credible, or would actually have been harmful to the defendant's case."); Farina v. State, 937 So. 2d 612, 624-625 (Fla. 2006) ("Griffith's testimony and portions of O'Neill's testimony are cumulative to the evidence presented at the resentencing. We

have held that counsel does not render ineffective assistance by failing to present cumulative evidence. [citations omitted] Although the remainder of O'Neill's testimony at the hearing was not cumulative, Anthony still cannot demonstrate prejudice. . . . Because we determine that no prejudice resulted from counsel's failure to introduce these portions of O'Neill's testimony, we need not consider whether counsel provided deficient performance. [citations omitted]"); Henry v. State, 2006 Fla. LEXIS 2368, 31 Fla. L. Weekly S 651 (Fla. October 12, 2006) (the second prong of Strickland "requires a showing that, in light of all the evidence surrounding his conviction, the conduct renders the results of the proceeding unreliable"); Brown v. State, 755 So. 2d 616, 637 (Fla. 2000) (failure to present additional lay witnesses to describe the childhood abuse and low intelligence was not prejudicial and would have been cumulative to evidence presented). See Melton v. State, 31 Fla. L. Weekly S 811 (Fla. November 30, 2006)("In sum, while the additional evidence presented at the evidentiary hearing certainly could have been offered at trial to paint a more complete picture of Melton's childhood, we find no error in the trial court's conclusion that the evidence presented below essentially mirrors the evidence presented by trial counsel during the penalty phase. We find no error in the trial court's assessment that the additional mitigation presented at the

evidentiary hearing does not undermine confidence in the ultimate outcome of the proceedings.").

Finally, that resentencing counsel Swisher acted as an able and effective advocate is confirmed by the trial court's Order and Findings in Support of Death Sentence in March of 1992. (RS6, 488-491). The court found Appellant's age of thirty to be a mitigating factor. The court also found the statutory mental mitigator that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Concerning this and other aspects of Appellant's character, the sentencing court explained:

> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance was established and considered by this court.
>
> The Defendant's background is a laundry list of experiences that almost predicted a life of crime and violence. He was abandoned at a young age by both his parents, although he later spent some time with his natural father. He was certainly neglected, and there was some evidence that he had been sexually abused. As a child he was hyperactive and diagnosed as having a character disorder. He grew up in various foster homes. There was little or no stability to his existence since he would cause such problems within the household that he would have to be removed. During his youth there was a history, reflected in the records introduced at the Penalty Phase, of killing animals, sexual play with other children, and compulsive lying. Unable to coexist in the home of his father and stepmother, or foster homes, the Defendant was eventually placed in Napa State Hospital

in California. There he remained from the time he was twelve until he turned eighteen.

Upon his release from the Napa State Hospital, he lived for a time with a Don Betterley, an Activity Specialist at the Hospital who had apparently taken an interest in him. At the time of the Defendant's imprisonment in Oregon, Mr. Betterely submitted a confidential questionnaire to the Oregon State Correctional Institution that provided a great deal of insight into the Defendant. His opinion of the Defendant mirrors that of the various psychiatrists and other mental health professionals who have examined him over the years. These include Dr. Donald Taylor and Sidney Merin, PhD., both of whom testified at the second Penalty Phase.

Dr. Taylor, a psychiatrist, was of the opinion that the Defendant was severely emotionally disturbed. Significantly, he did not find that the Defendant was schizophrenic, as he had been diagnosed in California as a youth. His opinion was more consistent with the diagnosis of a personality disorder, which was reflected on the Defendant's discharge summary from Napa State Hospital in 1970.

Dr. Merin also confirmed the diagnosis of a personality disorder.

Finally, the anecdotal evidence provided by the testimony of the Defendant's brother, James Rhodes, is consistent with the opinions of the professionals who have examined him.

3. Any other aspect of the Defendant's character or record and any other circumstance of the offense. The Court has considered the following non statutory mitigating circumstances.

a. As a child, the defendant was abandoned by his parents. This fact was established and considered by the court.

b. The social welfare system of California was never able to adequately place the Defendant in a social environment that could address his needs as a child. The Defendant has spent the majority of his life in institutions, from the time he was at least twelve. From the Napa State Hospital, to the prison systems of Oregon and Nevada, the Defendant was never de-institutionalized for more than a few months at a time. As a result, the Defendant never experienced a

> family life that could be considered normal. These facts were established and considered by the court.

(RS6, 489-490).

ISSUE III

WHETHER THE LOWER COURT ERRED IN FAILING TO ALLOW APPELLANT TO CHALLENGE THE STATE'S DNA EVIDENCE.

Appellant filed a Motion To Establish Condition of Forensic Evidence and Chain of Custody and Motion for DNA Testing on December 19, 2001. (R5, 701-711). At the hearing on May 29, 2002, Appellant's counsel acknowledged that the motion to establish chain of custody had been taken care of at this hearing. (R10, 1620-1621). As to the request for DNA testing, the prosecutor argued that Appellant had not satisfied the pleading requirements of Fla. R. Crim. P. 3.853 and argued that testing of the blue jeans even if it were not the victim's blood would not exonerate Appellant. Also, whether or not the victim's blood was found on the bra would not exonerate Appellant. (R10, 1621-1626). To be on the safe side, the court granted the motion for DNA testing. (R10, 1633). The written order appointing FDLE to conduct the DNA examination was filed July 18, 2002. (R5, 770-771).

At a subsequent hearing four months later on November 14, 2002, the prosecutor indicated that the items of clothing that had blood on them had been analyzed. Appellant's counsel added they were testing the jeans to see if the victim's blood was on the jeans and they were trying to determine if hairs taken from the victim's hands (that Malone had found not suitable for

comparison) were the victim's or Appellant's or someone else's. (R 3rd Supp. Vol., p.1725). Appellant's counsel indicated she didn't anticipate any evidentiary hearing "unless there's some huge anomaly" during the testing, "but it's up to the Court whether you have one in." (R 3rd Supp. Vol., p.1726-1727). When the court commented that there was no question of the victim's identity, the prosecutor agreed and Rhodes did not interpose a contrary view. (R 3rd Supp. Vol., p.1724-1725). Cf. Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979)(counsel did not object but deferred to the trial court's statement of the applicable law. "This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.").

Thereafter, Appellant submitted a closing argument on the post-conviction motion on December 23, 2002. (R5, 780-846). The State filed its Closing Argument on May 29, 2003. (R6, 860-931). The State added as an Exhibit to its Closing Argument the FDLE report dated January 27, 2003. (R6, 930-931). On July 7, 2003, Appellant filed a Motion To Depose State's DNA Expert (FDLE Crime Lab Analyst Patricia A. Bencivenga) on the testing procedures she used. (R6, 1008-1009). Five months later the court entered its order denying the post-conviction motion to vacate. (R6, 1012-1024).

In light of Appellant's representation to the court at the hearing on November 14, 2002 that "I hadn't anticipated having any evidentiary issues regarding the DNA motion, but it's up to the Court whether you have one" (R 3rd Supp. Vol., 1726-1727) and since there has not been "huge anomaly that happens in the testing" (R 3rd Supp. Vol., 1726), Appellant cannot show that the trial court abused its discretion following submission of the FDLE lab report of January 27, 2003 that no DNA results were obtained from testing the hair samples in the victim's left or right hand (R6, 930-931) without allowing a further fishing expedition via depositions.

Further, as stated previously herein, the victim's identity was established via fingerprints as testified at trial (DAR13, 1546, 1551-1559, 1567, 1570-1572; DAR 15, 1888). Consequently, any effort now to further identify victim Karen Nieradka is unnecessary and purposeless. To the extent Rhodes sought to present a new claim in his rehearing motion that is improper. Vining v. State, 827 So. 2d 201, 212-213 (Fla. 2002).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING VARIOUS CLAIMS.

Ineffective Assistance of Resentencing Counsel for Failure to Challenge the Trial Testimony of Three Jailhouse Informants:

In the resentencing appeal Appellant complained about the trial court's admission of the prior testimony of his former cellmates and this Court ruled that defense counsel acquiesced in the trial court's decision to admit the testimony of the unavailable witnesses. Rhodes v. State, 638 So. 2d 920, 925 (Fla. 1994).

Thereafter, in his post-conviction motion below Rhodes argued in claims XVIII and XX that there had been a Brady[12] violation and the State knowingly presented false testimony of inmate Harvey Duranseau - and that trial counsel failed to bring the alleged fact of Duranseau being a State agent to the court's attention. The trial court explained its reasons in rejecting these claims:

> **Claim XVIII and Amended Claim XVIII**
>
> Defendant's original Motion to Vacate claims that the State withheld Brady evidence, although specific reference to such evidence is not cited. That portion of the Claim must therefore be denied, as it is not supported by the record or any specific allegation of fact.
>
> The Defendant next alleges that he was denied his rights under the fifth, sixth, and eighth amendments

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

by the State's use of Defendant's fellow inmates as witnesses during the guilt phase of his trial. The Defendant contends that these witnesses were State agents and obtained statements from him in violation of his Fifth Amendment right to remain silent and in derogation of his Sixth Amendment right to have counsel present when he was interrogated. The testimony of all three inmate witnesses was objected to at trial and the issue was preserved and addressed by Defendant's initial appeal. (Exhibit "J"). This claim is now procedurally barred and is therefore denied.

The Defendant's Amended Motion to Vacate cites "current" case law to argue that the trial court's ruling regarding the admission of the inmate testimony was improper. However, the case cited by Defendant's counsel is no longer "current", having been specifically reversed in U.S. v. Lowery, 166 F.3d 1119 (11th Cir. Feb. 3, 1999). The Defendant has failed to demonstrate any prosecutorial misconduct nor has he demonstrated any failure of trial counsel that could constitute ineffective assistance regarding this issue and this Claim must therefore be summarily denied.

* * *

Claim XX

The Defendant claims that the State knowingly presented false testimony from witness Harvey Duranseau, a fellow inmate of the Defendant's while the Defendant was in the Citrus County Jail. The Defendant's assertion is based on statements made by Mr. Duranseau during cross-examination as a State witness when he was questioned about two letters that he wrote to the Defendant. The letters contained assertions that statements Mr. Duranseau had made to the police were false and coerced. On redirect examination, Duranseau testified that the assertions of falsity and coercion made in the letters were themselves false and part of an attempt to gain more information from the Defendant. The Defendant suggests that these portions of the trial record demonstrate a deliberate effort by the State to present knowingly false testimony. In addition, the claim persists in referring to Mr. Duranseau as a state agent, thereby invoking the argument regarding the Fifth and Sixth Amendments that was previously addressed in Claim XVIII. Finally, the Defendant

> claims that his trial counsel's failure to bring these matters "to the court's attention" constitutes ineffective assistance for which an evidentiary hearing should be required.
>
> The Defendant's argument has no merit. As Defendant's reference to the trial record demonstrates, the entire issue of Mr. Duranseau's statements was placed before the jury by Defendant's own counsel during cross-examination. (Exhibit G). The jury was fully aware of the contradictory nature of his testimony and was given the opportunity to judge the credibility of Mr. Duranseau and the truthfulness of his statements through the adversarial process. Indeed, Defendant's counsel may well have been ineffective if he had not explored this area during cross-examination. As for whether or not Duranseau was a state agent, the court has addressed this matter in Claim XVIII and found that the issue was raised by Defendant's trial counsel, ruled upon by the trial court and preserved and argued during the initial appeal. Defendant has failed to suggest the existence of any additional evidence to support the allegation of state agency. The claim must therefore be summarily denied.

(R4, 477-479).

That complaint raised below involved the assertion that Duranseau was a State agent and the use of his testimony at the guilt phase in the first trial when Appellant was represented by trial counsel Mr. Andringa. See Claim XVIII, R1, 111-124; Claim XX, R1, 126-128; and Amended Motion Claim XVIII, R2, 342-345; State's Response to Motion to Vacate, R3, 413-415, 416-418. Appellant did not present below the claim that he raises here for the first time, i.e., that resentencing counsel Swisher rendered ineffective assistance of counsel pertaining to the testimony of the jailhouse witnesses. Therefore, the issue is

not properly presented here. See Burns v. State, 2006 Fla. LEXIS 2593, 31 Fla. L. Weekly S 752 (Fla. November 2, 2006); McDonald v. State, 2006 Fla. LEXIS 2589, 31 Fla. L. Weekly S 747 (Fla. November 2, 2006); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988); Griffin v. State, 866 So. 2d 1 (Fla. 2003).[13]

Other Alleged Errors By Resentencing Penalty Phase Counsel:

On the resentencing appeal this Court rejected a claim that the trial court erred by rejecting two jurors (Blackham and Varellan) for cause as counsel acquiesced to the trial court's decision to excuse them for cause. Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994). This Court also ruled that the trial court had erred in admitting hearsay statements contained in a doctor's report but had not abused its discretion in denying defense counsel's request for a mistrial since it was not serious enough to warrant a mistrial and the failure to file a requested curative instruction was harmless beyond a reasonable doubt. Id. at 924. Appellant does not identify where he raised this claim below, but, in any event, he cannot satisfy the requirements of Strickland v. Washington, 466 U.S. 668 (1984).

To the extent that Appellant is urging that trial counsel rendered ineffective assistance on the court's failure to

[13] Nor did Appellant argue at the Huff hearing the claim that resentencing counsel was ineffective for failing to urge the cellmates were state agents. Cf. Vining v. State, 827 So. 2d 201 (Fla. 2002).

instruct the jury on the consent element of sexual battery and attempted sexual battery given in conjunction with the instruction on the aggravating circumstance of murder "committed while he was engaged in the commission or an attempt to commit the crime of sexual battery," the lower court correctly disposed of this claim:

> **Claim III**
>
> The Defendant alleges that the trial court failed to properly instruct the jury at resentencing on the "consent" element of sexual battery or attempted sexual battery. The State concedes that the jury instruction on sexual battery and attempted sexual battery, which was given in conjunction with the instruction on the aggravating circumstance of the murder being "committed while he was engaged in the commission, or and attempt to commit the crime of sexual battery", did not include the element of consent. Defendant further alleges that the failure of trial counsel to raise or preserve the issue constitutes ineffective assistance. Although issues concerning jury instructions are procedurally barred if not raised on direct appeal, the Court must address the Defendant's ineffectiveness of counsel claim. The incomplete jury instruction in the Defendant's sentencing proceeding was related to the collateral offense of sexual battery as the same was included in the "in the course of a sexual battery" aggravator. The absence of the element of lack of consent in the jury instruction for this aggravator did not create a reasonable probability that the jury's recommendation would have been different. It is difficult to conceive that the jury considered a murder committed during a consensual sexual encounter as an aggravating circumstance, and certainly the reference in the given instruction to the "crime of sexual battery" strongly presumes a lack of consent on the part of the victim. The Court therefore finds that the Defendant has failed to meet the requirements of the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984)

and this claim is summarily denied.

(R4, 471).

This Court has previously ruled (twice) that there was sufficient evidence that the murder was committed during an attempted sexual battery. Rhodes v. State, 638 So. 2d 920, 926-927 (Fla. 1994):

> We also find that there was sufficient evidence that the murder was committed during an attempted sexual battery to justify the giving of the jury instruction and to support the trial court's finding of this aggravating factor. The victim's body was found clad in only a brassiere, which was up around the victim's neck. Most of the various stories told by Rhodes suggested some form of sexual activity had taken place during his encounter with the victim. Specifically, Rhodes told several witnesses that the victim resisted his sexual advances. On the same basic evidence, this aggravating factor was upheld in Rhodes' original appeal. 547 So. 2d at 1207-08.

This Court has also ruled that the elements of an underlying felony do not have to be explained with the same particularity required if that felony were the primary offense charged. Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990), vacated on other grounds, 505 U.S. 1215 (1992).

This claim is meritless.

Ineffective Assistance of Guilt Phase Counsel:

The lower court addressed and disposed of Appellant's contention that guilt phase counsel rendered ineffective assistance in Claim VI of its order below:

a.) Defendant claims that his counsel was ineffective

regarding jury selection when the State, during selection of alternate jurors, moved to backstrike a member of the panel already accepted but unsworn. This resulted in an objection and motion for mistrial from Defendant's counsel, which was properly denied. The issue was preserved and was addressed on the initial direct appeal. The Defendant has been unable to demonstrate any prejudice resulting from this event. Defendant's motion contains some speculation regarding possible alternate scenarios in the selection process, but the motion fails to demonstrate that a juror that was unacceptable to the Defendant served on the jury. This portion of the claim has no merit, does not require an evidentiary hearing and is summarily denied.

b.) Defendant claims that his counsel was ineffective for failing to investigate and later failing to impeach witness Margaret Tucker regarding the date on which the Defendant arrived late for work. Although the work records of the Defendant which were presented at the first sentencing hearing reflected that he was late on February 24, 1984, there is no showing that Mrs. Tucker could be impeached regarding that issue. Her testimony was that she believed that the Defendant was late for work on a Friday in late February. (Exhibit "A"). Defendant has failed to allege any facts that would demonstrate a deficient performance on the part of his trial counsel regarding this issue and it too should be summarily denied.

c.) Defendant claims that counsel was ineffective in failing to object to testimony at trial regarding the voluntary nature of Defendant's statements. There is reference to an apparent discrepancy in the testimony of Detective Porter regarding this issue between the statement given at trial and the one that was given during the pretrial motion to suppress. The State, in its response, has satisfied the Court that there is in fact no discrepancy in testimony but an error in the transcript of the testimony at the motion to suppress. (Exhibit "B"). In addition, the Defendant has failed to demonstrate the existence

of any good faith objection to the voluntary nature of his statements or that he suffered any prejudice as a result of counsel's failure to object to their introduction. This portion of the claim has no merit and should be summarily denied.

d.) Defendant claims that his counsel was ineffective regarding a failure to request a curative instruction regarding some testimony relating to irrelevant collateral crimes. In fact, trial counsel objected to the testimony and moved for a mistrial, which was denied. (Exhibit "C") The issue was preserved and raised for review in the direct appeal. State v. Rhodes, 547 So.2d 1201, 1203 n2. (Fla.1989). The Defendant has failed to demonstrate that counsel's performance in this regard was deficient and further has failed to demonstrate any resulting prejudice. In fact, the trial judge's suggestion that a curative instruction would only call further attention to the improper testimony was correct. This claim has no merit and should be summarily denied.

e.) Defendant claims that his trial counsel was ineffective for failing to object to testimony from Dr. William Ross Maples, a forensic anthropologist who was called by the State to testify regarding the cause of death of the victim. The apparent basis of objection to the testimony is relevance. However it appears that the testimony was very relevant to the State's burden of proof regarding corpus delecti. (Exhibit "D"). That being the case, it is apparent that the Defendant is unable to demonstrate any prejudice from the absence of an improper objection. The claim has no merit and should be summarily denied.

The matters contained in this claim do not individually or cumulatively demonstrate a deficient performance on the part of Defendant's trial counsel and the claim should be summarily denied.

(R4, 472-474).

Other Alleged Errors in Summary Denial:

Finally, Appellant makes a mere string cite of issues

presented below without any supporting argument. This is improper under this Court's jurisprudence. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Shere v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999); State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998); Sweet v. State, 810 So. 2d 854, 870 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122, 1127 n.4 (Fla. 2002); Whitfield v. State, 923 So. 2d 375, 378 (Fla. 2005); Jones v. State, 928 So. 2d 1178, 1182 (Fla. 2006); Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006).

Appellant's effort to "preserve" such claims now are unavailing since Appellant may not now defeat his prior procedural defaults by impermissibly attempting to revive them in an unavailable vehicle.

The lower court correctly summarily denied relief on claim XXX (R4, 484; procedurally barred and meritless); claim XVII (R4, 477; insufficiently pled and meritless); claim XXVIII (R4, 483; barred and meritless); claim XXXI (R4, 484-485; procedurally barred and meritless); claim XXVII (R4, 483; procedurally barred); claim XIII (R4, 476; meritless and it is

also procedurally barred);[14] claim X (R4, 475; procedurally barred); claim XI (R4, 475-476; insufficiently plead and meritless); claim XIV (R4, 476-477; meritless); claim XVI (R4, 477; claim not cognizable collaterally); claim XIX (R4, 478; meritless and claim is procedurally barred as question for direct appeal); claim XX (R4, 478-479; meritless); claim XXIV (R4, 481-482; meritless and not proper subject of collateral challenge); claim XXII (R4, 480; meritless and also procedurally barred as issue for direct appeal); claim XXIX (R4, 483-484; procedurally barred and meritless); claim XXV (R4, 482; procedurally barred and meritless); claim XXXII (R4, 485; procedurally barred and meritless); claim XXXVI (R4, 486; moot, meritless and also procedurally barred).

CONCLUSION

Appellee respectfully requests that this Court affirm the denial of relief by the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Terri L. Backhus, Backhus & Izakowitz, P.A., 13014 North Dale Mabry,

[14] This Court has consistently held that these juror interview claims are procedurally barred for the failure to raise on direct appeal. See Ragsdale v. State, 720 So. 2d 203, 205, n.1 & 2 (Fla. 1998); Gaskin v. State, 737 So. 2d 509, 513, n.5 & 6 (Fla. 1999); Young v. State, 739 So. 2d 553, 555, n.5 (Fla. 1999); Vining v. State, 827 So. 2d 201, 216 (Fla. 2002).

Suite 746, Tampa, Florida 33618, this 29th day of December, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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