IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-31

RICHARD W. RHODES, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

“RS” -- record on the resentencing proceeding;

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

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ARGUMENT IN REPLY

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

The State argues that since FBI Agent Malone's trial testimony did not implicate Mr. Rhodes then any misconduct associated with his testimony cannot be error because it is not material. See, Answer Brief at 35-36. The State concedes that under Archer, the evidence at issue must have been **favorable** to the accused, either because it is exculpatory or **impeaching**. See, Archer v. State, 934 So. 2d 1187, 1202 (Fla. 2006). The State claims that because Malone's false and misleading testimony about his testing and identification of exhibits did not link Mr. Rhodes to the crime, any error must be harmless.

The State also argues that Malone only realized his "mistaken" testimony the day before he was to testify at Mr. Rhodes's evidentiary hearing and that was the first time the prosecution knew Malone's testimony was false. See, Answer Brief at 40. The State questioned whether this information was even favorable to Mr. Rhodes because Malone's testimony was that the hair clutched in the victim's hand was "not suitable for comparison." Thus, not helpful to the defense. See, Answer Brief at 41. It also argued that even if Malone's testimony was false, the prosecution cannot be deemed to have knowledge of the false testimony and that the prosecution's specific choosing of the exhibits to be shown to the jury was simply an inadvertent omission of the evidence that Malone actually tested. See, Answer Brief at 51.

The State's argument is that the State can present false testimony, hide behind its discredited and ostracized FBI agent, hide exculpatory evidence from the defense and "inadvertently omit" evidence from the jury and it is still harmless error.

The State fails to address whether confidence in the outcome of Mr. Rhodes's trial is undermined, nor does it address that it is the jury that was prevented from weighing the credibility of Malone and the exculpatory evidence he possessed. See, Kyles v. Whitley, 115 S. Ct. 1555 (1995) and Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001).

In Hoffman v. State, 800 So. 2d 174, 179-180 (Fla. 2001), the victim clutched a hair foreign to the victim and to Mr. Hoffman. That was the basis on which relief was granted. The State makes no effort here to justify why the result in Mr. Rhodes's case should be any different.

The lower court in its written order denied relief finding that Malone's testimony was false, but no prejudice ensued. However, the same court in a prior order found:

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

> potential for casting doubt upon whether the hair in the victim's hands really did belong to her. This is particularly significant since the Defendant, in an interview with law enforcement, suggested that the murder was committed by an acquaintance known to him as "Crazy Angel." (PC-R. 469-629).

The court made these findings **before** it was revealed that Malone gave false testimony and before it was revealed that he did not test Q-13--a blond hair that was clutched in the victim's hand which could not have come from the victim or Mr. Rhodes.

Despite these facts, the State repeats that Malone's testimony and the state's participation in the deception was an "inadvertent mistake." At some point, however, the State must be held accountable for its actions.

On April 15, 1997, the Department of Justice Inspector General's Report on Laboratory Practices and Alleged Misconduct at FBI Crime Laboratory (hereinafter referred to as the OIG report) shared that view when it opened an investigation into FBI Malone and his reputation for exaggerating and embellishing on the witness stand. If Malone's conduct was so innocuous there would have been no need for the OIG to review all of his cases. Admitting mistakes does not make the magnitude of the false testimony any less onerous. This is a death penalty case not a misdemeanor shoplifting case. Mr. Rhodes will suffer the ultimate punishment. Death is different. See, Callins v. Collins, 510 U.S. 1141 (1994). In Mr. Rhodes's 1984 trial, he

was sentenced to death by a vote of 7 to 5. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). The prejudice of this false and "inadvertently omitted" testimony cannot be dismissed.

False Testimony

No where in Brady, Giglio or Archer[1], cited by the State, does any court hold that the evidence must implicate the defendant in order for harmful error to occur. Malone implicated Mr. Rhodes. The State argued at Mr. Rhodes's guilt phase:

> Mike Malone testified. He's a special agent with the FBI. He analyzed the hair found. All the hair gathered from the victim was, in fact, the victim's head hair or else could not be identified at all based upon limited amount of hair and quantity of hair. He found no foreign hairs. **Again, said that just by not finding any foreign hairs did not mean the defendant was or was not present at the scene.** And you can recall the photograph of the scene and just imagine how difficult it was to get any evidence at all at that particular location.
>
> He said that he also found the victim's [sic] head hair in both the left hand and the right hand of the victim, indicating this is not uncommon in homicides and indicated that it's usual in **a person who is in the midst of death's throes where they would grab their own hair**. (R. 2404)[emphasis added].

Malone created the impression that Mr. Rhodes was there, he just did not leave any hair evidence behind to prove it. The State

[1]Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972), Archer v. State, 934 So. 2d 1187 (Fla. 2006).

argued that at closing.

Only now, when the State's conviction is in jeopardy, does the State downplay the importance of Malone's testimony and his backdoor slur against Mr. Rhodes. It was clear at trial that the State considered Malone's testimony important and brought him from Washington D.C. to testify twice in the case. The prosecution presented Malone's qualifications as an expert in forensic hair analysis twice in guilt and penalty phase. Even though the prosecution knew Malone's testimony did not directly identify Mr. Rhodes, they presented his backdoor exaggerations anyway. Mr. Rhodes's attorney, Judge Henry Andringa, objected to Malone testifying outside his area of expertise, and his objection was overruled (R. 1874-75). This Court considered this claim on direct appeal to be meritless. Rhodes v. State, 547 So. 2d at 1203. Now that it is known that Malone's testimony was false, the claim takes on a new light.

Even if identification of Mr. Rhodes as the perpetrator of the crime was not the purpose of Malone's testimony, he was presented to the jury to show the thoroughness and professional expertise with which the Pinellas County Sheriff's Office and FBI had investigated the case. The prosecutor argued, "...you can recall the photograph of the scene and just imagine how difficult it was to get any evidence at all at that particular location" (R. 2404). Malone was the State's expert witness.

What the jury did not know was that Malone had exculpatory information that was withheld from Mr. Rhodes and information

that impeached Malone's testimony.[2] The jury did not know that clutched in the victim's hand was a blond hair that could not have originated from Mr. Rhodes or the victim. This withheld information in the hands of an experienced criminal defense attorney such as Judge Andringa could have made the difference in the outcome of the trial just as the lower court acknowledged in its written order granting an evidentiary hearing (PC-R. 469-629). The evidentiary hearing was ordered based on the 1997 OIG Report alone. The court did not know at that time that Malone had actually given false testimony in Mr. Rhodes's case.

Exculpatory evidence is material when it tends to show that the defendant was not the actual perpetrator of the crime. Cf. Hoffman v. State. Even the trial court admitted that such could have been argued to the jury (PC-R. 469-629). Mr. Rhodes was denied that opportunity.

This information (the victim clutched the hair of another person in her hand) directly contradicted Malone's testimony that he could not rule out that Mr. Rhodes was involved in the case (R. 2404). In fact, had Malone tested the hair, he would have known that Mr. Rhodes was not involved in the crime.

Contrary to the State's argument and the lower court's

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[2]The State argued that the blond hair clutched in victim's hand is not exculpatory because Malone testified that the hair was "not suitable for comparison." But, Mr. Rhodes did establish that Malone could not have known whether the hair was suitable for comparison or not. The blond hair was not mounted on a glass slide, and could not have been examined under a comparison microscope as Malone testified was necessary to analyze a hair. Thus, Malone's conclusion is false.

order, Mr. Rhodes proved that confidence in the outcome of the trial is undermined. He proved that Malone lied about the testing he conducted. He proved that Malone identified exhibits as those he tested when he had never even looked at the evidence. He had to know the exhibits he was identifying were not the ones he tested because they were not mounted on glass slides. The State contends that the State inadvertently failed to admit the glass slides at trial, but Malone knew by looking at the exhibits that he had never tested them. He told the jury he analyzed each and every hair that had been submitted to the lab while pointing at those same exhibits. That was a lie and the prosecution knew it because it had the glass slides that had been tested. It could not have been an advertent omission because the attorneys consciously chose the exhibits. The lack of a confession from the state attorney to his tactics does not preclude a finding that the state had knowledge. Circumstantial evidence and their own exhibits prove it. They prepared the witness to testify and decided which exhibits to introduce through him.

Mr. Rhodes proved that Malone did not test the blond hair from the victim's clutched hand that could not have originated from Mr. Rhodes or the victim. Mr. Rhodes proved that Malone's testimony that the hair was insufficient for testing was simply a lie. Malone could not have known whether the hair was sufficient for testing unless he had mounted the hair on a glass slide to view under a comparison microscope. The blond hair is ensconced in a plastic petri dish container, it is not mounted

on a glass slide. Mr. Rhodes proved Malone's conclusion with regard to the blond hair was false. The lower court's finding that Mr. Rhodes did not prove Malone's conclusions were false was error.

In addition, the lower court's legal analysis was flawed. Mr. Rhodes did not have to prove that the outcome of the trial would have been different. He only had to prove that confidence in the outcome has been undermined. See, Kyles v. Whitley,115 S. Ct. 1555 (1995). The lower court believed that Mr. Rhodes had to prove that the outcome of the trial had to be different, and that he must prove that Malone's conclusions were false. The lower court ignored the proper analysis of Kyles and forgot that Malone's own testimony proved his conclusions were false. Even if he made no admissions, scientific conclusions in a death penalty case cannot be reliable when the FBI analyst in charge of the case did not examine the evidence. Mr. Rhodes does not have to prove that the science behind the conclusions was false, though in this case it was. Mr. Rhodes must show that Malone's testimony about those conclusions was false, misleading and went uncorrected by the prosecution. In a Brady/Giglio violation, there is no distinction between whether the false evidence goes to impeachment or testimony at trial.

Prosecution knew Malone's Testimony was False

The State chose which exhibits to enter into evidence at trial. As is clear from the exhibits reviewed by the lower court and identified by Malone, none of the exhibits entered into evidence through Malone's testimony were ones that he had

examined. None of the exhibits were mounted on glass slides which Malone testified they must be in order to be analyzed. He testified that none of the hairs were taken out of the glass slides once they were mounted.

Malone had never seen the contents of the bags and petri dishes which he told Mr. Rhodes's jury he had analyzed. The State specifically chose hair exhibits with the most hair and debris to give the jury the impression that Malone had examined "each and every" single strand of hair that was submitted to him. The State suggests this was an inadvertent error by the prosecutors, but that is belied by the record.

The State knew which exhibits had been tested and which ones had not. They possessed both the exhibits that were not mounted on glass slides and the glass slides themselves. The State now asks this Court to believe that the prosecutors who prepared Malone to testify did not know that the glass slide exhibits were the only ones that had been examined by their expert witness. This was the same expert witness they called to testify at guilt phase to prove Mr. Rhodes was guilty of first-degree murder and the same expert they called at penalty phase to support the aggravating circumstances in the 1984 trial.

The State erroneously relies on Hannon v. State, 941 So.2d 1109, 1145-46 (Fla. 2006). The Hannon court summarily denied his claim that Malone gave false testimony without holding an evidentiary hearing. The court stated that because Malone did not testify that Hannon was wearing a blue jean fabric similar to a pattern found by Malone from crime scene evidence that

Hannon could not prove Malone's testimony unreliable. The Hannon court did not find that Malone's testimony was false. Nor did it find that there was exculpatory evidence withheld as a result of Malone's misconduct.

Though the State withheld the OIG report, the court found no prejudice and that Hannon could not prove Malone's testimony to be unreliable or false. It found no evidence Malone had exaggerated or conducted incomplete tests in Hannon's case or that defense counsel could have used the report to impeach Malone at trial. Likewise, no evidence existed that showed that the State consciously selected exhibits to display to the jury that had not been tested by Malone.

The State would have this Court believe that the circumstances in Mr. Rhodes's case are the same when Malone himself confessed his testimony was misleading and the lower court found Malone's testimony to have been false. Mr. Rhodes proved Malone exaggerated, conducted incomplete tests, and lied when he said he tested "each and every" strand of hair given to him by the police.

The proof is in the exhibits themselves. The State's exhibits admitted into evidence at trial reveal large masses of hair fibers collected from the crime scene. None of the State's exhibits are mounted on glass slides. By Malone's own testimony, there was no other way to examine the hairs other than to mount them on glass slides and view them through a microscope. At trial, Malone identified the exhibits (bags and plastic dishes of hair and fiber) and said he tested each and

every strand of hair in them. He testified that the blond hair in exhibit Q13 was "not suitable for comparison." Malone either negligently failed to examine it, or he saw that the blond hair was not the same color as the victim or Mr. Rhodes and decided not to examine it.

Malone was investigated by the Department of Justice for this same behavior in other cases, and his "mistakes" here fit perfectly with his reputation for conducting incomplete tests and exaggerating testimony to fit the government's case. See, Hannon v. State, 941 So.2d at 1145.

Mr. Hannon's case did not have these facts or proof. There was no proof that Malone and the State consciously hid the incompleteness of his testing and suppressed potentially exculpatory evidence from the defense. Contrary to Hannon, an experienced defense counsel could have not only impeached Malone's testimony but used the potentially exculpatory evidence to exonerate Mr. Rhodes.

The State now argues that it did not know Malone's testimony was false until the day before he testified at the evidentiary hearing in 2004. It was only after receiving a defense subpoena, Malone finally confessed to some of his "mistakes." There were at least four other "mistakes" Malone still has not acknowledged though they are plainly obvious in the documentary evidence admitted at the hearing.

The question should be whether the State would present Malone's testimony today now that the defense knows about these "mistakes." Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994).

Probably not.

The evidence was material

In **its order granting an evidentiary hearing on this issue, the lower court said that "[b]y testifying that the hair found in the victim's hands belonged to her, [Agent Malone] not only excluded the Defendant as the source of the hair but necessarily excluded any other unknown third party." The court acknowledged there was the "potential for casting doubt" upon whether the hair in the victim's hands really belonged to her (PC-R. 469-629).**

In its findings at the evidentiary hearing, the lower court did not recite these facts but instead claimed that the outcome of the trial would not have been different. These two findings, the first made **before** the lower court and Mr. Rhodes knew Malone's testimony was false, and the second made **after** the court knew Malone's testimony was false are internally inconsistent and contrary to the facts adduced at the evidentiary hearing.

Had trial counsel, Judge Andringa, known the facts that were revealed to Mr. Rhodes at the evidentiary hearing, he could have impeached Malone with his own testimony. He could have asked for the exculpatory evidence and made a decision on how best to use it. He could have had it analyzed in 1984 when the evidence was fresh and witnesses were available. Even without this knowledge or the FBI report, Andringa asked the trial court to direct the State to preserve the physical evidence in the case. Yet, even now the DNA evidence has not been fully

disclosed to the defense and still not been presented in any court.

Mr. Rhodes does not have to prove who the third party was who committed the crime, he must only create a reasonable doubt as to whether he committed it. The existence of the blond hair, that the lower court acknowledged could prove the existence of a third party that is not Mr. Rhodes, is reasonable doubt and was withheld from the defense. This was material.

After the evidentiary hearing ended, and the DNA statute was passed, Mr. Rhodes asked for DNA testing of all of the hair evidence and other biological material. The results of that testing have never been presented in court. Contrary to the State's brief, counsel did not waive the issue. The quote cited by the State was made at the time that DNA testing was initially ordered. At the time DNA testing was ordered, there was no reason to hold a hearing because Mr. Rhodes did not have any results or good faith issues to raise. The testing had not been done. If Mr. Rhodes had waived the issue, he would not have asked to depose the FDLE crime lab analyst after the testing was completed. Mr. Rhodes was denied an opportunity to develop the evidence that the lower court said he did not prove. This was hardly a level playing field. Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994)("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.")

The prosecution held all of the cards. Only the State has access to the FDLE crime lab analyst. Only the State has access

to the supporting documentation, equipment and DNA expertise. Without a deposition of the State's expert, Mr. Rhodes is prevented from learning about the testing and is foreclosed from making a decision as to what steps to take next.

Despite rehearing, the lower court denied all of Mr. Rhodes's requests and forced Mr. Rhodes to go forward with this appeal without a resolution of all the issues. To now say that Mr. Rhodes had every opportunity to present this evidence but did not is disingenuous and wrong. The DNA testing and results are not before the Court and have never been presented below.

Mr. Rhodes has shown prejudice

Mr. Rhodes proved that material Brady and Giglio violations occurred and was prejudiced by them. Had the lower court correctly analyzed the claim consistent with its prior order and the facts proved at the evidentiary hearing, Mr. Rhodes would have been granted relief. There is no quantitative or qualitative difference between the facts in Mr. Hoffman's case and this one.

To establish prejudice under Giglio, Mr. Rhodes must prove there is any "reasonable likelihood" that the false testimony could have affected the judgment of the jury. United States v. Agurs, 427 U.S. 97 (1976) cited by Hannon v. State, 941 So. 2d 1109 (Fla. 2006). At the time of trial, Mr. Rhodes's jury was ambivalent at best. The vote for death was by the narrowest margin of 7 to 5. The victim's body was found weeks after the murder in a pile of rubble from a demolished building. The body was so badly decomposed that medical examiner Joan Woods could

not find a cause of death. She relied on Professor Maples, who boiled the bones to learn that death was caused by a broken hyoid bone before death. The problem with Maples's cause of death was that many of the victim's bones were broken and missing. Tissue was missing. It was not inconceivable that the cause of death could have been a gunshot wound or a stabbing in tissue that was missing. The State decided on strangulation as a cause of death because it had nothing else except a broken hyoid.

The State presented evidence that Mr. Rhodes had possession of the victim's car and told many stories while in custody as proof of his guilt. But these stories were also consistent with someone else committing the crime. Mr. Rhodes said he had the victim's permission to drive the car. No one ever revealed to the defense that one of the hairs clutched in the victim's hands was blond hair which would have supported his defense that he did not kill the victim. The State argues that Mr. Rhodes did not prove that the blond hair was exculpatory, but he did. He need only prove that the hair was favorable and consistent with his defense. The hair color alone was favorable to the defense.

Booking photos of Mr. Rhodes and the victim proved their hair color. Records from Mr. Rhodes's youth until adulthood showed that Mr. Rhodes's hair was never blond. The victim's hair was brown in all records admitted at trial, including the autopsy. Even though the victim was found in the debris of a demolished building, she clutched blond hair in her hand. Mr. Rhodes established that the blond hair could have been used as

impeachment and as evidence that someone else committed the crime. Malone, on the other hand, testified that it was the victim's own hair, and that he had tested each and every strand of evidence sent to him. His testimony was used to show how thorough the State had been in its investigation and to show that just because Mr. Rhodes's hair was not present, it did not mean he was not there. The prejudice here is profound.

The State's insistence that it did not know and that Malone was honestly "mistaken" when he falsely testified is contrary to the State's own exhibits. These are not the facts of Hannon. This is prosecutorial incompetence and insidious subterfuge. It was not the level playing field of a fair trial under the Sixth and Fourteenth Amendments. There is a "reasonable likelihood" that the outcome in this case would have been different had Mr. Rhodes had access to this information to impeach Malone and to present exculpatory evidence that supported his defense.

The prosecution had actual knowledge that Malone's testimony was false. It knew:

1. Malone had not tested each and every strand of evidence submitted to him by the Sheriff's Office because it had a bag of approximately sixty-three (63) glass slides with FBI stickers on them, and it had the exhibits introduced at trial that were bags and plastic containers of hundreds of loose hair and debris (the large bags established thoroughness of investigation);

2. Malone could not identify Mr. Rhodes as being at the scene (established thoroughness of investigation);

3. Malone would testify that just because he had no evidence that Mr. Rhodes was at the crime scene, it did not mean he was not there (established

thoroughness of investigation, supported guilt and aggravators at penalty phase);

4. Malone would testify that the hair in the victim's hands was her own, pulled from her head in the "throes of death." (supported aggravators).

Malone testified many times for the prosecution. His reputation was for testifying consistently with whatever the State's case happened to be. That is why he was investigated by the Department of Justice. The State argues that Malone was never disciplined for his behavior, but that is a failing of the FBI, not the Department of Justice who issued the report and recommended discipline. Malone was transferred to a different section and allowed to retire. The fact that Malone was allowed to escape from his misconduct does not alter the facts.

Malone gave false testimony where his "expertise" and evidence was used to deprive Mr. Rhodes of his life. The State's argument is an attempt to evade its responsibility for presenting false testimony and depriving the defense of exculpatory evidence. Mr. Rhodes is entitled to a new trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING

Mr. Rhodes has been in and out of mental hospitals and prisons since he was an infant. The U.S. Supreme Court has repeatedly emphasized that counsel in death penalty cases must investigate first and then develop strategy that is informed by actual knowledge. See, Blanco v. Singletary, 943 F. 2d 1477, 1503 (11th Cir. 1991).

The State argues that it was Mr. Rhodes's responsibility to investigate and prepare his own defense as he was the "captain

of the ship." If Mr. Rhodes did not tell trial counsel he wanted witnesses such as Eileen Meis, Kenny Rhodes, Lorraine Armstrong or others to testify at resentencing, then trial counsel's responsibilities were done. See, Answer Brief at 58-78.[3]

The State suggests that this has been this Court's "theme" for years. No matter how mentally ill, illiterate or irrational a defendant may be, he is still responsible for trial counsel's investigation, preparation and execution of his defense. No matter that a defendant is incarcerated, he is still responsible for his own investigation.

All that Mr. Swisher did was to retain Dr. Taylor, give him a packet of medical and prison information given to him by the State, and ask him to contact grandmother Mary Vailes. He spoke with no family members. He spoke with state's doctor, Sydney Merin, but Mr. Swisher's bill does not reflect any such meeting.

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[3]The State cites Hamblen, Boyd and Nixon as authority for the ship captain theme, but the facts do not apply here. In Hamblen v. State, 527 So. 2d. 800, 804 (Fla. 1988), this Court held that "all competent defendants have a right to control their own destinies" in the context of Mr. Hamblen wanting to represent himself. He had that right. In Boyd v. State, 910 So. 2d 167, 190 (Fla. 1988), this Court said Mr. Boyd had the right to only call two witnesses if that is what he chose to present in mitigation. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) dealt with trial counsel waiving guilt in his opening statement without Mr. Nixon's permission. None of these cases involve a defendant who wants mitigation presented but his trial attorney has not conducted adequate investigation despite having the information to do so. The State attempts to put the burden on Mr. Rhodes to conduct the investigation and present his defense, but that is not his obligation.

Mr. Swisher said he reviewed records but in his review he apparently missed the names and address of the family members that were listed on the documents and failed to see that Don Betterly had given a statement that was listed in those documents. Defense counsel's performance was so deficient that Mr. Rhodes brought it to the court's attention.

Mr. Swisher's testimony was incredible, inconsistent and contrary to the documents in his possession. His billing reflects his lack of preparation. The fact that Judge Baird had to recruit the State at the beginning of resentencing to find two mitigation witnesses Mr. Rhodes was forced to choose is proof that counsel was not ready for trial. Instead of asking for a continuance, Mr. Swisher sat by as Judge Baird told Mr. Rhodes to pick two witnesses he wanted called.

Mr. Rhodes was not responsible for conducting the mitigation investigation in his first trial, nor should he have at resentencing. Judge Andringa had no problems contacting mitigation witnesses and getting information. Mr. Rhodes did complain about Mr. Andringa's preparation. At resentencing, Mr. Swisher testified that Mr. Rhodes was cooperative until they got to trial. The record shows that Mr. Swisher had the same information at his disposal as Mr. Andringa did. Mr. Rhodes gave Mr. Swisher lists of family members. Mr. Swisher had access to Mr. Rhodes's wife and medical records given to him by the State. The State argues that Mr. Rhodes only told his trial counsel about two witnesses. That is simply not true.

Mr. Swisher remembered only two, and changed his testimony

when it became clear to him that he had access to boxes of information about potential mitigation witnesses. The State concedes Mr. Swisher had access to not only to previous counsel's files from the first trial, but the medical and institutional records given to him by the State that contained Mr. Rhodes complete social history. See, Answer Brief at 63. These records included the names, addresses and phone numbers of Mr. Rhodes's family members, Mr. Betterly, his doctors at Napa State Hospital as a child, and his doctors at various prisons. The record itself reflects that Mr. Rhodes gave Mr. Swisher a list of witnesses to be called.

When Judge Baird held an *in camera* hearing to hear Mr. Rhodes's complaints that his trial attorney was not preparing and investigating his case, the judge gave him the option of calling two witnesses only.

The State misunderstands Mr. Rhodes's argument that Mr. Swisher only filed a total of four motions during resentencing. See, Answer Brief at 63. Mr. Swisher failed to perform the basic functions of a defense attorney. Trial counsel filed a total of four (4) motions at resentencing. They were an entry of appearance, July 25, 1991; a motion for continuance, July 25, 1991; a motion for appointment of confidential expert, August 26, 1991; and a motion in limine, February 12, 1992. (PC-R. Supp. 2, pg. 15,16,18). Swisher did not file any motions challenging the statutory aggravators or the constitutionality of the death penalty and failed to preserve these issues for future appeals. He did not ask for additional jury

instructions. He did not hire an investigator. He relied exclusively on Mr. Rhodes to provide witnesses for resentencing (PC-R. 13-14).

The purpose of filing motions to challenge statutes is to preserve issues for appeal and to try to bring about a change in the law. Future rulings are dependent on this preservation of error. Here, Mr. Swisher preserved nothing.

Mr. Rhodes proved deficient performance

No adversarial testing occurred at resentencing. See, Strickland v. Washington, 466 U.S. 668, 687 (1984); Wiggins v. State, 539 U.S. 510, 521 (2003). The State oversimplifies the issues and misstates the facts to create a fiction of competency for Mr. Swisher when none existed.

Mr. Swisher contacted one witness for resentencing -- Dr. Donald Taylor and intended to introduce mental health mitigation through him exclusively. Mr. Swisher may have known about grandmother Mary Vailes and Mr. Rhodes's two step-brothers in the Marines, but made no effort to contact them. He asked Dr. Taylor to call Mary Vailes, but Mr. Swisher never spoke with her.

Because he had never spoken to Mrs. Vailes, neither Swisher nor Dr. Taylor knew that Mrs. Vailes had the **least** amount of contact with Mr. Rhodes than any other relative. Catherine Brossard, Mr. Rhodes's aunt, lived with Mrs. Vailes and knew much more about Mr. Rhodes's upbringing, but Swisher never spoke to her. Dr. Taylor relied on Swisher to tell him what to review and who to contact, but Swisher did not know who to contact

because he had spoken with no one.

The State argues that counsel cannot be deemed deficient if the "client does not provide information to counsel about his background or is otherwise uncooperative" See, Answer Brief at 65. It then cites many citations that do not apply to the facts of this case. Mr. Rhodes was not an obstacle nor the reason for Mr. Swisher's deficiencies. It is unclear what more Mr. Rhodes could have done. He gave Swisher a list of witnesses. Swisher had the phone numbers of the stepbrothers in the Marines. He never spoke with them.

The evidence that refutes the State's argument is in its own materials given to Mr. Swisher by the State at trial. Even if Mr. Rhodes had completely refused to assist in his own defense, trial counsel still had information in his office that he never read. The names and addresses of family members were listed in a two-page report on family background in the Oregon State Prison records. In another report, Mr. Betterley's unlisted phone number was listed (PC-R. Supp. 2, Def. Ex. 10, pg. 23). The information from Mr. Betterly that Mr. Swisher was so adamant to avoid was in medical records he admitted into evidence. Mr. Swisher had told Mr. Rhodes that if he did not call Mr. Betterly then the bad information (Betterly calling Mr. Rhodes a liar and manipulator) would not come in at resentencing. But the information, already in the State's possession, came out anyway. Mr. Rhodes became justifiably upset because he had no advocate.

Defense counsel had a fundamental duty to investigate,

before the resentencing. The "principal concern...is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself responsible." Wiggins v. Smith, 539 U.S. 510 at 522-23. In Wiggins, counsel's decision not to pursue mitigation was made prematurely when counsel "decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins 'direct responsibility for the murder," even though extensive mitigation was available to present to the jury. Id. at 517. The Court found that counsel abandoned their investigation of petitioner's background after having acquired only a rudimentary knowledge of his history from a narrow set of sources. Id. at 524. Here, Mr. Swisher did not even have a rudimentary knowledge of Mr. Rhodes's background though he had the materials in front of him.

Mr. Swisher was charged with the duty of finding all reasonably available mitigation. Id. at 524. Yet, he did nothing but claim he was "set up." It was never clear what that meant, but the only way a "set-up" could occur was if Mr. Rhodes had some special information only he knew and that Mr. Swisher could not learn from any other source. The "late" information Mr. Swisher referred to was not exclusive to Mr. Rhodes. The documents Mr. Swisher had in his possession listed all of the Rhodes family members, including James Rhodes, treating physicians, nurses and Mr. Betterly's address and phone number. Thus, Mr. Swisher's feeling of being "set up" was due to his own

lack of preparation. Mr. Swisher knew he had not properly prepared for a death penalty resentencing. He had contacted one witness, Dr. Taylor. He had not even read the reports from Napa State Hospital and Oregon State Prison.

Even after Mr. Rhodes complained to the trial judge that Mr. Swisher had not gotten the documents from Catholic Services that he knew existed, Mr. Swisher still did not get the documents. Instead, the judge gave Mr. Rhodes a Hobson's Choice. Choose two mitigation witnesses you want called or go with the minuscule mitigation Mr. Swisher had prepared.

The tragedy of the situation was that Mr. Rhodes's life is uniquely documented almost from birth. As a child, he was in and out of social services agencies in California. Witness Lorraine Armstrong was available to paint the jury a picture of what it was like for Richard to grow up in Napa State Hospital. He was the product of father who was a convicted pedophile and an alcoholic mother who family members believed was retarded. At resentencing, the lower court found that there was no evidence that Richard had been sexually abused as a child. At the evidentiary hearing, Eileen Meis and Kenny Rhodes testified with convincing clarity about the repeated and horrifying abuse and neglect suffered by Richard.

Contrary to the State's argument and the lower court's order, this information was not cumulative to Dr. Taylor's testimony. Dr. Taylor had only documents before him and a brief conversation with grandmother Mary Vailes to rely on. He testified that he asked for more information but Mr. Swisher

never provided it. In fact, Dr. Taylor relied on the person with the least amount of contact with Richard during childhood. Mrs. Vailes did not know what was happening at Napa State Hospital and she did not know whether Richard had been sexually abused.

Because of Mr. Swisher's lack of preparation and the trial court's impatience, Mr. Rhodes was placed in an untenable position. Because he complained about his attorney, the judge made him his own counsel by making him choose two people to testify. Though he had no legal background and was irrational, Mr. Rhodes had to choose two witnesses for mitigation. The court never explained to him what mitigation was and it was unclear if Mr. Swisher ever did. Mr. Rhodes had a previous trial with Judge Andringa. But the two of them had no problems because Andringa acted as his lawyer and advocate. He prepared the case and presented witnesses without complaint by Mr. Rhodes.

Now the State attempts to paint Mr. Rhodes as an uncooperative evil genius who could dupe Mr. Swisher into being ineffective. Had Mr. Swisher done his job of investigating and preparing, he would not run the risk of being ineffective. Mr. Swisher never testified that Mr. Rhodes did not want mitigation presented, in fact, the opposite was true. Mr. Rhodes desperately wanted the jury to get a true picture of his life. He just did not know how to do it and the judge's ultimatum of choosing two mitigation witnesses was not the proper procedure in a death penalty case.

Even when a capital defendant's family members and the defendant have suggested that no mitigating evidence is available, his lawyer is **required** to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. Rompilla v. Beard, 545 U.S. 374 (2005). In Rompilla, the defense failed to review a court file of a prior conviction that they knew was going to be used as an aggravating circumstance at trial. This was deficient performance and prejudicial, despite the fact that the attorneys presented mitigation evidence from five family members who testified that the jury should have mercy, that he was innocent and that his 14-year-old son loved his father and would visit him in prison. Thus, even if an attorney presents some mitigation, as Mr. Swisher did here, an attorney is not immune from deficient performance. If the quantity and quality of the mitigation only scratches the surface the attorney is still ineffective.

Mr. Swisher knew the State was going to present violent prior offenses as aggravating circumstances. Instead of contacting the witnesses who could put the prior offenses in context with his past social history, Swisher blamed Mr. Rhodes for his omission. Swisher admitted he had Mrs. Vailes' phone number and the names of two step-brothers in the Marines, but he never spoke with them. Mr. Rhodes claimed he gave a list of witnesses to Swisher, but Swisher gave contradictory testimony as to whether he received the list. Swisher could not remember

if he had a list of family members from Andringa's trial file, yet Andringa had no problem finding witnesses or gaining Mr. Rhodes's cooperation. No reasonable attorney would have conducted a death penalty case without contacting family members, or doctors listed in the medical records when a defendant had such an extensive mental health history. Wiggins v. Smith, 539 U.S. 510(2003). Mr. Rhodes spent a total of ten years of his life outside a hospital or prison. The jury knew none of this information.

Finally, the State suggest that this Court disregard the testimony of Investigator Dorothy Ballew and the hearsay statements of Mr. Rhodes's deceased Aunt Catherine Broussard. See, Answer Brief at 68. These witnesses were not offered for the truth of Ms. Broussard's statements, but to show that the information was available to Mr. Swisher. Ms. Broussard was alive at the time of Mr. Rhodes's resentencing and available to Mr. Swisher if he had made a few phone calls. Dr. Taylor was given Ms. Broussard's name and number by Ms. Vailes. Ms. Broussard along with Eileen Meis (Meis is misspelled in the record as Mease) were in the closest contact with Richard when he was at Napa State Hospital. Ms. Broussard was friends with Napa State Hospital nurse Lorraine Armstrong and exchanged letters about Richard's welfare. Ms. Ballew testified that she had no difficulty finding the witnesses and only recited Ms. Broussard's hearsay statements because she passed away after interviews with Ms. Ballew. Even if the only evidence Mr. Rhodes had were Ms. Broussard's hearsay statements, they would

have been admissible at the time of resentencing through the testimony of Dr. Taylor or any other mental health expert who should have been called. This information should be considered and weighed in the context in which it was offered at the evidentiary hearing. Had Mr. Swisher procured the testimony of Ms. Broussard, the State could have had its opportunity to "oath-taking and cross-examination." The State argues that Mr. Rhodes's ineffectiveness claim rests on the "dubious proposition" that Mr. Swisher could have found and interviewed Kenny Rhodes. See, Answer Brief at 69. However, there was nothing "dubious" about finding Kenny Rhodes. Collateral counsel was able to find him, just as the State was able to find James Rhodes when Judge Baird asked them to conduct the investigation that Mr. Swisher did not do.

The State demonstrates how little it knows about death penalty mitigation when it states that Mr. Swisher could not use both James and Kenny Rhodes before the jury because their testimony was inconsistent. Mr. Swisher never spoke with Kenny Rhodes, and only spoke with James Rhodes in the midst of the resentencing. Mr. Swisher had no idea whether to use either brother because he never spoke with them prior to the resentencing. As Wiggins held, the investigation is supposed to be done **before** the resentencing begins, not during or after.

Moreover, to describe the testimony of Eileen Meis and Lorraine Armstrong as inconsequential is like saying Hurricane Katrina was a rainshower. Ms. Meis was the only witness who corroborated the sexual abuse that Mr. Swisher attempted to

prove at resentencing. The lower court specifically rejected this mitigator because it heard no evidence that this occurred.

Ms. Meis testified to the horrific conditions Mr. Rhodes suffered as a child, including living in a haystack and on the beach, eating without utensils, repeatedly abandoned, chained to a dog house and being made to eat from a dog dish, chained to the bed at home for wetting the bed and for being raped by his own father. Ms. Meis also suffered the devastation that Mr. Rhodes's pedophile father had wrought on the family. Ms. Meis's testimony was different in its quality and quantum of proof. The jury was never given the opportunity to hear this information. Ms. Meis did not "merely describe" Mr. Rhodes's father. She proved the significant mitigator of sexual abuse that prior counsel could not. She and Lorraine Armstrong put Mr. Rhodes's life in context, something Dr. Taylor could not do because Mr. Swisher had not provided sufficient information. Mr. Rhodes's jury was entitled to make its decision after hearing all of the evidence. Light v. State, 796 So. 2d 610 (Fla. 2nd DCA 2001).

Mr. Rhodes proved prejudice

The State misrepresents the facts and misapplies the law. James Rhodes never testified that Richard "complained as a teenager of sexual abuse." He said he (James) had suffered sexual abuse, not Richard. As a matter of fact, most of James's testimony was about him because he had so little contact with Richard after the children were separated by social services. Thus, the value of James's testimony was minimal. Though

Richard asked that James be brought to testify, he did not know what mitigation was or how James's testimony could help. Mr. Swisher knew nothing about James until he spoke with him during the resentencing. His preparation consisted of talking to him the night before he testified.

The jury was left with a hodge-podge defense put together by an ill-prepared defense attorney and one additional witness that the judge pulled in to pacify for Mr. Rhodes. There was no defense strategy. Dr. Taylor was thrown on the stand without preparation or sufficient background information to even form an opinion. This is not the level of attorney performance anticipated by the Sixth Amendment, ABA Standards and the long line of Strickland cases from 1984 to the 1992 resentencing.

Dr. Faye Sultan testified to the significant mental health issues suffered by Mr. Rhodes. Her thorough preparation and testimony was the complete opposite of Dr. Taylor's off-the-cuff synopsis of Mr. Rhodes's mental condition. Though Dr. Taylor's ultimate diagnosis did not change, the supporting background evidence certainly did.

At resentencing, Dr. Taylor was severely impeached with his lack of independent corroborative evidence and for finding the statutory mitigator of duress when there was no evidence to support it. Dr. Sultan's testimony was based on independent corroborative evidence. She interviewed numerous witnesses and read the plethora of background documents from hospitals, social services and prisons. She found that Mr. Betterly likely abused Mr. Rhodes just as Mr. Rhodes had said at the time of

resentencing when he urged Mr. Swisher to speak to Betterly.

Had the jury seen and heard this testimony as opposed to the flimsy and superficial testimony of Dr. Taylor that was destroyed by cross examination, the resentencing outcome would have been different. The prejudice to Mr. Rhodes by his defense attorney's total lack of advocacy, preparation and investigation is a textbook example of what not to do in a death penalty case.

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

The State argues that collateral counsel waived an evidentiary hearing on this claim.[4] See, Answer Brief at 80. The statement made by counsel on May 29, 2002, that she did not anticipate an evidentiary hearing unless there were anomalies in the testing, was true at that time. The DNA testing was not completed until eight months later. Counsel did not have a good faith basis on May 29, 2002 to seek an evidentiary hearing because there were no issues to challenge.

Counsel did not receive any reports from FDLE's crime lab until January 27, 2003, when she requested the full file and not just the report. Counsel did not receive the file associated with the report until March 11, 2003.

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

The report is highly technical law enforcement and laboratory jargon that requires consultation with experts before counsel can evaluate whether she has a question about what FDLE did. It took counsel 90 days to consult with an expert to interpret what the report said and learn whether there was a problem with the testing. At that time, counsel filed a motion to depose FDLE's crime lab analyst because that is the avenue to learn what happened during testing.

Mr. Rhodes filed a motion to depose the State's DNA expert on July 7, 2003 (PC-R. 1008), but the request was denied. As a result, none of the DNA results or procedures have been challenged in court or placed in the record.

As of this date, Mr. Rhodes has been unable to challenge the State's results, and the State has control and unlimited access to the results, the samples and the FDLE expert. Mr. Rhodes does not. This is a denial of due process.

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

Now, the State suggests that a judge *sua sponte* entering a DNA report into the record is proper because no results were obtained from the testing. The Florida Rules of Evidence, however, does not reflect such a rule of procedure. The rules

do not suggest that entering a report into a court's order makes evidence properly admitted, or that the State's interpretation of a report's results accurately reflects what an analyst concluded. The proper procedure for admitting evidence is not to simply take the State and FDLE's word. The State and the judge cannot simply admit evidence while Mr. Rhodes watches from the sidelines. That is not due process. See, Fla. R. Crim. P. 3.853; Fla. R. Crim. P. 3.851. Mr. Rhodes did not waive this claim.

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

The arguments in Mr. Rhodes's Initial Brief are sufficient to rebut the State's arguments. Mr. Rhodes relies on his Initial Brief for to refute the State's arguments.

CONCLUSION

Mr. Rhodes did not get a full and fair hearing, and he is entitled to a new trial or resentencing. Mr. Rhodes requests that his conviction and sentence of death be vacated.

CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to Mr. Robert Landry, Asst. Attorney General, Concourse Center #4, 3507 Frontage Rd., #200, Tampa, FL 33607, this 3rd day of May, 2007.

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