IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1847

RICKEY BERNARD ROBERTS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Roberts' second motion for post-conviction relief. The circuit court denied Mr. Roberts' claims following an evidentiary hearing. While this appeal was pending, this Court granted Mr. Roberts' request for a remand to get the facts. In those proceedings in circuit court, new information surfaced that required the filing of a third motion for post-conviction relief. This Court granted a relinquishment of jurisdiction to permit consideration of that motion. The circuit court conducted an evidentiary hearing on the third motion. After permitting written closing arguments, the circuit court granted post-conviction relief and ordered a resentencing by a newly impaneled jury. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"PC-R1. ___" - Record on appeal to this Court from denial of the first Motion to Vacate Judgment and Sentence;

"PC-R2. ___" - Record on appeal to this Court from 1996 summary denial of the second Motion to Vacate Judgment and Sentence;

"PC-R3. ___" - Record on appeal to this Court from denial of the second Motion to Vacate Judgment and Sentence following remand by this Court for evidentiary hearing;

"SPC-R3. ___" - Supplemental record on appeal following relinquishment of jurisdiction to consider third Motion to Vacate Judgment and Sentence;

"PC-R4. ___" - Record on appeal in the current appeal following the evidentiary hearing conducted during 2004.

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

REQUEST FOR ORAL ARGUMENT

This is an appeal from the denial of post-conviction relief in a capital case following an evidentiary hearing. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Roberts, through counsel, respectfully urges the Court to permit oral argument.

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INTRODUCTION

Rickey Bernard Roberts was convicted of first-degree murder on the basis of the testimony of Michelle Rimondi, who claimed she witnessed the murder, and the testimony of Rhonda Haines, who claimed Mr. Roberts confessed the murder to her (Rimondi testimony R. 2120-2361; Haines testimony R. 2368-2467). Mr. Roberts testified in his behalf and refuted the testimony of both Ms. Rimondi and Ms. Haines (Roberts testimony R. 2744-2872).[1] In closing argument, the trial prosecutor acknowledged that the case came down to whom to believe (R. 2945) ("Ultimately, you have to decide who is lying and what they have to gain or to lose by coming in this courtroom and lying."). After hearing the testimony of Michelle Rimondi, Rhonda Haines, and Rickey Roberts, the jury deliberated twenty-three hours over three days before convicting Mr. Roberts.

Ms. Rimondi was a sixteen-year-old runaway who supported herself through prostitution (R. 2121).[2] Ms. Rimondi testified

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[1] It was the defense's theory that one or both of Ms. Rimondi's male friends who had violent tempers, Manny Cebey or Joe Ward, killed Mr. Napoles, perhaps out of jealousy, and then had Ms. Rimondi pin the blame on Mr. Roberts, a passerby who fell into their trap when he stopped for a hitchhiking Ms. Rimondi (R. 1557).

[2] In his 1989 motion to vacate, Mr. Roberts presented a Brady claim premised upon undisclosed impeachment of Ms. Rimondi. Shortly before Mr. Roberts' trial, Ms. Rimondi had been charged with grand theft in Dade County (R. 664). However, she received

that in the early morning hours of June 4, 1984, she was with George Napoles in a parked car when Mr. Roberts came up to the car and killed Mr. Napoles with a baseball bat and raped her.[3]

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pretrial intervention. The defense was precluded from impeaching Ms. Rimondi with the pending charge (R. 665). However, what neither the judge nor the defense knew was that the State had previously placed conditions upon Ms. Rimondi. In an August 28, 1984, letter to Rimondi's father, the prosecutor stated, "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitments. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action." (PC-R. 277). The State held this threat to take further action over Ms. Rimondi's head. This went undisclosed to the defense and to the jury (PC-R2. 47).

The State also failed to disclose that Ms. Rimondi was frequently calling Mr. Roberts' prosecutor and demanding money. Notes contained in the State Attorney's Roberts file which were disclosed to Mr. Roberts during postconviction proceedings provide exculpatory information that was not disclosed to trial counsel. Several of these exhibits reflect Michelle Rimondi's desire for money from Mr. Roberts' prosecutor, Sam Rabin (PC-R2. 47-48). One phone message provided: "Sam call Michelle 271-9855 (Money)" (PC-R. 271). Another document included a phone message to "Sam" from "Michelle Rimondi" "Re: money" (PC-R. 272). Yet another message provided: "Michelle Rimondi -- Holiday Inn 324-0800 -- I'll tell her to be here @ 10:00 a.m. I have to give her money" (PC-R. 273). Clearly, such action by Ms. Rimondi reflected her desire for money in return for her testimony.

Mr. Roberts' Brady claim was summarily denied in light of Ms. Haines' testimony. At that time, Mr. Roberts had not learned of any withheld Brady material as to Ms. Haines.

[3] Other Brady material presented in 1989 concerned Ms. Rimondi's examination by Dr. Valerie Rao, an associate medical examiner, who provided services at the Rape Treatment Center. In the latter capacity, she saw Ms. Rimondi on June 4, 1984, at 8:20 a.m. (R. 2529-30, 2543-44). According to an undisclosed statement by Dr. Rao which was not heard by the jury, she "didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and

Ms. Haines testified at trial that she had been Mr. Roberts' girlfriend in June of 1984, and that she had a discussion with Mr. Roberts on June 4, 1984, in which he said he thought he had killed a man:

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collected" (PC-R. 247). Dr. Rao, in fact, found Ms. Rimondi's story so incredible she had to confirm that there had been a homicide with the medical examiner (PC-R. 248). This too was found insufficient in light of Ms. Haines' testimony (PC-R. 342, 452).

Q. Tell me what time he mentioned this, approximately?

A. It was about noon, around noon.

Q. About noon?

A. Uh-huh.

Q. This is on Monday, the fourth?

A. Yes.

Q. Tell the jury please exactly what Rick said to you about noon on Monday the fourth?

A. I think I killed somebody and I asked him if it was a man or woman and he said a man and that was it, because I really didn't believe him, so I didn't push it no more.

Q. He said he thought he had killed somebody?

A. Yes.

Q. You asked him if it was a man or woman?

A. Yes.

Q. And he said it was a man?

A. Uh-huh.

Q. Did you press him for any more details about that?

A. No.

Q. Did he volunteer any more details at that time?

A. No.

(R. 2380-81). Ms. Haines also testified that she had initially told the police that Mr. Roberts had been with her at the time of the murder, but she dropped that story in June after the police incarcerated her alleging that she was an accomplice to the murder. She secured her release by telling the police that she did not know Mr. Roberts' whereabout at the time of the murder. She then maintained that, in fact, she did not know anything about the murder. She testified that at that point in time--the early summer of 1984--she was lying to the police about her knowledge and about her criminal record. She told them that she had only two arrests (R. 2439).[4] But as she explained in her trial testimony, in fact, she had eleven fugitive warrants in Fort Lauderdale at the time (R. 2435). Ms. Haines then testified that when she ultimately agreed to testify against Mr. Roberts, no promises were made by the prosecution in order to get her assistance:

[4] Ms. Haines gave a sworn statement to the police on June 26, 1984, in which she stated that she had two prior prostitution arrests, one three months before in Dade County and one in Fort Pierce (PC-R4. 298). During cross-examination at Mr. Roberts' trial, Ms. Haines admitted that when she made this statement she was lying, "I had eleven other arrests" (PC-R4. 298). She then acknowledged during cross-examination at trial that she was "currently a fugitive from justice out of Fort Lauderdale on those eleven fugitive warrants" (PC-R4. 305). At no time did the State indicate that Ms. Haines' testimony in this regard was incorrect.

Q. Did any prosecutor or anybody, any police officer, threaten you or promise you anything for you to tell what Rick said to you about what happened?

A. No.

Q. Did you get any special favor or anything like that?

A. No.

(R. 1691-92).

At the 2004 evidentiary hearing, Ms. Haines testified that her testimony at Mr. Roberts' trial was false. She explained that she in fact was told not to worry about the eleven outstanding warrants by one of the prosecutors (PC-R4. 471-72).[5] She understood that the charges pending against her would be taken care of (PC-R4. 472). She also revealed that after her release from jail in late June of 1984, she was arrested a number of additional times between her June 26th

[5] One of the trial prosecutors, Judge Leonard Glick, testified that he believed that the existence of the eleven warrants was a matter that he would have delved into before the trial. Had it been determined that the eleven warrants did not exist, Judge Glick testified that he would have been obligated to correct the testimony in that regard (PC-R4. 850). Since the testimony was not corrected, Judge Glick indicated that it was appropriate to assume that his understanding at the time of trial was that his investigation into the matter led him to believe the eleven warrants for Ms. Haines' arrest did in fact exist (PC-R4. 850-51).

Moreover, Mr. Roberts' trial counsel "cross-examined her vigorously" regarding the eleven outstanding warrants (PC-R4. 854). Had Judge Glick known that the warrants did not exist, he would have brought that fact out in order to counter the defense's line of attack (PC-R4. 855).

statement and Thanksgiving of 1984.[6] When she was arrested she "used different names" (PC-R4. 466). One of the names she used was Shannon Harvey (PC-R4. 466).

In fact, the evidence presented in 2004 established that records of the large majority of the eleven outstanding warrants had disappeared.[7] According to the evidence that the

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[6] At the end of November, Ms. Haines left Florida and went to her mother's residence in Arizona after she learned she was pregnant (PC-R4. 468). Soon, Sam Rabin, Mr. Robert's prosecutor, started calling her in Arizona. He knew about the prostitution charges against her (PC-R4. 534). To get him off her back, Ms. Haines finally told him what he wanted to hear (PC-R4. 469). In return for telling him what he wanted to hear, *i.e.* Mr. Roberts had told her he thought he killed someone, Mr. Rabin said, "Rhonda, don't worry about your past arrests or anything, don't worry about nothing" (PC-R. 471). Every time Ms. Haines traveled to Florida to testify against Mr. Roberts, she "didn't know if they [the charges] were taken care of or not, so I was still scared. I was scared every time I went down to Miami to testify cause I didn't know if they were going to throw me in jail or not" (PC-R4. 504). After she testified against Mr. Roberts, Ms. Haines understood that the charges against her were taken care of (PC-R4. 472).

[7] The State has taken different and conflicting positions about these 11 outstanding warrants. Mr. Howell, the trial prosecutor who represented the State at the evidentiary hearings in 1997 and 2004 as well, testified in 1997 that there were eleven outstanding charges against Ms. Haines at the time of her testimony in 1985:

> Q. Do you recall when the first time that you learned about her allegation of outstanding charges in Broward County?
>
> A. Very vividly. I probably recall that as much as anything else about this case.
>
> Q. And when was that?

State presented, four Broward County arrests could be located on an NCIC rap sheet which the State claimed concerned Rhonda Haines. There was some confusion as to whether two of those arrests were actually separate arrests or the same arrest entered twice (PC-R4. 873). However, two of the arrests were disposed of on October 12, 1988 (PC-R4. 877). According to the court records in the case, a Rhonda Williams who was also known

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> A. That was in her deposition and I think it was October. I may not be correct on this, but October of 1985, immediately prior to the trial is when I first learned of the allegations of eleven outstanding prostitution warrants or charges or something like that in Broward.

(PC-R3. 705-06). Mr. Howell was adamant that the eleven charges "were still pending at the time of trial" (PC-R3. 707). But in 2004, Mr. Howell gave conflicting testimony when he swore that he did not believe that there had been eleven outstanding arrests:

> Q. Do you have any knowledge as to when the other seven charges that Ms. Haines has indicated was pending against her?
>
> A. I don't think they were. I think she was mistaken. Maybe she had other arrests at some time. She had other arrests maybe in Orlando. Maybe there was something else. But there were not - - at least on the NCIC - - there were four arrests.
>
> I'm not sure how many charges were totaled in those four arrests. You know, maybe six or seven charges, but I don't think she had eleven cases in Broward, ever.

(PC-R4 726-27).

as Rhonda Casteel signed a guilty plea spelling her first name as "Ronda" (PC-R4. 173). As the State witness acknowledged he had no recollection of Ms. Haines ever using the alias of Rhonda Casteel (PC-R4. 879). Moreover, records from California showed that Rhonda Haines was in California in 1988. She was arrested on March 8, 1988, on April 14, 1988, June 3, 1988, and June 21, 1988 (PC-R4. 221-22). She appeared in court for the disposition of one the cases on September 22, 1988, and received probation (PC-R4. 222). She appeared in court for disposition in another case on October 14, 1988, and received credit for 95 days in jail (PC-R4. 221). Thus, the records show that the two cases disposed of on October 12, 1988, did not involve Rhonda Haines. In any event, the State conceded in circuit court that somewhere between 7 and 9 of the eleven cases from Broward County had disappeared without a trace.

Moreover, the record also revealed that the State was aware of Ms. Haines' alias and her arrests in Dade County using the name Shannon Harvey.[8] Mr. Roberts' trial attorney testified

[8] In 2004, Mr. Roberts introduced evidence that demonstrated that Rhonda Haines was arrested on August 16, 1984, under the name Shannon Harvey - this was after Mr. Roberts' arrest and while the charges against him were pending. The "Jail Booking Record" introduced as Def. Ex. N concerned Ms. Haines and supported the statement in her 1996 affidavit and in 2004 testimony that she had been arrested in Dade County, that the State was aware of the arrest, and took care of it and a prior arrest under the name Shannon Harvey from February of 1984 for

that the State did not advise him of Ms. Haines' alias, Shannon Harvey (PC-R4. 892-93).[9] The investigator used by Mr. Roberts' collateral counsel also testified that as of 1996 when he located Ms. Haines and interviewed her, the State had provided no information regarding her arrest in 1984 under the name Shannon Harvey (PC-R4. 815). It was not until the 1997 evidentiary hearing that the State introduced this document into evidence without explanation (PC-R4. 201, 204, 728-31).[10]

When this evidence is properly analyzed under the controlling Brady standard, it is clear that the State did not disclose that Rhonda Haines had been arrested in Dade County for prostitution on August 16, 1984, while using the name of Shannon Harvey (PC-R4. 204). Similarly, the State did not disclose that the case, along with a prior from February 23, 1984, had been disposed of without jail time on August 22, 1984, during the

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her. This had been a demonstration of the State's power and ability to assist her.

[9] Judge Glick acknowledged he believed that under Brady he would have been obligated to disclose Ms. Haines' alias, *i.e.* the name Shannon Harvey, had he been aware that Ms. Haines had been using it (PC-R4. 852).

[10] Certainly during the June 25, 2004, proceedings, William Howell, the trial prosecutor who was also lead counsel for the State during these proceedings, expressed surprise at the document that he had introduced into evidence in 1997 ("MR. HOWELL: May I. Where did this document come from? MR. MCCLAIN: You introduced it into evidence back in 1997. MR. HOWELL: I did? MR. MCCLAIN: The State did." T2. 128).

time period that charges were pending against Mr. Roberts, and his prosecutor was trying to get Ms. Haines to testify against him. This was clearly information that was favorable to Mr. Roberts that was not disclosed until after Mr. Roberts had filed his current motion to vacate and until after this Court had ordered an evidentiary hearing on that motion.

When the proper Brady materiality standard is applied to this previously undisclosed favorable information cumulatively with the previously presented Brady information that was known to the State, but that was not disclosed to the defense, it is clear that a new trial is warranted. This is particularly true given the jury's struggle to reach a verdict even without the information that impeached the two witnesses upon whom the case was built. Here the circuit court failed to apply the proper Brady analysis.

STATEMENT OF THE CASE

a. Procedural History

On June 6, 1984, Mr. Roberts was arrested on first degree murder charges. On June 21, 1984, a Dade County Grand Jury indicted Mr. Roberts for the first degree murder of George Napoles, sexual battery of Michelle Rimondi, and two counts of robbery and kidnapping of Michelle Rimondi (R. 1). On June 26, 1984, Mr. Roberts pled not guilty.

Mr. Roberts was provided court appointed counsel. Before trial, there were a number of changes in counsel due to conflicts and scheduling problems (PC-R3. 4-7). Thomas Scott was appointed as counsel for Mr. Roberts on July 13, 1984 (PC-R3. 5). He remained counsel until January 30, 1985, when three days before the then scheduled trial he was forced to withdraw due to conflict arising over the State's last minute disclosure that it had secured inculpatory evidence from Rhonda Haines (R. 105).[11]

[11] On December 31, 1984, a subpoena was issued by the State for Ms. Haines to appear at Mr. Roberts' trial set for January 28, 1985. On January 25, 1985, prosecutor Rabin first disclosed to the defense that Ms. Haines would testify as to a statement Mr. Roberts supposedly made to Ms. Haines. However, Rule 3.220(a)(1)(iii) provided in 1985 that the prosecutor was required to disclose within fifteen days of a demand "the substance of any oral statements made by the accused. . .together with the name and address of each witness to the statements." Obviously, the Rule was violated; however, Mr. Roberts was given a continuance because his trial lawyer, Thomas Scott, was forced to withdraw because of a conflict arising from this late disclosure. As explained in the motion to withdraw, "[w]hen defense counsel inquired of the State as to whether the Government could advise where Rhonda Haines was located, the State announced it did not know, that she calls in weekly from an unknown place" (R. 101).

Sam Rabin, the prosecutor in January of 1985, was called at the July 1997 evidentiary hearing by the State. Rabin testified in cross-examination concerning his contact with Ms. Haines in late 1984: "Q. Do you recall ever having her address? A. Again, I don't have an independent recollection of it, but if she left the State of Florida and she is somebody that we wanted to have on the witness list, we certainly would have her address." (PC-R3. 685). He later elaborated, "I don't have any recollection, but as I told you if the State intended

After Scott withdrew, Kenneth Lange was appointed to represent Mr. Roberts (PC-R3. 5). On October 18, 1985, Lange deposed Ms. Haines. In this deposition, she testified that she had eleven outstanding arrest warrants for prostitution in Broward County (PC-R3. 706).[12]

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on using her as a witness, the State would have kept track where she was" (PC-R3. 687).

[12] In this deposition, Ms. Haines testified as follows:

> A. See, I have eleven warrants out for my arrest in Fort Lauderdale.
>
> Q. You have eleven arrest warrants?
>
> A. Um-hum.
>
> Q. Out for you in Fort Lauderdale?
>
> A. Um-hum.
>
> Q. And is that exactly eleven? Or twelve or --
>
> A. It could be maybe a couple less than eleven, but I know its around eleven.
>
> Q. Could be a couple of more than eleven?
>
> A. I don't know.
>
> Q. Eleven is your best guess. Active arrest warrants you have in Fort Lauderdale?
>
> A. Yes.

(October 18, 1985 Depo. Of Rhonda Haines at 4-5).

Mr. Roberts was tried before a Dade County jury in December of 1985. Michelle Rimondi and Rhonda Haines testified for the State. Mr. Roberts testified on his own behalf and disputed the testimony of Ms. Rimindo and Ms. Haines. In his closing argument, the prosecutor acknowledged that the case was one of credibility - "Ultimately, you have to decide who is lying and what they have to gain or lose by coming in this courtroom and lying" (R. 2945). Once the case had been submitted to the jury, lengthy deliberations ensued. After a considerable passage of time, the jury requested a jury view (R. 3194). Shortly after the jury view, a guilty verdict was returned. All together, the jury deliberated for twenty three (23) hours over three days before returning a verdict of guilty of first-degree murder, sexual battery, and kidnapping (R. 3206).

At the penalty phase proceeding, the jury, by a vote of seven to five (7-5), recommended that Mr. Roberts be sentenced to death for the first-degree murder conviction. Thereafter, the circuit court imposed a sentence of death.[13]

[13] On April 7, 2000, Judge Solomon testified that he had contacted the State on an ex parte basis and asked that an order sentencing Mr. Roberts to death be prepared for his signature. Judge Solomon acknowledged that he had in fact followed the same procedure he used in State v. Riechmann. Prior to April 7, 2000, Judge Solomon had not disclosed this fact. This

According to the written findings, the aggravating circumstances found were as follows: (1) Mr. Roberts has previously been convicted of a violent felony; (2) Mr. Roberts was under sentence of imprisonment; (3) the murder was committed while Mr. Roberts was engaged in the crime of sexual battery (this aggravator was entirely dependent upon Ms. Rimondi's claim that she was raped); and (4) it was especially heinous, atrocious and cruel (this aggravator was dependent upon the testimony of both Ms. Rimondi and Ms. Haines).

On direct appeal, Mr. Roberts' conviction and sentence of death were affirmed. Roberts v. State, 510 So. 2d 885 (Fla. 1987). On September 28, 1989, during the pendency of a death warrant, Mr. Roberts filed a Rule 3.850 motion. On October 19, 1989, Mr. Roberts supplemented his motion to vacate and included specific Brady allegations regarding the failure to disclose favorable evidence related to Michelle Rimondi. On October 25, 1989, the circuit court ruled that the supplementation was proper, but concluded that the motion to vacate should be summarily denied. A notice of appeal was promptly filed. This Court entered a stay of execution. Following briefing and argument, this Court affirmed the summary denial of Rule 3.850

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disclosure subsequently led to the vacation of Mr. Roberts' sentence of death.

relief, finding as to the Brady claim that Mr. Roberts had failed to make an adequate showing of materiality given the other evidence of guilt. Roberts v. Dugger, 568 So. 2d 1255 (Fla. 1990).

Mr. Roberts filed a petition for writ of habeas corpus in the federal court. The federal district court conducted an evidentiary hearing and thereafter denied relief. Roberts v. Singletary, 794 F.Supp. 1106 (S.D.Fla. 1992).

On appeal, the Eleventh Circuit affirmed. Roberts v. Singletary, 29 F.3d 1474 (11th Cir. 1994). As the Eleventh Circuit noted in its opinion, Ms. Rimondi underwent an effective "tenacious cross-examination" -- so effective that the court found that "further impeachment of Rimondi with any inconsistent statements would not have changed the outcome of the trial." Roberts v. Singletary, 29 F.3d 1474, 1478-79 (11th Cir. 1994). In doing so, the Eleventh Circuit relied upon Mr. "Roberts' girlfriend [who] testified that Roberts told her he killed a man." Id.

On January 25, 1996, another warrant was signed setting Mr. Roberts' execution for the week of February 22, 1996. During the exigencies of that death warrant, Mr. Roberts filed an emergency motion to vacate judgment and sentence on

February 20, 1996. Mr. Roberts presented Claim I, captioned in the following fashion:

> MR. ROBERTS WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASES OF MR. ROBERTS' TRIAL. AS A RESULT, MR. ROBERTS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT MR. ROBERTS WAS ERRONEOUSLY CONVICTED.

(PC-R2. 16). Thus, Mr. Roberts indicated that his claim was premised upon his constitutional right to an adequate adversarial testing. Within the body of the claim, Mr. Roberts explained the legal underpinnings of the claim:

> The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose evidence which supported the theory of defense. United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992). The State is obligated to correct any false testimony. Napue v. Illinois, 360 U.S. 264 (1959).

(PC-R2. 16-17). Clearly, Mr. Roberts' claim was premised upon an allegation that the State had violated Brady and/or Giglio. The factual basis for the claim arose from an affidavit executed by Rhonda Haines in which she described the pressure applied and the promises made by the State in order to secure her testimony

against Mr. Roberts. Ms. Haines indicated that because of the pressure and the promises, she testified falsely at Mr. Roberts' trial. Mr. Roberts argued that this was new evidence of his innocence that under State v. Gunsby, 670 So. 2d 920 (Fla. 1996), must be evaluated cumulatively with his Brady and Giglio claims, both the current claims and the previously presented claims.

The affidavit supporting the Brady, Giglio, and Gunsby claims provided as follows:

> I, RHONDA WILLIAMS, being first duly sworn, do hereby depose and say:
>
> 1. My name is Rhonda Williams but I used to go by the name Rhonda Haines. In early 1984, I was living in Miami with Less McCullars, who I knew as Rick. In June of that year, Rick was arrested for a murder that happened on the Rickenbacker causeway. I was questioned by the police about his whereabouts during the time of the crime. I told the police that Rick had been with me throughout the night that the murder happened, but they didn't believe me and so I was arrested. The police charged me with accessory after the fact to murder and put me in jail.
>
> 2. After keeping me in jail for about three weeks, I was taken to see Sam Rabin, the lawyer who was prosecuting Rick. Mr. Rabin told me that there was no reason for me to be in jail and that if I just told him what I knew he would let me go. He also made it clear that if I cooperated with him, he could help me with some outstanding charges I had against me for prostitution. In fact, up until my arrest, I had been working as a prostitute to support myself.
>
> 3. I then admitted to Mr. Rabin that I did not know whether or not Rick was at home with me through the whole night that the murder happened. I

explained to him how Rick was there with me when I went to sleep around 9 p.m. and that he was in bed with me when I woke up about 5:00 am. Mr. Rabin said that I would have to give him a sworn statement with this information in order to be released from jail and I did so. Mr. Rabin also told me that I would have to testify at Rick's trial. He also made it clear that he could and would put me in jail again and prosecute me, too, if I didn't cooperate with him.

4. After Mr. Rabin had me released, I began visiting Rick at the jail. I also met with his defense attorneys and answered all their questions. I told them the truth. On the night of the murder, Rick was at home when I went to sleep at 9 p.m. and he was also there in bed with me when I woke up at 5:00 am. Rick never told me that he killed anyone.

5. I continued to work the streets up until around Thanksgiving 1984. Because I had many pending charges in Broward County, I was only working in Dade. The police knew who I was and my connection to Rick's case. They constantly harassed me. I was arrested many times and then told by Sam Rabin that he would make things better for me if I would just help him. Mr. Rabin also found out about my outstanding charges in Broward and told me that he could have them taken care of if I would cooperate with him on Rick's case. Mr. Rabin seemed convinced that I knew more about Rick's case than I did. At this time I was also doing way too much cocaine and I was pregnant. By Thanksgiving I was several months along.

6. All of this constant police pressure got to me and I left Florida and went to my mother's in Arizona. Mr. Rabin starting calling my mother's house and pressuring me again. I lied at trial and said Rick had called me in Arizona. In fact, Rick never called me in Arizona. I told my mother what Mr. Rabin was calling about and all the pressure he was putting on me. Her advice was to tell him something to get him off my back. I finally just took her advice. I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying "I know you know more." I knew he would take care of all the

prostitution charges, and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted. So over time I would add to the story whenever Mr. Rabin would say "I know you know more." He would suggest things that I would then say I remembered and add to the story.

7. In 1985, I testified at a deposition and at Rick's trial. My testimony was false. I testified the way that I did because Mr. Rabin would not leave me alone and because he said he could take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

8. Mr. Rabin was good on his word. After I testified, the Broward County charges disappeared. However, I was so guilt ridden when I got back to Arizona that I started doing cocaine again big time. I really fell apart. I just wanted to forget about what I had done. I put Rick out of my mind and avoided all contact with my past in Florida. I even stopped using the name Rhonda Haines.

9. I have recently had the chance to review the sworn statement that I made to Sam Rabin on June 26, 1984 and it is true and correct. I answered all of his questions truthfully in that statement.

(PC-R2. 26-28).

Relying on this affidavit, Mr. Roberts explained his Brady argument in the following fashion:

> Rhonda Haines' new affidavit establishes that the State possessed exculpatory evidence which according to Ken Lange and Thomas Scott was not disclosed to the defense. The State promised Rhonda Haines consideration for her testimony. The nondisclosure of this evidence violated the Eighth and Fourteenth Amendments of the United States Constitution and Rule 3.220 of the Florida Rules of Criminal Procedure.

> Gorham v. State, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988).

(PC-R2. 40-41). Mr. Roberts explained his Giglio argument in the following fashion:

> Rhonda Haines now indicates that she affirmatively lied when in direct examination by the trial prosecutor, she indicated no promises or threats had been made to secure her testimony. In fact, promises and threats had been made by Sam Rabin, an Assistant State Attorney. Thus, the State knowingly presented false and misleading testimony in order to secure a conviction. This violated the Eighth and Fourteenth Amendments. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The Florida Supreme Court has held that Rule 3.850 relief is required where new non-record evidence establishes that the State "subvert[ed] the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993). When a prosecutor presents false and misleading evidence, a reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).

(PC-R2. 41). Finally, Mr. Roberts explained his argument premised upon Gunsby in the following fashion:

> Rhonda Haines' affidavit constitutes new evidence not previously available to Mr. Roberts which establishes that his conviction and sentence of death are unreliable. See Gunsby v. State, 21 Fla. L. Weekly at S21 ("[w]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined.").

(PC-R2. 41-42).

The circuit court summarily denied the motion ruling that an evidentiary hearing on the claims premised upon Ms. Haines' affidavit was unnecessary. Mr. Roberts appealed. This Court reversed, concluding that an evidentiary hearing was required upon this claim so that the evidence upon which Mr. Roberts' legal arguments rested, *i.e.* Ms. Haines' sworn testimony, could be presented to the circuit court. Roberts v. State, 678 So. 2d 1232 (Fla. 1996).

However, on remand the circuit court refused to issue a certificate of materiality necessary for Mr. Roberts to obtain an out-of-state subpoena in order to secure the presence of Ms. Haines, a California resident, at the evidentiary hearing. Without a certificate of materiality, Mr. Roberts was unable to secure Ms. Haines's presence at the evidentiary hearing conducted in July of 1997, and thus was unable to present her testimony. Despite Ms. Haines' absence, the State chose to present evidence at that hearing. As State Exhibit #1, the State introduced a document three pages long. "The first two pages are the FBI rap sheet" for Rhonda Haines (PC-R4. 202-03, 923). "The third page is a booking - - is a booking record from Metro-Dade County so it is a separate document from a separate source" (PC-R4. 204, 923). It was a "booking card for prostitution and resisting arrest charge of Shannon Harvey on -

- date of birth 1/22/65, from August 17th, 1984" (PC-R4. 204, 730). As for the FBI rap sheet, "there is a run date up at the top of 8/22/1984 which is August 22, 1984, yet there is a stamp down here that Mercy Guasp got it on December 13, 1984 or, yes, it was furnished to her on, I guess, 12/13/1984. And there is a date stamp of December 14th so there are three different dates on this thing" (PC-R4. 953). The third page of the exhibit also contained a December 14, 1984, date stamp (PC-R4. 204, 923). At the 1997 evidentiary hearing, the State presented no testimony regarding the third page of the exhibit or the reason it was introduced into evidence.[14]

Following the close of the 1997 hearing, the circuit court denied post-conviction relief. Mr. Roberts again appealed to this Court. This Court once again reversed and remanded for further proceedings, finding error in the circuit court's refusal to issue a certificate of materiality. Roberts v. State, 840 So. 2d 962 (Fla. 2002). This Court held that the

[14] The State also called three witnesses to testify at the hearing. These witness were: Harvey Wasserman, the supervisor of investigation for the Dade County State Attorney's Office; Judge Leonard Glick, who was one of the prosecuting attorneys at Mr. Roberts' December 1985 trial; and Samuel Rabin, a former assistant state attorney who had been in charge of the prosecution of Mr. Roberts' case from June of 1984 until February of 1985. In rebuttal, Mr. Roberts called William Howell, who was the other trial prosecutor in December of 1985 and who was still employed as an assistant state attorney and was acting as counsel for the State in the 3.850 proceedings.

circuit court must conduct an evidentiary hearing at which it heard Ms. Haines' testimony regarding her assertions in her affidavit about the circumstances of her original trial testimony.

On remand, the circuit court issued a certificate of materiality; however, the California court refused to order Ms. Haines to travel to Florida due to hardship regarding child care. Instead, the California court ordered Ms. Haines to give evidence via video satellite. Thereafter, the circuit court heard Ms. Haines testify via video satellite hookup on February 13, 2004. The evidentiary hearing was reconvened on June 25, 2004, for the presentation of additional witnesses. The evidentiary hearing was again reconvened on October 15, 2004, to hear the remaining witnesses.

In her 2004 testimony, Ms. Haines explained that she in fact was told not to worry about the eleven outstanding warrants by one of the prosecutors (PC-R4. 471). She understood that the charges pending against her would be taken care of (PC-R4. 472). At the evidentiary hearing, the State conceded that somewhere between 7 and 9 of the eleven cases from Broward County had disappeared without a trace and without explanation.

Ms. Haines revealed that she had used the alias of Shannon Harvey and had been arrested on prostitution charges

under that name (PC-R4. 466). This was the mysterious name first appearing in the three page document that the State introduced as State's Exhibit 1 at the 1997 evidentiary hearing. Armed with the third page of this exhibit first disclosed in 1997, Mr. Roberts' investigator located court files showing that while using the name Shannon Harvey, Rhonda Haines was arrested on 8/16/84 for prostitution in Dade County (PC-R4. 825-26). With the investigator laying the foundation, the court files regarding Shannon Harvey were introduced into evidence. The records showed that disposition of the 8/16/84 case was linked to another Shannon Harvey prostitution arrest in Dade County occurring on 2/22/84. Both cases showed a disposition on August 22, 1984 (PC-R4. 950). The clerk's file regarding the February 22nd prostitution arrest of Rhonda Haines (PC-R4. 163-64) indicated that Shannon Harvey was an alias for Rhonda Haines (PC-R4 905). Sam Rabin, the initial prosecutor on Mr. Roberts' case, testified that the documents showed that at the time of the August arrest of Shannon Harvey it was determined that she was Rhonda Haines (PC-R4. 949, 952).

Moreover, the record also revealed that the State was aware of Ms. Haines' alias and her arrests in Dade County using the name Shannon Harvey. Mr. Roberts' trial attorney testified that the State did not advise him of Ms. Haines' alias, Shannon

Harvey (PC-R4. 892-93). Judge Glick, one of the trial prosecutors, acknowledged he believed that under Brady he would have been obligated to disclose Ms. Haines' alias, *i.e.* the name Shannon Harvey, had he been aware that Ms. Haines had been using it (PC-R4. 852). The investigator used by Mr. Roberts' collateral counsel also testified that as of 1996 when he located Ms. Haines and interviewed her, the State had provided no information regarding her arrest in 1984 under the name Shannon Harvey (PC-R4. 815). That name did not surface until the 1997 evidentiary hearing, where the State introduced the three-page document into evidence without explanation (PC-R4. 201, 204, 728-31).

Further, evidence was presented showing that NCIC records did not include either the February 22, 1984, arrest of Rhonda Haines using the name Shannon Harvey, or the August 16, 1984, arrest of Shannon Harvey (PC-R4. 874-75). Moreover, NCIC did not show that Rhonda Haines used the alias of Shannon Harvey. The State's witness, Harvey Wasserman, testified:

> Q. For example, I'm going to hand you Exhibit J. Exhibit J is an arrest of Ronda Haines November 12, 1998 [sic]. It gives January 31st, 1985 as a birth date.
>
> That arrest does not appear on the rap sheet, does it?
>
> A. This is from February 22, 1984. It does not appear in the rap sheet, no.

Q. Certainly that raises questions about the completeness of the rap sheet?

A. Of the rap sheet? Yes, sir.

(PC-R4. 876). So absent knowing of the document the State introduced at the 1997 evidentiary hearing, when it was first disclosed to Mr. Roberts, the records could not be tracked down in the usual manner because the Dade County arrests of Shannon Harvey did not show up on Ms. Haines' rap sheet.

After permitting the parties to submit written closing arguments, the circuit court denied relief. In denying Mr. Roberts' Brady claim, the circuit court stated:

> Applying these principles, the court finds no Brady violation. Thus, the Court does not find that there is a reasonable probability that had the foregoing evidence been disclosed the result of the proceeding would have been different. [Citations omitted]. Even assuming that the State had in its possession information as to Haines' prostitution arrest under the name of Shannon Harvey as well as the disposition of a February 22, 1984 prostitution arrest, the trial record shows that Roberts vigorously assailed Haines' character and arrest record as illustrated by the following: [Quotation from R. 2434-39 omitted].
>
> Moreover, the Court finds that trial counsel should and could have obtained Haines' alleged alias, Shannon Harvey, by merely asking during her deposition whether she ever used an alias or by moving to compel the State to produce all aliases of its witnesses since it is commonly known by law enforcement officers, prosecutors and defense attorneys that prostitutes generally use aliases. Based on the foregoing, the Court does not find that this evidence would have impeached the testimony of Haines nor would it have

> resulted in a markedly weaker case for the prosecution and a markedly stronger one for Roberts.
>
> Similarly, as to Roberts' claim that the State failed to disclose Michelle Rimondi's request for money and its supposed threat to take action against her if she did not stay in contact with the State or her father, the Court finds that Roberts has not shown that Rimondi received any money or other benefit in exchange for her testimony. Sam Rabin testified that Rimondi received no money or other benefit for her testimony since she was an eyewitness and victim. He further explained that the State Attorney's office had a policy that directly prohibited prosecutors from engaging in doling out money or other benefits that would compromise either Rimondi's testimony or that of any potential witness in the prosecution of criminal cases. Thus, the evidence - a message note from Rimondi requesting money and a letter addressed to Rimondi's father advising him that his daughter must stay in contact with him or the State - is totally speculative at best and does not support the existence of a Brady violation.

(PC-R4. 379-80).[15]

From the circuit court order denying relief, Mr. Roberts perfected this appeal.

b. Statement of the Facts

On June 4, 1984, George Napoles was beaten to death. At trial, Ms. Rimondi claimed that it was Rickey Roberts who killed Mr. Napoles and raped her at approximately 3:00 a.m. on June 4, 1984.

[15] Mr. Roberts had in fact filed a motion to compel seeking to have the State required to produce criminal records of state witnesses (R. 52-53).

On the Monday morning of June 4, 1984, Ian Riley called the Miami police to report that Michelle Rimondi had reported the murder of George Napoles to him. Ms. Rimondi had further indicated that she had been raped. According to Mr. Riley's trial testimony, Ms. Rimondi woke Mr. Riley up at about 5:00 a.m. (R. 2029).[16] Ms. Rimondi was a sixteen year old runaway who supported herself through prostitution. Mr. Riley was Joe Ward's roommate. Joe Ward and Manny Cebey were male friends of Ms. Rimondi.[17] She described Mr. Cebey as her boyfriend.[18] Ms. Rimondi acknowledged that both Mr. Ward and Mr. Cebey had violent tempers.[19] In fact, there was evidence which

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[16] According to Ms. Rimondi at the time of the alleged murder and rape, Jamie Campbell was present with her in the car. Ms. Campbell was also a sixteen-year-old prostitute. However, even though Ms. Campbell was present throughout the time period of the homicide, she saw nothing. She indicated that she had fallen asleep in the front passenger seat of the car she occupied with Ms. Rimondi and Mr. Napoles sometime after their arrival at the Rickenbacker Causeway. When she woke up at 5:00 a.m., she could not find anyone, so she drove the car to a friend's house (R. 1842-47).

[17] As was spelled out in the opening statement, it was the defense's theory that one or both of Ms. Rimondi's male friends who had violent tempers, Manny Cebey or Joe Ward, killed Mr. Napoles, perhaps out of jealousy, and then had Ms. Rimondi pin the blame on Mr. Roberts, a passerby who fell into their trap when he stopped for a hitchhiking Ms. Rimondi (R. 1557).

[18] In fact, Ms. Rimondi acknowledged that she and Mr. Cebey had sex late the Saturday night before the murder, and again on Sunday morning less than 24 hours before the murder (R. 2274).

[19] Ms. Rimondi acknowledged that Mr. Ward had "a real bad temper" and that he was a "[r]eal violent guy, as a matter of

the jury never heard that Joe Ward was Ms. Rimondi's pimp. According to Mr. Riley, Ms. Rimondi indicated a black man had murdered George Napoles in front of her. About forty minutes after telling Riley of the murder, Ms. Rimondi reportedly revealed that she had also been raped by the black man and that afterwards the assailant drove her to Mr. Ward's home at her request (R. 2030).

Following Mr. Riley's phone call, Ms. Rimondi was transported to the police station. There, she was examined by Dr. Valerie Rao, an associate medical examiner, who provided services at the Rape Treatment Center. In the latter capacity, she saw Ms. Rimondi on June 4, 1984, at 8:20 a.m. (R. 2529-30, 2543-44).[20]

Shortly before Mr. Roberts' trial, Ms. Rimondi had been charged with grand theft (R. 664). However, she received

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fact" (R. 2269). As to Mr. Cebey, Ms. Rimondi acknowledged that "he had a very bad temper, quick temper" (R. 2274).

[20] According to undisclosed notes made from interviews of Dr. Rao regarding her contact with Ms. Rimondi and which the jury did not hear about, Dr. Rao "didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and collected." (PC-R. 247; PC-R4. 1073). Dr. Rao, in fact, found Ms. Rimondi's story so incredible she had to confirm that there had been a homicide with the medical examiner (PC-R. 248). Further, Dr. Rao found "no vaginal trauma" which was unusual given Ms. Rimondi's story (PC-R. 248). Dr. Rao was also told that Ms. Rimondi was "not sure" that her last coitus with Mr. Cebey had been on June 3, 1984, at 10:00 a.m. (PC-R. 248). This, too, was inconsistent with Ms. Rimondi's trial testimony.

pretrial intervention. The defense was precluded from impeaching Ms. Rimondi with the pending charge (R. 665). However, what neither the judge nor the defense knew was that the State had previously placed conditions upon Ms. Rimondi.[21] In an August 28, 1984, letter to her father, the prosecutor stated, "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitments. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action." (PC-R. 277). The State held this threat to take further action over Ms. Rimondi's head. This went undisclosed to the defense and to the jury.

The State also failed to disclose that Ms. Rimondi was frequently calling Mr. Roberts' prosecutor and demanding money. (PC-R. 271-73). Clearly, such action by Ms. Rimondi reflected her desire for money in return for her testimony. It went towards a potential motive she had in testifying. Moreover, not only were there notes reflecting Mr. Rimondi's demand for money,

[21] In the September 2, 2005, order denying post conviction relief, the circuit court failed to recognize that trial counsel had been precluded from questioning Ms. Rimondi regarding her pending criminal charges. Thus, the circuit court did not discuss whether the undisclosed August 28, 1984, letter that threatened to take further action against her would have caused the trial court to have to rule under Davis v. Alaska, 415 U.S. 308 (1974), that cross-examination about the matter could be pursued.

there were handwritten notes in the State Attorney's file indicating, "Michelle Rimondi - Holiday Inn 324-0804. I'll tell her to be here @10:00 A.M. I have to give her money" (PC-R. 273). Mr. Rabin testified in federal court that the handwritten note "was probably written by my secretary at the time and it bears out the fact that Michelle Rimondi, when this is taken was, staying at the Holiday Inn" (PC-R4. 1358). However, the payment of money to Michelle Rimondi was not disclosed.[22]

In addition to presenting Ms. Rimondi's testimony, the State called Rhonda Haines at trial. Ms. Haines testified that in June of 1984 she had been Mr. Roberts' girlfriend. She related that on June 4th Mr. Roberts told her that he thought he had killed somebody and he thought that it had been a man (R. 2381). Ms. Haines told the jury that she had initially lied to the police when she first told them that Mr. Roberts had been

[22] The circuit court in denying post conviction relief said that "Sam Rabin testified that Rimondi received no money" (PC-R4. 379). In making this statement, the circuit court overlooked the fact that in his federal testimony which was introduced into evidence, Mr. Rabin testified that in fact Ms. Rimondi was to receive money that he was deliver to her (PC-R4. 1358). However in 2004, Mr. Rabin's testimony was equivocal; he merely testified that "[a]ny money we would have given to her there would be a record of it. So there was no record of her receiving money which I would assume that it's not and we did not give her money" (PC-R4. 938). He did not disavow his testimony in federal court that the handwritten note from his secretary which was shown to him while he was testifying indicated that the money was to be taken to Ms. Rimondi at the Holiday Inn (PC-R. 273)("I have to give her money").

with her the entire night of June 3rd-4th (R. 2382). After providing this alibi, she was arrested as an accessory to the murder. When she was told that the charges would be dropped if she would say that she did not know where Mr. Roberts was the night of June 3-4, she told the assistant state attorney that she had been sick and had fallen asleep (R. 2424). Ms. Haines said that as a result she did not know at what time Mr. Roberts had left their bed and at what time he had returned (R. 2384). The accessory charges were then in fact dropped (R. 2440).

Rhonda Haines told the jury in December of 1984 while living in Arizona, she had told the assistant state attorney that Mr. Roberts had admitted the killing (R. 2453). According to her trial testimony, Mr. Roberts at one point had told her that he had gone to the Rickenbacker Causeway and had come across a Cuban male and two girls, one of whom was sleeping in the back of a car. Supposedly, Mr. Roberts related that he and the Cuban male were using cocaine and sharing the girl sexually (R. 2388). An argument ensued, and Mr. Roberts hit the man in the head with a baseball bat (R. 2389). Ms. Haines testified that no promises had been made by the State in exchange for her testimony (R. 2392).[23]

[23] In her 2004 testimony, Ms. Haines swore that her trial testimony was false. Mr. Roberts never confessed to her, and

Mr. Roberts testified in his own behalf and denied the charges, although admitting he had picked up a hitchhiking Ms. Rimondi on the night of the murder. Mr. Roberts' defense was that Ms. Rimondi, a prostitute, was covering up the fact one or more of her male friends (Joe Ward and/or Manny Cebey), killed Mr. Napoles, Ms. Rimondi's client, and then framed Mr. Roberts for the murder. The jury deliberated for twenty-three (23) hours before convicting.

At the July 1997 evidentiary hearing, the State called Harvey Wasserman, a supervisor of investigation at the Dade County State Attorney's Office. Mr. Wasserman testified to his reading of computer generated printouts that were produced in 1996 of Rhonda Haines' criminal history. He indicated that the records he had obtained reflected that "in 1985, 1984, 1985, she had two pending prostitution-related cases in Broward County." (PC-R3. 643). According to Mr. Wasserman, these two charges were not disposed of until 1988. (PC-R3. 640-43). He was unable to find documentation of the eleven outstanding charges that Ms. Haines testified at trial were pending in Broward County at that time. (PC-R3. 642)("Q. Okay. So, were there any other cases that she had from Broward County according to the

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the State pressured her and promised to take care of the Broward charges.

records that you reviewed? A. No, sir, not from anything that we have.").

William Howell, co-counsel at trial for the State and co-counsel in the 3.850 proceedings, was called by Mr. Roberts in rebuttal to establish whether at the time of trial Ms. Haines had eleven outstanding charges in Broward County. Mr. Howell testified:

> Q. Do you recall when the first time that you learned about her allegation of outstanding charges in Broward County?
>
> A. Very vividly. I probably recall that as much as anything else about this case.
>
> Q. And when was that?
>
> A. That was in her deposition and I think it was October. I may not be correct on this, but October of 1985, immediately prior to the trial is when I first learned of the allegations of eleven outstanding prostitution warrants or charges or something like that in Broward.
>
> Q. And, did you discuss that with anybody in the State Attorney's Office?
>
> A. That I'm having a little witness trouble with - - I'm sure I did. I don't have a specific recollection of the discussion, but I would have discussed that with Mr. Glick.
>
> Q. As a result of your knowledge and your discussion, what did you do regarding those eleven prostitution warrants?
>
> A. Regrettably, nothing, nothing. We just left them. We decided that she was going to have to take care of them herself, and we did nothing. And, and I say regrettably.

> Q. You didn’t make them go away for her?
>
> A. Absolutely not. We’d made - - absolutely, Mr. Glick, nor I made no effort to do anything with those charges. In fact, they were still pending at the time of trial. They were still pending when we put her on the airplane to go home and Mr. Lange pointed that out over and over during the course of the trial.
>
> Q. Did you ever tell her that you would make them go away?
>
> A. No, I did not, no. I couldn’t. **I don’t know how. I mean, honestly, today, I don’t know how to make them go away**.

(PC-R3. 705-07)(emphasis added).[24]

Judge Leonard Glick, the lead prosecutor for the State at trial, offered similar testimony in 1997:

[24] Mr. Howell’s testimony in 1997 regarding not knowing how to make cases disappear rings particularly hollow in light of the recent revelations regarding a practice of hiding files in Dade County for the past two decades. This was the subject of Mr. Roberts’ motion to relinquish which this Court has denied.

Q. Were you at the time of trial aware that she had some outstanding cases or at least that she had some outstanding cases in Broward County?

A. At the time of the trial, yes.

Q. Do you recall when you became aware of that fact?

A. The best of my recollection, I became aware of the fact after a depo was taken but before the actual trial itself.

Q. Would that have been the deposition of Rhonda Haines or - -

A. Yes.

Q. And, to the best of your knowledge, was there a discussion between you and any other person about what the - - how to handle those outstanding cases that she said alleged existed in Broward?

A. The only other person I would have discussed it with would be you.

Q. And, do you recall whether or not we had such a discussion?

A. I believe we did.

Q. Okay. And, do you recall how it was that we decided to handle those outstanding charges?

A. Well, ultimately, we decided to do nothing and did nothing.

(PC-R3. 656).

Sam Rabin was also called by the State in 1997. He was the lead prosecutor on Mr. Roberts' case from the time of the arrest until February of 1985. Mr. Rabin was asked if Ms. Haines ever asked him for assistance in disposing of her Broward County

charges. He responded: "Not that I recall." (PC-R3. 673). He was also asked if he "ever contacted anyone in Broward County, whether it be the prosecuting agencies or the police agencies or anyone else in making an attempt to resolve any cases that Ms. Haines had in Broward County." (PC-R3. 673). Mr. Rabin responded:

> To the best of my knowledge, no, and if I could qualify that answer. I was aware both through the motions that were filed in this case to the depositions that were taken by the office of CCR, that that was an issue. And so I attempted to go back and look through any notes I might have to refresh my recollection to see if something like that might have occurred that I didn't know.
>
> But I wanted to be comfortable in my answer that, rather than just not recall that it did not occur, and I found nothing anywhere to indicate that that ever occurred.

(PC-R3. 673-74). On cross-examination, Mr. Rabin explained that the file that he had reviewed only had "the indictment. I may have had a press clipping or two." (PC-R3. 689). He was asked to locate that file since it had not previously been disclosed to Mr. Roberts and agreed to advise Mr. Roberts' counsel of its contents. (PC-R3. 694). That very day he wrote a letter to collateral counsel and placed it in the court file indicating

that "I looked through my files and I could find no file on the Roberts case." (PC-R3. 725).[25]

At the 2004 evidentiary hearing, Ms. Haines testified that her testimony at Mr. Roberts' trial was false. She explained that she in fact was told not to worry about the eleven outstanding warrants by one of the prosecutors (PC-R4. 471-72). She understood that the charges pending against her would be taken care of (PC-R4. 472). She also revealed that after her release from jail in late June of 1984, she was arrested a number of additional times between her June 26th statement and Thanksgiving of 1984.[26] When she was arrested she "used

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[25] Thus, he had had no file and no notes to review despite his testimony that he had sought to review notes in his file and could find "nothing anywhere to indicate that that ever occurred." (PC-R3. 674).

[26] At the end of November, Ms. Haines left Florida and went to her mother's residence in Arizona after she learned she was pregnant (PC-R4. 468). Soon, Sam Rabin, Mr. Robert's prosecutor, started calling her in Arizona. He knew about the prostitution charges against her (PC-R4. 534). To get him off her back, Ms. Haines finally told him what he wanted to hear (PC-R4. 469). In return for telling him what he wanted to hear, *i.e.* Mr. Roberts had told her he thought he killed someone, Mr. Rabin said, "Rhonda, don't worry about your past arrests or anything, don't worry about nothing" (PC-R4. 471). Every time Ms. Haines traveled to Florida to testify against Mr. Roberts, she "didn't know if they [the charges] were taken care of or not, so I was still scared. I was scared every time I went down to Miami to testify cause I didn't know if they were going to throw me in jail or not" (PC-R4. 504). After she testified against Mr. Roberts, Ms. Haines understood that the charges against her were taken care of (PC-R4. 472).

different names" (PC-R4. 466). One of the names she used was Shannon Harvey (PC-R4. 466).

In fact, the evidence presented in 2004 established that records of the large majority of the eleven outstanding warrants had disappeared. According to the evidence that the State presented, four Broward County arrests could be located on an NCIC rap sheet which the State claimed concerned Rhonda Haines. There was some confusion as to whether two of those arrests were actually separate arrests or the same arrest entered twice (PC-R4. 873). However, two of the arrests were disposed of on October 12, 1988 (PC-R4. 877). According to the court records in the case, a Rhonda Williams who was also known as Rhonda Casteel signed a guilty plea spelling her first name as "Ronda" (PC-R4. 173). As the State witness acknowledged, he had no recollection of Ms. Haines ever using the alias of Rhonda Casteel (PC-R4. 879). Moreover, records from California showed that Rhonda Haines was in California in 1988. She was arrested on March 8, 1988, on April 14, 1988, June 3, 1988, and June 21, 1988 (PC-R4. 221-22). She appeared in court for the disposition of one the cases on September 22, 1988, and received probation (PC-R4. 222). She appeared in court for disposition in another case on October 14, 1988, and received credit for 95 days in jail (PC-R4. 221). Thus, the records show that the two cases

disposed of on October 12, 1988, did not involve Rhonda Haines. In any event, the State conceded in circuit court that somewhere between 7 and 9 of the eleven cases from Broward County had disappeared without a trace.

Moreover, the record also revealed that the State was aware of Ms. Haines' alias and her arrests in Dade County using the name Shannon Harvey. Mr. Roberts' trial attorney testified that the State did not advise him of Ms. Haines' alias, Shannon Harvey (PC-R4. 892-93). The investigator used by Mr. Roberts' collateral counsel also testified that as of 1996 when he located Ms. Haines and interviewed her, the State had provided no information regarding her arrest in 1984 under the name Shannon Harvey (PC-R4. 815). That name was not disclosed until the 1997 evidentiary hearing, where the State introduced the three-page document into evidence without explanation (PC-R4. 201, 204, 728-31).

SUMMARY OF ARGUMENT

1. The circuit court's analysis of Mr. Roberts' claim under Brady v. Maryland, 373 U.S. 83 (1963), is filled with legal errors. An examination of the circuit court's order shows that the denial of relief was premised upon a seriously flawed legal analysis. The circuit court ignored recent United States Supreme Court case law and held that trial counsel's diligence

is an element of a Brady claim. The circuit court misapprehended the materiality standard regarding whether confidence is undermined in the reliability of the outcome and required proof that the State's case would be markedly weaker and the defense's case would be markedly stronger. The circuit court failed to properly apply the United States Supreme Court standard as to what constitutes impeachment which is subject to disclosure to defense counsel under Brady. The circuit court failed to engage in a cumulative analysis of the materiality standard. The circuit court failed to recognize that information that shows that a witness has a motive to obtain money from her testimony constitutes impeachment under Brady. The circuit court ignored the uncontested evidence that the State did not disclose that it paid money to a witness. As a result, the circuit court's decision flowing from these legal errors was erroneous as a matter of law.

2. Proper application of the Brady materiality standard to the favorable information that was in the State's possession and not disclosed to defense counsel demonstrates that in a case that was undeniably a credibility battle, confidence is undermined in the outcome. The undisclosed favorable information constituted impeachment of the credibility of the two witnesses that were absolutely central to the State's case.

Given that the case came down to whether to believe these two witnesses or Mr. Roberts who testified in his own behalf, confidence is undermined in the reliability of the outcome in light of the cumulative effect of the withheld impeachment.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The denial of Brady claims involve mixed question of law and fact which are subject to *de novo* review by this Court. Rogers v. State, 782 So.2d 373, 377 (Fla. 2001). The circuit court denied relief on Mr. Roberts' Brady claim after conducting an evidentiary hearing. The circuit court's legal analysis is subject to *de novo* review by the Court.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT'S ANALYSIS OF MR. ROBERTS' BRADY CLAIM WAS ERRONEOUS AND FAILED TO FOLLOW KYLES V. WHITLEY, STRICKLER V. GREENE, AND BANKS V. DRETKE, AND THUS VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

After conducting an evidentiary hearing, the circuit court permitted the parties to submit written closing arguments.

Thereafter, the circuit court issued a twenty page order (PC-R4. 361-81). In a section of the order that was over four pages in length, the circuit court addressed Mr. Roberts' Brady claim. The circuit court found the claim made pursuant to Brady v. Maryland, 373 U.S. 83 (1963), meritless, stating:

> Applying these principles, the court finds no Brady violation. Thus, the Court does not find that there is a reasonable probability that had the foregoing evidence been disclosed the result of the proceeding would have been different. [Citations omitted]. Even assuming that the State had in its possession information as to Haines' prostitution arrest under the name of Shannon Harvey as well as the disposition of a February 22, 1984 prostitution arrest, the trial record shows that Roberts vigorously assailed Haines' character and arrest record as illustrated by the following: [Quotation from R. 2434-39 omitted].
>
> Moreover, the Court finds that trial counsel should and could have obtained Haines' alleged alias, Shannon Harvey, by merely asking during her deposition whether she ever used an alias or by moving to compel the State to produce all aliases of its witnesses since it is commonly known by law enforcement officers, prosecutors and defense attorneys that prostitutes generally use aliases. Based on the foregoing, the Court does not find that this evidence would have impeached the testimony of Haines nor would it have resulted in a markedly weaker case for the prosecution and a markedly stronger one for Roberts.
>
> Similarly, as to Roberts' claim that the State failed to disclose Michelle Rimondi's request for money and its supposed threat to take action against her if she did not stay in contact with the State or her father, the Court finds that Roberts has not shown that Rimondi received any money or other benefit in exchange for her testimony. Sam Rabin testified that Rimondi received no money or other benefit for her testimony since she was an eyewitness and victim. He further explained that the State Attorney's office had

> a policy that directly prohibited prosecutors from engaging in doling out money or other benefits that would compromise either Rimondi's testimony or that of any potential witness in the prosecution of criminal cases. Thus, the evidence - a message note from Rimondi requesting money and a letter addressed to Rimondi's father advising him that his daughter must stay in contact with him or the State - is totally speculative at best and does not support the existence of a Brady violation.

(PC-R4. 379-80). In this analysis, the circuit court made a number of legal errors. As a result, the circuit court's decision flowing from these legal errors was erroneous as a matter of law.

A. Elements of a Brady claim.

The circuit court in its order denying relief set forth its understanding of the elements that must be shown to be present in order to establish that a Brady violation occurred. In this regard, the circuit court stated:

> To establish such a claim, the defendant must show: (1) that the State possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence, nor could he obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different.

(PC-R4. 376). However, the circuit court's statement of the elements of a Brady violation was erroneous.

This Court in Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000), stated:

> Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.

The recent formulation that the Court referenced as omitting the "due diligence" requirement was the decision in Strickler v. Greene, 527 U.S. 263 (1999). There, the United States Supreme Court very clearly set forth the three-part test for demonstrating a due process violation under Brady:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. at 281-82.[27]

[27] The second component of the circuit court's analysis had two alternate parts, *i.e.* either defense counsel possessed the material or he could have obtained it "with any reasonable diligence." In denying Mr. Roberts' relief, the circuit court only relied on the second alternative saying that trial counsel "should and could have obtained Haines' alleged alias" (PC-R4. 379). There was absolutely no evidence that Mr. Roberts' counsel was aware of the alias.

Accordingly, the first part of the circuit court's second component is not at issue here. Counsel merely notes that this Court in Occhicone indicated that nothing in Strickler indicated that trial counsel's possession of the alleged Brady material would not defeat a Brady claim. Counsel does not dispute this Court's point in Occhicone, but would submit that under the standard formulated in Strickler that a showing that trial counsel possessed the Brady material would demonstrate that the defendant was not prejudiced by the State's failure to disclose. Thus under the United States Supreme Court's formulation, the

In fact, the United States Supreme Court's omission of a "due diligence" element to a Brady claim was reaffirmed and explained by that Court in Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). There, the Supreme Court stated: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

Thus, the diligence element in the circuit court's analysis was not properly a part of the analysis as explained by the United States Supreme Court. The circuit court's analysis was thus erroneous as a matter of law. The circuit court's determination "that trial counsel should and could have obtained Haines' alleged alias" was irrelevant to the proper test and under Strickler and Banks does not defeat a Brady claim.[28]

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defense counsel's possession of the Brady material is not one of the three delineated component's of a Brady violation. Instead, it would be one of the circumstances that would showed that no prejudice resulted from the State's failure to disclose.

[28] Before the United States Supreme Court's decision in Strickler, this Court did treat Brady claims as containing a diligence component. However, a finding of a lack of diligence converted the Brady claim into another constitutional claim, *i.e.* ineffective assistance of counsel with the lack of diligence establishing deficient performance. State v. Gunsby,

B. What constitutes impeachment.

Having ruled that trial counsel "should and could have obtained Haines' alleged alias, the circuit court then stated: "Based on the foregoing, the Court does not find that this evidence would have impeached the testimony of Haines nor would it have resulted in a markedly weaker case for the prosecution and a markedly stronger one for Roberts" (PC-R4. 379).[29] In making this statement, the circuit court erred as a matter of law in its conclusion that Ms. Haines' undisclosed use of the alias and her arrests using that name which the State was aware

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670 So.2d 920, 924 (Fla. 1996)("To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel"). Thus, a want of diligence on the part of trial counsel in no way altered the ultimate issue: whether the defendant received a constitutionally adequate adversarial testing. It was merely a question of which player, the prosecutor or the defense attorney, was obligated to make sure that information in the State's possession was also in the possession of defense counsel. In Strickler and in Banks, the United States Supreme Court resolved that question as a matter of law. According to the Supreme Court, defense attorneys have a right to assume that prosecutors are honoring the Brady obligation and are thus freed to focus their investigative resources on obtaining favorable evidence that would not be in the State's possession, subject to the Brady obligation.

[29] In the language the circuit court employed, there seems to be a finding that trial counsel's failure to learn of the alias somehow reflects upon whether the alias constituted impeachment. The seems to a be a *non sequiter*. Whether the use of the alias could have been used as impeachment seems to have nothing to do with counsel's actions in failing to learn of the alias.

of and disposed of favorably to Ms. Haines could not have been used to impeach Ms. Haines.

The circuit court failed to understand the significance of the circumstances surrounding Ms. Haines' use of the alias and the favorable disposition of the arrests under the name Shannon Harvey. First, the United States Supreme Court has made it clear that demonstrations of why a witness might have reason to curry favor with the State constitutes impeachment that the defense is entitled to present before the jury. Davis v. Alaska, 415 U.S. 308 (1974). There, the United States Supreme Court stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." *Douglas* v. *Alabama*, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford* v. *United States*, 282 U.S. 687 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

Davis, 415 U.S. at 317-18 (footnote omitted).

The fact that Ms. Haines had used an alias when she was arrested in Dade County for prostitution in and of itself demonstrates a fear on Ms. Haines' part as to what would happen to her when she was arrested. The only reason to hide behind an alias is fear. Such fear in itself is evidence that Ms. Haines had motive to curry favor and get help from the State.

Moreover, the fact that the State in August of 1984 gave Ms. Haines a favorable disposition of all the pending charges she had under the name of Shannon Harvey was a display of the State's power to help Ms. Haines. This display of power occurred during the time period that the prosecutor was courting Ms. Haines, *i.e.* trying to get her to help him build a case against Mr. Roberts. It thus constitutes evidence of what Ms. Haines had received in the past and what she had reason to hope she would get in the future. Again, those events go towards demonstrating why Ms. Haines would believe that she had reason to curry favor with the State.

Moreover, the United States Supreme Court has made it clear that under the proper Brady analysis, it is not a matter of the defense proving bias or proving the underlying fact of bias or motive being used to impeach a State's witness. As a matter of constitutional law, the defense is entitled to present circumstances that it can argue affords a basis for an inference

of bias or motive.[30] In Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court made it very clear that the proper analysis of a Brady claim requires looking at the undisclosed information from the defenses perspective and how the defense could have used the information had its existence been disclosed.[31] In the circuit court's analysis, it seems that the circuit court believes that it is proper to engage in the materiality analysis by looking at the suppressed information from the court's perspective. That is, the circuit court's view was that if none of the suppressed information changes the court's opinion regarding the defendant's guilt, the evidence did not constitute impeachment. However, the Supreme Court in Kyles noted that the dissent in that case engaged in a very similar analysis relying on the fact that the state trial court had made a finding that the undisclosed impeachment was not credible, and said that the dissent's analysis was legal erroneous. It was not a question of whether a judge presiding in collateral proceedings found the

[30] In Kyles, 514 U.S. at 442 n. 13, the Supreme Court noted that the undisclosed Brady material "would have revealed at least two motives" for a witness to come forward to implicate Kyles in the murder, *i.e.* "[t]hese were additional reasons [for the individual] to ingratiate himself with the police".

[31] Throughout the materiality analysis that the United States Supreme Court conducted in Kyles, the Court considered how the defense "could have" used the Brady material at trial, what "opportunities to attack" portions of the State's case the evidence provided for the defense, and what the defense "could have argued." 514 U.S. at 442 n. 13, 446, 447, 449.

undisclosed information altered his view of the State witness's credibility, but instead the use the defense could have made of the evidence and its resulting effect on the jury. Kyles, 514 U.S. at 449 n. 19 ("Of course neither observation could possibly have affected the jury's appraisal of Burns' credibility at the time of Kyles's trials").

Here, the circuit court's legal finding that the information regarding Ms. Haines' use of the alias, Shannon Harvey, her arrests under that name, and the disposition of those cases, was erroneous. The information could have been used in conformity with Davis v. Alaska to show that Ms. Haines had reason to curry favor with the State. As a matter of law, it constituted impeachment.

C. The use of the markedly weaker and marked stronger standard.

In the circuit court's language previously quoted, the circuit court indicated that it was denying relief on the Brady claim because Ms. Haines' use of an alias would not have "resulted in a markedly weaker case for the prosecution and a markedly stronger one for Roberts" (PC-R4. 379). This formulation of the materiality standard does not conform to the standard set forth by the United States Supreme Court. Further,

this erroneous formulation results in a distorted view of the record.

The United States Supreme Court has held that a new trial is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). Accordingly, a Brady violation is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. Prejudice is shown when confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to disclose favorable information. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

The circuit court misapprehended the law when it held that there must be a "markedly weaker case for the prosecution and a markedly stronger one for Roberts" (PC-R4. 379) in order for Mr. Roberts to show prejudice from the State's failure to disclose favorable evidence, *i.e.* information that could have impeached

Ms. Haines.[32] Such a test ignores the fact that in a close case where the jury struggled with the evidence because it was a close call, it would not take nearly as much to undermine confidence in the outcome as it would in case which was open and shut in favor of a conviction. Where the jury believed a witness, despite numerous challenges to his or her credibility, the credibility has more likely been cracked and damaged, and thus more susceptible to having collapsed if additional impeachment had been available to further attack the witness's credibility. It is very much akin to ice covering a pond having been weakened and cracked from use by skaters. The more weakened the ice is, the more likely the next skater to further stress the ice will cause it to break and cause the skater to fall into the water below.

In fact, this Court has demonstrated how materiality is more readily shown when it involves a witness subjected to heavy impeachment that the jury nonetheless believed at trial. In Mordenti v. State, the witness in question was Mr. Mordenti's ex-wife, and she had been subject to vigorous attack and a

[32] The first problem with the circuit court's analysis is its failure to recognize that the undisclosed information constituted impeachment. Failing to recognize the impeachment value of the undisclosed information condemns any analysis of the resulting prejudice to fail to properly evaluate the potential effect of the undisclosed impeaching information.

wealth of impeaching information. So when it was learned in post-conviction that additional impeachment was withheld from the defense, materiality was readily and easily established because the additional, but suppressed, impeachment may have pushed the witness's credibility past the tipping point. Similarly, a new trial was ordered in Cardona v. State because additional impeachment took on added importance because the witness in question, the co-defendant, had already been heavily impeached.

The circuit court's use of the markedly weaker/ markedly stronger standard in Mr. Roberts' case failed to fully consider all of the circumstances and the fact that the trial prosecutor acknowledged that the case came down to whom to believe (R. 2945) ("Ultimately, you have to decide who is lying and what they have to gain or to lose by coming in this courtroom and lying."). Accordingly, in the circumstance presented here, undisclosed impeachment evidence was of more value than in a case where such an intense credibility battle was not presented. The proper question is whether, considering all of the circumstances, including the credibility battle at issue, is confidence in the reliability of the verdict undermined.

D. The absence of a cumulative materiality analysis.

In its written order denying relief, the circuit court engages in a materiality analysis of bundled bits of withheld information that are discussed in neatly identified parts. No cumulative analysis of all of the undisclosed information occurred.

In the Brady context, the United States Supreme Court and this Court have both explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d 553, 559 (Fla. 1999). In Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly

> discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995)**.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

While considering the materiality of the failure to disclose Ms. Haines' alias and her arrests that were resolved in August of 1984, the circuit court was required to examine cumulatively this information with the other evidence that was not disclosed to the jury but was discovered in postconviction and presented in a previous motion to vacate. Yet, the circuit court's analysis gave no cumulative consideration to the undisclosed impeachment of Michelle Rimondi;[33] instead, the circuit court employed a separate materiality analysis as to Ms. Rimondi.[34]

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[33] This included her phone messages demanding money from Mr. Roberts' prosecuting attorney, and the letter the State sent to her and her father demanding that Ms. Rimondi abide with certain conditions or else face the State's threat to take action.

[34] In Mr. Roberts' prior motion to vacate file in 1989, he presented constitutional challenges to his conviction based on undisclosed impeachment information regarding Ms. Rimondi and on ineffective assistance of counsel as to Ms. Rimondi. These claims were rejected due to a finding of insufficient prejudice

Other Brady material presented in 1989 was ignored altogether. No mention was made of statements made by Dr. Valerie Rao, an associate medical examiner, who provided services at the Rape Treatment Center. In the latter capacity, she saw Ms. Rimondi on June 4, 1984, at 8:20 a.m. (R. 2529-30, 2543-44). According to an undisclosed statement by Dr. Rao which was not heard by the jury, she "didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and collected" (PC-R. 247). Dr. Rao, in fact, found Ms. Rimondi's story so incredible she had to confirm that there had been a homicide with the medical examiner (PC-R. 248).

The circuit court's materiality analysis violated Kyles v. Whitley and Lightbourne v. State.

E. A witness's demand for money is impeachment.

In analyzing the undisclosed information that Michelle Rimondi was demanding that the State provide her money, the circuit court erred as a matter of law in holding that a witness's efforts to obtain consideration is not impeachment.[35]

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given that Rhonda Haines' testimony that Mr. Roberts confessed was left untouched by impeachment information regarding Ms. Rimondi.

[35] Likewise, the circuit court dismissed the undisclosed letter from the prosecutor to Ms. Rimondi's father. In his 1989 motion to vacate, Mr. Roberts included this letter in his Brady

The circuit court found that Ms. Rimondi's demand for money "is speculative at best and does not support the existence of a Brady violation" (PC-R4. 380).

The United States Supreme Court has held that information that demonstrates a witness's motive in assisting the State is impeachment. In Kyles, 514 U.S. at 442 n. 13, the Supreme Court noted that the undisclosed Brady material "would have revealed at least two motives" for a witness to come forward to implicate Kyles in the murder, *i.e.* "[t]hese were additional reasons [for the individual] to ingratiate himself with the police". A Brady claim is not a matter of the defense proving the existence of

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claim. Shortly before Mr. Roberts' trial, Ms. Rimondi had been charged with grand theft in Dade County (R. 664). However, she received pretrial intervention. The defense was precluded from impeaching Ms. Rimondi with the pending charge (R. 665). However, what neither the judge nor the defense knew was that the State had previously placed conditions upon Ms. Rimondi. In an August 28, 1984, letter to her father, the prosecutor stated, "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitments. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action." (PC-R. 277). The State held this threat to take further action over Ms. Rimondi's head. This went undisclosed to the defense and to the jury (PC-R2. 47). Clearly when Ms. Rimondi failed to live up to her commitment, the August 28th letter indicated that she faced "further action"; she had reason to fear the consequences and to want to curry favor with the State. Under Davis v. Alaska, this letter clearly demonstrates that Ms. Rimondi had reason to curry favor with the State, and Mr. Roberts was entitled to present the information to the jury for its consideration in evaluating Ms. Rimondi's credibility.

bias or proving the underlying fact of bias or motive being used to impeach a State's witness.[36] As a matter of constitutional law, the defense is entitled to present circumstances that it can argue afford a basis for an inference of bias or motive. *See* Davis v. Alaska. However, the defense was precluded from informing the jury that Ms. Rimondi was attempting to use her testimony to obtain money from the State. This was undisclosed impeachment, and the circuit court was in error to conclude otherwise.

F. The circuit court ignored the evidence that Ms. Rimondi was provided with money in response to her demand.

The circuit court stated, "Sam Rabin testified that Rimondi received no money or other benefit for her testimony" (PC-R4. 379). However, the circuit court misrepresented the evidence in this regard.

In his federal testimony which was introduced into evidence, Mr. Rabin in fact indicated that Ms. Rimondi was to receive money that he was deliver to her (PC-R4. 1358). In 2004, Mr. Rabin testified that "[a]ny money we would have given

[36] In another words, there does not have to be a showing that the State actually gave the witness money; the question is whether the witness could have been motivated by the desire to use his or her testimony to extract money from the State. Certainly, phone messages showing that a witness is demanding money from the State demonstrate not just a motive or a hope to obtain money, but actually steps taken to cash in.

to her there would be a record of it. So there was no record of her receiving money which I would assume that it's not and we did not give her money" (PC-R4. 938). However, he did not disavow his testimony in federal court that the handwritten note from his secretary which was shown to him while he was testifying indicated that the money was to be taken to Ms. Rimondi at the Holiday Inn (PC-R. 273)("I have to give her money").

Notes contained in the State Attorney's Roberts file which were disclosed to Mr. Roberts during postconviction proceedings provide exculpatory information that was not disclosed to trial counsel. Several of these exhibits reflect Michelle Rimondi's desire for money from Mr. Roberts's prosecutor, Sam Rabin (PC-R2. 47-48). One phone message provided: "Sam call Michelle 271-9855 (Money)" (PC-R. 271). Another document included a phone message to "Sam" from "Michelle Rimondi" "Re: money" (PC-R. 272).[37] Yet another message provided: "Michelle Rimondi --

[37] One of the phone messages from Ms. Rimondi demanding money was addressed to "Sam" and dated "August" (PC-R. 272). Sam Rabin was the assigned prosecutor on Mr. Roberts' case from June of 1984 until February of 1985. The only August that he would have been receiving phone messages from Ms. Rimondi was in August of 1984, which was the same month that Mr. Rabin wrote a letter Ms. Rimondi's father indicating that "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitment. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I

Holiday Inn 324-0800 -- I'll tell her to be here @ 10:00 a.m. I have to give her money" (PC-R. 273). Clearly, these notes reflect more than merely Ms. Rimondi's desire for money. These notes when considered collectively reflect that a decision had been made to give her money. The circuit court's analysis of the significance of these notes and Mr. Rabin's federal testimony was in error.

G. Conclusion.

The circuit court's analysis of Mr. Roberts' Brady claim erred in multiple ways as a matter of law. The circuit court's order should be reversed.

ARGUMENT II
MR. ROBERTS WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE STATE WITHHELD FAVORABLE INFORMATION FROM HIS TRIAL COUNSEL BECAUSE UNDER THE CIRCUMSTANCES THE UNDISCLOSED INFORMATION UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE VERDICT RETURNED IN THE ABSENCE OF THIS INFORMATION.

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police". Kyles v. Whitley, 514 U.S. 419, 437 (1995). The prosecutor as the State's representative has an

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shall be in contact with you to take further action." (PC-R. 277).

obligation to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. Strickler v. Greene, 527 U.S. 263, 280 (1999). Thus, a prosecutor's specific knowledge of the favorable evidence does not matter, if the favorable evidence is in the possession of other State agents. Kyles, 514 U.S. at 438-39 ("Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."). As the Supreme Court has explained, "procedures and regulations can be established to carry [the prosecutors'] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, 405 U.S. 150, 154 (1972). In Banks v. Dretke, 540 U.S. 668, 675-76 (2004), the United States Supreme Court held:

> When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." Id. The prosecutor's constitutional obligation is not discharged simply because the prosecutor thought the defense should have been aware of exculpatory information. In Strickler, the Supreme Court made it clear that defense counsel's diligence was not an element of a Brady claim. The United States Supreme Court has explained, "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976). "[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." Kyles v. Whitley, 514 U.S. 419, 439 (1995).

A due process violation is established when a three-part test is met:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. at 281-82. Prejudice is shown when confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to disclose favorable information. Cardona v. State, 826 So.2d 968 (Fla. 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001).

Here, the State failed disclose Rhonda Haines' 8/16//84 prostitution arrest under the name Shannon Harvey and the disposition of that case along with the undisclosed 2/22/84 prostitution arrest on August 22, 1984 (PC-R4. 160, 163, 204, 944, 947, 950-51).[38] The same day as the disposition of these

[38] When the case went to trial in December of 1985, Ms. Haines testified that she had a discussion with Mr. Roberts on June 4, 1984, in which he said he thought he had killed a man:

> Q. Tell me what time he mentioned this, approximately?
>
> A. It was about noon, around noon.
>
> Q. About noon?
>
> A. Uh-huh.
>
> Q. This is on Monday, the fourth?
>
> A. Yes.
>
> Q. Tell the jury please exactly what Rick said to you about noon on Monday the fourth?
>
> A. I think I killed somebody and I asked him if it was a man or woman and he said a man and that was it, because I really didn't believe him, so I didn't push it no more.

two charges (August 22, 1984), Ms. Haines' rap sheet was run (PC-R4. 952).[39] Neither arrest appears on the August 22nd rap sheet (PC-R4. 952). The rap sheet and the booking card for Shannon Harvey were introduced into evidence by the State during the 1997 evidentiary hearing as a three page exhibit (PC-R4. 201-04). Besides sharing the August 22nd date, each page has been stamped with the date December 14, 1984 (PC-R4. 923).

Q. He said he thought he had killed somebody?

A. Yes.

Q. You asked him if it was a man or woman?

A. Yes.

Q. And he said it was a man?

A. Uh-huh.

Q. Did you press him for any more details about that?

A. No.

Q. Did he volunteer any more details at that time?

A. No.

(R. 1680-81).

[39] Surely the juxtaposition of these two events, the August 22nd disposition of Ms. Haines' two arrests (one under the name Shannon Harvey) and the August 22nd run of Ms. Haines' rap sheet suggests that the State was fully aware of who Shannon Harvey was and her connection to Mr. Roberts' case. Given that the rap sheet and the booking card surfaced together as one exhibit at the 1997 hearing clearly demonstrates that within the State's own files these two items were linked.

Since it was the State that introduced this three page document at the 1997 hearing, indisputably the three page document was in the State's possession.[40]

During Ms. Haines' 2004 testimony, she confirmed that one alias she had used when arrested by the police for prostitution was the name "Shannon Harvey." (PC-R4. 466).[41]

Mr. Roberts' trial attorney testified that he did not recall ever being provided any information regarding "Shannon Harvey." (PC-R4. 892-93).[42] Sam Rabin, the assigned prosecutor

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[40] During the June 25, 2004, proceedings, William Howell, the trial prosecutor who was also lead counsel for the State during these proceedings, did express some surprise at the document that he had introduced into evidence in 1997 ("MR. HOWELL: May I. Where did this document come from? MR. MCCLAIN: You introduced it into evidence back in 1997. MR. HOWELL: I did? MR. MCCLAIN: The State did." PC-R4. 837).

[41] Of course the August 16, 1984, prostitution arrest under the name Shannon Harvey corroborated one of Ms. Haines' main contentions in her affidavit - that she had continued to work as a prostitute following her June 1984 release and was frequently arrested in Dade County. Mr. Roberts' prosecuting attorney was aware of the arrests since they appear in the state attorney's file with a date stamp showing that they were placed in the file while Mr. Rabin was the prosecutor and before he disclosed Ms. Haines' name as a state's witness. Circumstantial evidence would suggest, or at least allow the defense to argue, that he used them as leverage to try to get Ms. Haines to help him prosecute Mr. Roberts.

[42] During the State's cross-examination of trial counsel, the questioning focused upon whether there was any indication that Shannon Harvey and Rhonda Haines were "one in the same." (PC-R4. 903). The thrust of the State's case was to dispute whether there was any obligation to disclose the Shannon Harvey booking card, not whether the booking card was disclosed. Of course, Def. Ex. J (the certified copy of the clerk's file regarding the

on Mr. Roberts' case from June of 1984 until February of 1985 testified that he had no recollection of either the February arrest of Rhonda Haines nor the August arrest of Shannon Harvey and disclosing them to the defense (PC-R4. 954).[43] Judge Leonard Glick, one of the two trial prosecutors, testified that he had no recollection whether Shannon Harvey was an alias used by Rhonda Haines (PC-R4. 852). However, Judge Glick did acknowledge that "an alias for Rhonda Haines, is something [he] would have felt, under Brady, [he] w[as] obligated to disclose." (PC-R4. 852). Mr. Howell, the other trial prosecutor, testified that he had no recollection of seeing the booking card for the prostitution arrest of Shannon Harvey (PC-R4. 733).[44] He indicated that he had no memory of knowing whether Shannon Harvey was an alias for Rhonda Haines, and that he did not recall whether the alias was disclosed to the defense (Id.).[45]

February 22nd prostitution arrest of Rhonda Haines) indicated that Shannon Harvey was an alias for Rhonda Haines (PC-R4. 905). Sam Rabin, the initial prosecutor on Mr. Roberts' case, testified that the documents showed that at the time of the August arrest of Shannon Harvey, it was determined she was the same person as Rhonda Haines (PC-R4. 949, 951).

[43] Mr. Rabin did testify that had he known of the Shannon Harvey alias, he would have disclosed it (PC-R4. 926).

[44] This despite the fact that he was the counsel for the State who introduced the document into evidence at the 1997 evidentiary hearing.

[45] However after his testimony was completed and the hearing wore on, the thrust of Mr. Howell's questioning was to challenge

Theresa Farley Walsh, the investigator used by Mr. Roberts' post-conviction counsel, testified that in her review of the public records disclosed by the State that she had never seen the August 16, 1984, booking card for Shannon Harvey (PC-R4. 748, 784).[46] Similarly, Jeffrey Walsh, an investigator used by

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whether Rhonda Haines and Shannon Harvey were one and the same (PC-R4. 834, 903-04).

[46] The lead attorney from 1989, Tom Dunn, testified in 2004 to his decision that locating Ms. Haines and Ms. Rimondi were the litigation team's top priority (PC-R4. 788, 792). He specifically directed Ms. Walsh to locate Ms. Haines (PC-R4. 793).

At the 2004 proceedings, Ms. Walsh testified to the unsuccessful efforts that she undertook as the CCR investigator assigned to Mr. Roberts' case in 1989 to locate Ms. Haines. Ms. Walsh testified in 1989 the tools to locate a witness that exist now did not exist (PC-R4. 794-95). In 1989, she relied on her experience in other capital cases to try find a means of locating Ms. Haines. Accordingly, she reviewed the public records that were provided for leads on Ms. Haines' whereabouts. She obtained Ms. Haines' social security number, her date of birth, and the FDLE rap sheet concerning her (PC-R4. 749-51). In reading the transcripts, she learned of the eleven warrants in Broward County. She tried to track down court files or any other record regarding these cases. She was very frustrated by her failure to locate some record about them (PC-R4. 753).

Ms. Walsh did notice reference in Ms. Haines' trial testimony to her moving to her mother's residence in Arizona. Ms. Walsh searched for information on Ms. Haines' mother. She was able to come up with an Arizona phone number for Ms. Haines' mother which she provided to Mr. Dunn (PC-R4. 754). Mr. Dunn called the phone number and reached Ms. Haines' mother. However, he was unable to obtain any information regarding Ms. Haines' whereabouts from her mother (PC-R4. 796-97).

In her efforts to locate Ms. Haines, Ms. Walsh attempted every means she could think of to locate Ms. Haines. However, nothing bore fruit during the pendency of the sixty day warrant in 1989. Ms. Walsh continued her efforts to locate Ms. Haines

collateral counsel in 1996 who interviewed Ms. Haines, testified that he never had access to any information regarding Shannon Harvey (PC-R4. 810, 815). Certainly, the record from the proceedings in 1996 when a warrant for Mr. Roberts' execution was pending is rife with efforts to make sure that all public records and Brady material in Mr. Roberts' case had been disclosed and assurances by the State that everything had been turned over. Office of the State Attorney v. Roberts, 669 So. 2d 251 (Fla. 1996).

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after Mr. Roberts received a stay of execution from this Court (PC-R4. 756). But no solid information was discovered.

When an evidentiary hearing was ordered by a federal judge in 1992, Ms. Walsh re-intensified her efforts. She contacted the Arizona Capital Project to obtain its assistance in obtaining Arizona records that might help her locate Ms. Haines (PC-R4. 755-57). She contacted the sheriff's office in Phoenix asking for any records it may have on Ms. Haines. But still, no leads surfaced revealing Ms. Haines' location.

When it appeared that Mr. Roberts' execution was to be rescheduled, a decision was made in desperation to hire Global Search, an outfit from Seattle that offered a service to search for people (PC-R4. 812). Global was very expensive, but only charged if it was successful in finding the individual in question (PC-R4. 759). It was the first entity that employees of CCR learned of that used electronically available data to find missing persons (PC-R4. 785). Mr. Dunn was able to convince the head of CCR to agree to pay Global's bill if Ms. Haines was located (PC-R4. 759).

With Mr. Roberts' execution imminent, Global located Ms. Haines in February of 1996 (PC-R4. 759). Mr. Dunn immediately sent another investigator, Jeff Walsh, who was familiar with Mr. Roberts' case, to Los Angeles to interview Ms. Haines (PC-R4. 813). Within three days of Mr. Walsh's first contact with Ms. Haines, she provided the information appearing in the affidavit and executed the affidavit (PC-R4. 814).

Yet until the State introduced the booking card along with the rap sheet at the 1997 evidentiary hearing, the link between Rhonda Haines and Shannon Harvey remained undisclosed. Given the State's repeated assertions that all public records and Brady material had been disclosed, it was incumbent upon the State to come clean. Banks v. Dretke.

When counsel for Mr. Roberts located Ms. Haines in 1996, her affidavit, in which she attested to her arrests in Dade County after the accessory charge against her was dropped in June of 1984 and she was released from jail, was provided to the circuit court. Ms. Haines also attested to the State's knowledge of those arrests and its efforts to use those arrests as leverage. Had he had the booking in 1996, Mr. Roberts would have relied upon it as objectively demonstrating the Brady violation Ms. Haines revealed when she was contacted in 1996 and provided her affidavit.[47]

[47] At the time that this Court reviewed the summary denial of Mr. Roberts' 1996 motion to vacate, he had no physical documentation to corroborate Ms. Haines' assertions. At that time, there was only her sworn statement as to the Brady violation. It was not until 1997 during the evidentiary hearing ordered by this Court that the State introduced into evidence and thereby for the first time provided to Mr. Roberts' collateral counsel the booking card showing the arrest of Shannon Harvey in August of 1984 on prostitution. That booking card provided Mr. Roberts with a means of discovering that Shannon Harvey was Ms. Haines' alias. After this Court vacated the results of the 1997 hearing and remanded for another evidentiary hearing, Mr. Roberts was afforded his first

A Brady violation is established when:

opportunity to present the information that was unearthed in light of the booking card.

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

Here, the booking card regarding Shannon Harvey was disclosed in 1997. The booking card revealed that on August 16, 1984, Shannon Harvey was arrested on prostitution charges (PC-R4. 204). The booking card was introduced and attached to Ms. Haines FBI rap sheet that was run on August 22, 1984 (PC-R4. 202-03). Using the booking card, court files could be and were located. The court files showed that Shannon Harvey was an alias for Rhonda Haines (PC-R4. 163). The court files showed that the prostitution arrest was disposed of in court on August 22, 1984, the same date the FBI rapsheet was run. The facts

unearthed as a result of the disclosure of the August 22, 1984, booking card constituted impeaching evidence within the meaning of Brady, as both Judge Glick and Mr. Rabin acknowledged in their testimony (PC-R4. 852, 926).

If that booking card, along with the undisclosed February 22, 1984, booking card showing a prostitution arrest of Rhonda Haines, had been disclosed and investigated, court files could have been found reflecting that Shannon Harvey was an alias for Rhonda Haines and that the two prostitution cases were combined for disposition on August 22, 1984. The resolution of the two cases would have provided trial counsel with ammunition with which to further impeach Rhonda Haines by showing that she had reason to believe that the prosecutor had power over her and could in fact make her life better if she would just say what he wanted her to say.

Certainly, the circumstances surrounding the disclosure of the August 16th booking card demonstrates conclusively that it was in the State's possession. At the 2004 evidentiary hearing, no one recalled either the August 16th booking card or the February 22nd booking card being disclosed to the defense. Moreover, at Mr. Roberts' trial, no questions were asked of Ms. Haines regarding these arrests and their dispositions. Mr. Roberts' trial counsel testified that he had been aware of Ms.

Haines' alias, he would have questioned her about it (PC-R4. 893). Thus, the information was suppressed within the meaning of Brady v. Maryland.[49]

To the extent that this evidence was not disclosed to Mr. Roberts's trial counsel, Mr. Roberts was prejudiced. "In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence." Mordenti v. State, 894 So. 2d at 170. In the Brady context, the United States Supreme Court, as well as this Court, have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559. In Lightbourne v. State, 742 So. 2d at 247-48, this Court, in

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[49] In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), this Court stated:

> This argument [that the defense should have figured out that exculpatory evidence existed] is flawed in light of **Strickler and Kyles**, which squarely **place the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.
>
> However, in order to be entitled to relief based on this nondisclosure, Hoffman must demonstrate that the defense was prejudiced by the State's suppression of evidence.

Id. at 179 (emphasis added).

explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995)**.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

The failure to disclose Ms. Haines' alias and her arrests that were resolved in August of 1984 must be examined cumulatively with the other withheld information that was favorable to Mr. Roberts and which the jury did not hear about.

Mr. Roberts pled a Brady claim based upon the undisclosed information that he was provided in 1989 in his prior motion to vacate. The undisclosed favorable information concerned Ms. Rimondi. The decision denying Mr. Roberts' Brady claim premised upon that undisclosed information must be re-examined and evaluated cumulatively with the undisclosed favorable information that concerned Ms. Haines. Lightbourne v. State.

Michelle Rimondi was a critical witness for the State. A central issue at the trial was the credibility of Michelle Rimondi, a sixteen-year-old runaway who supported herself through prostitution (R. 2121). In Mr. Roberts' prior collateral proceedings in 1989, his challenges based upon Brady and ineffective assistance of counsel as to Michelle Rimondi were denied due to a finding of insufficient prejudice given Rhonda Haines' testimony that Mr. Roberts confessed.

On the Monday morning of June 4, 1984, Ian Riley called the Miami police to report that Ms. Rimondi had reported the murder of George Napoles to him. Ms. Rimondi had further indicated that she had been raped. According to Mr. Riley's trial testimony, Ms. Rimondi woke Mr. Riley up at about 5:00 a.m. (R. 2029). Mr. Riley was Joe Ward's roommate; there was evidence which the jury never heard that Joe Ward was Ms. Rimondi's pimp. According to Mr. Riley, Ms. Rimondi indicated a black man had

murdered George Napoles in front of her. About forty minutes later, Ms. Rimondi reportedly revealed that she had also been raped by the black man and that afterwards the assailant drove her to Mr. Ward's home at her request (R. 2030).

Defense counsel at trial established that Michelle Rimondi was a liar. Defense counsel asked Ms. Rimondi about her drug usage. Her responses were inconsistent with her prior deposition, and she admitted lying. "And you lied about that under oath, correct? A. Yes, sir" (R. 2241). Subsequently, she admitted a second lie about her drug usage. "And you lied at that point about your drug use? A. Yes, sir" (R. 2244). Inconsistencies regarding where Ms. Rimondi was located at critical times were written off as "a misunderstanding" (R. 2252), and an unexplainable mistake (R. 2255).

In her testimony, Ms. Rimondi also explained that her memory regarding how she supported herself improved from the time of her deposition to the time of trial. At trial, she testified that she supported herself through "back paychecks" and explained her inconsistent deposition answers: "There were so many questions that day. I just had so many things on my mind that I just really didn't remember" (R. 2262).

Ms. Rimondi did not remember inconsistent prior statements regarding the location of the murder and of the sexual assaults.

(R. 2297-99). Prior inconsistencies as to the number of swings of the baseball bat were "misunderstood" (R. 2300-01). Ms. Rimondi had no explanation for the location of Mr. Napoles' driver's license approximately 150 feet from the body. (R. 2305). She thought it went out the car window while driving over a bridge (R. 2307). Ms. Rimondi had no explanation for inconsistencies regarding when and where a knife was pulled on her, or even whether any threats were made at all (R. 2312-13). Ms. Rimondi had no explanation why Mr. Roberts supposedly stole eight dollars from her but did not take her jewelry which included "seven real gold, 15 karat gold neck chains," "a gold, real gold bracelet," "two real diamond rings," and "four real gold rings" (R. 2316-17).

Ms. Rimondi did not tell anyone about a second sexual assault for six months because "I was never asked" (R. 2334, 2335). The physical location of Mr. Napoles' body did not match Ms. Rimondi's testimony. According to Ms. Rimondi's testimony and the location of the body when found, the tide would have covered the body. However, the body was neither wet nor possessed any residue of the tide (R. 3038).

After defense counsel's tenacious cross-examination of Ms. Rimondi, and in the face of all these inconsistencies in Ms. Rimondi's story, the jury deliberated for nearly twenty-four

hours over three days. But, there was a wealth of evidence undermining Ms. Rimondi's credibility that the jury did not hear. Taken with the substantial impeachment of Ms. Rimondi that the jury did hear, the exclusion of the undisclosed evidence from the jury's consideration cannot be said to have resulted in a verdict worthy of confidence. Kyles.

Following Ian Riley's phone call to the police on the morning of the murder, Ms. Rimondi was transported to the police station. There, she was examined by Dr. Valerie Rao, an associate medical examiner, who provided services at the Rape Treatment Center. In the latter capacity, she saw Ms. Rimondi on June 4, 1984, at 8:20 a.m. (R. 2529-30, 2543-44). According to an undisclosed statement by Dr. Rao, she "didn't believe V's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and collected." Dr. Rao, in fact, found Ms. Rimondi's story so incredible she had to confirm that there had been a homicide with the medical examiner.

At trial, Ms. Rimondi claimed that it was Rickey Roberts who killed Mr. Napoles and raped her at approximately 3:00 a.m. on June 4, 1984. Mr. Roberts testified in his own behalf and denied the charges, although admitting he had picked up a hitchhiking Ms. Rimondi on the night on the murder. Mr.

Roberts' defense was that Ms. Rimondi, a prostitute, either alone or with one or more of her male protectors (Joe Ward and/or Manny Cebey), killed Mr. Napoles, Ms. Rimondi's client, and then framed Mr. Roberts for the murder. Even without the undisclosed favorable information that further impeached Ms. Rimondi and demonstrated additional motives to lie about her involvement in the murder and her relationship with the victim, the jury deliberated for twenty-three hours before convicting.

Shortly before Mr. Roberts' trial, Ms. Rimondi had been charged with grand theft in Dade County (R. 664). However, she received pretrial intervention. The defense was precluded from impeaching Ms. Rimondi with the pending charge (R. 665). However, what neither the judge nor the defense knew was that the State had previously placed conditions upon Ms. Rimondi. In an August 28, 1984, letter to Rimondi’s father, the prosecutor stated, "Michelle has agreed to abide by these conditions and I trust that she will live up to her commitments. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action." The State held this threat to take further action over Ms. Rimondi's head. This went undisclosed to the defense and to the jury.

The State also failed to disclose that Ms. Rimondi was frequently calling Mr. Roberts' prosecutor and demanding money. Notes contained in the State Attorney's Roberts file which were disclosed to Mr. Roberts during postconviction proceedings provide exculpatory information that was not disclosed to trial counsel. Several of these exhibits reflect Michelle Rimondi's desire for money from Mr. Roberts's prosecutor, Sam Rabin. One phone message provided: "Sam call Michelle 271-9855 (Money)." Another document included a phone message to "Sam" from "Michelle Rimondi" "Re: money." Clearly, such action by Ms. Rimondi reflected her desire for money in return for her testimony. A note in the State Attorney file that according to Mr. Rabin was written by his secretary (PC-R4. 1358) provided: "Michelle Rimondi -- Holiday Inn 324-0800 -- I'll tell her to be here @ 10:00 a.m. I have to give her money." This note reflects an intention by the State to pay Ms. Rimondi money.

The nondisclosures precluded the defense from presenting this information to the jury, even though the jury was instructed to consider money payments to a witness in determining credibility.

Mr. Roberts's trial counsel has testified that this undisclosed information was significant and would added to more

fuel to the defense's argument that Ms. Rimondi was not worthy of belief:

> THE WITNESS: I would have made the same argument of allowing the jury to hear all of this and Judge Solomon, you know, for example if I had found out that there were notes in the State Attorneys file that were not disclosed to me that Miss Rimondi was getting paid money by the state attorney and which I understand there was some notes to that effect, there was money changing hands which I was never made aware of and I would have added that as part of my argument.
>
> THE COURT: Before we get into that theoretical aspect, you have knowledge that there was money changing hands?
>
> THE WITNESS: No, no the first I heard of it was when the collateral representative found it in the file.
>
> THE COURT: Well, we can all make up theoretical scenarios that might have changed your defense.
>
> THE WITNESS: It wouldn't have changed it. It just would have added more fuel to the relevancy of the issue.

(PC-R4. 1068-69).

> Q Let me show you what has been marked as defendants exhibit 4.
>
> Have you seen that exhibit prior to today?
>
> A Again as with the last three exhibits, I believe that you just showed it to me for the first time.
>
> Q And you not see that exhibit prior to trial?
>
> A As with the last three exhibits and this exhibit, it was not made known to me by the State Attorneys Office.

Q Would that have been important to your defense of Mr. Roberts?

A Well again it establishes more --

THE COURT: Yes or no.

THE WITNESS: Yes.

(PC-R4. 1070-71).

The jury in this case received the following standard jury instruction:

WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use you common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

* * *

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

(R. 5130) (emphasis added). Ms. Rimondi's receipt of money or other benefit was a factor the jury was specifically instructed to consider in determining whether to believe her or Mr. Roberts. The jury could not consider either Ms. Rimondi's demands for money, nor the State's apparent decision to provide money, however, because it was were never apprised of these

facts and never learned of the communications regarding payments of money.

The record at this point certainly establishes that Michelle Rimondi was demanding. The jury was instructed money payments was a factor to consider in weighing witness credibility. Clearly, whether the demands for money were justifiable was an issue the jury should have heard and considered in deciding whether to believe Ms. Rimondi. However, because of the State's failure to disclose this information, the jury did not have this necessary and available information which the instructions highlighted as an important consideration. In light of the jury instructions highlighting a witness' monetary motivation, disclosure was required.

In addition to money payments, the jury similarly did not hear about the State's threat to take "further action" against Rimondi if she failed to live up to her commitments. When she was caught violating her commitments and committing a crime, she was certainly motivated to curry favor with the State. And in fact, despite the threat, Ms. Rimondi received pre-trial intervention regarding a criminal charge. In fact, the trial court refused to let Mr. Roberts' counsel to elicit any information regarding the Ms. Rimondi's criminal activity and her receipt of lenience.

In an undisclosed August 28, 1984, letter to Michelle Rimondi's father from Mr. Robert's prosecutor, Sam Rabin, Mr. Rabin wrote:

> It was a pleasure speaking to you today regarding our mutual concern, Michelle. After you and I had an opportunity to speak, I again reiterated my demands upon Michelle that she attend school regular, live with the Welshs, seek to obtain a job, maintain contact with the undersigned Assistant State Attorney twice weekly and contact you once a week.
>
> Michelle has agreed to abide by these conditions and I trust that she will live up to her commitment. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action.
>
> I want to apologize for not contacting you earlier regarding your role as Michelle's parent in the prosecution of Rickey Bernard Roberts (case number 84-13010), however this was an oversight on my part. I will keep you informed of all developments in the case, which is presently set for trial on November 12, 1984. If you would like to attend the trial, I will make arrangements to have you flown down at the expense of the State of Florida.
>
> If I can be of any further assistance to you regarding the foregoing correspondence or any other matters related to Michelle, please do not hesitate to contact me at (305) 547-5252.
>
> Sincerely,
>
> JANET RENO
> State Attorney
>
> By: SAMUEL J. RABIN, JR.
> Deputy Chief Assistant
> State Attorney

(PC-R. 277; PC-R4. 1345-48).

Mr. Roberts' trial counsel testified that he was not provided this letter:

> THE WITNESS: Seven is a letter again from Sam Rabin who was the homicide prosector with Miss Rimondi, a letter to someone who I believe is Miss Rimondi's father Kenneth Rimondi.
>
> THE COURT: Well, you know nothing about these documents except they are documents that seem to be dated and sent to somebody.
>
> THE WITNESS: That's all I know.
>
> THE COURT: You never saw them before counsel showed them to you; is that right?
>
> THE WITNESS: Right.

(PC-R4. 1072).

Certainly, prosecutors in Dade County did not routinely notify the parents of teenagers living there that if the teenagers do not abide by certain conditions the prosecutors will "take further action." Exactly what criminal activity Ms. Rimondi engaged in to warrant this letter, Mr. Rabin was unable to recall (PC-R4. 1354-55). However, obviously her criminal history had already warranted some action because "further action" was being threatened. There was, and is, no question that Ms. Rimondi was supporting herself at the time of Mr. Napoles' death through prostitution and that she was actively trying to recruit other teenage girls to the business (R. 670). She also testified at trial that she was engaged in the use of

illegal drugs (R. 2238-44). Certainly this establishes a substantial criminal history for a sixteen year-old. Yet despite Mr. Rabin's warning in his letter "to take further action" if Ms. Rimondi did not maintain contact with him twice weekly and otherwise abide by his conditions, when Ms. Rimondi was subsequently charged with grand theft, she simply received pretrial intervention.

Certainly Mr. Rabin's letter to Ms. Rimondi's parents contained information, *i.e.*, threats "to take further action." Such a threat would have provided Ms. Rimondi with a motive to curry favor with the State. Accordingly, access to the letter would have been useful to defense counsel in cross-examining Ms. Rimondi and in cross-examining her regarding those matters, as is guaranteed by Davis v. Alaska. Here, the State did not disclose its threats to Ms. Rimondi. Defense counsel could not confront Ms. Rimondi with this information because he did not know about it. Consequently, the jury never learned this information which was favorable to Mr. Roberts, particularly in a case that came down to an issue of credibility. In fact, in his closing arguments to the jury, the trial prosecutor acknowledged that the case came down to whom to believe (R. 2945) (“Ultimately, you have to decide who is lying and what

they have to gain or to lose by coming in this courtroom and lying.”).

Moreover, in light of the threat contained in the letter, Ms. Rimondi would have had reason to worry about criminal prosecution. Her one trump card was her testimony against Mr. Roberts. When she was arrested for grand theft in November of 1985, she immediately wanted to talk to Mr. Roberts' prosecuting attorney (PC-R. 263). Whatever the prosecutor's mental state as to his intent to help her, the important thing was what she wanted. She wanted to use her trump. She wanted help in her criminal case, and she viewed the prosecutor in Mr. Roberts' case as a person who would help her. This was a specific example of her willingness to use her testimony to help herself.

The State also failed to disclose a statement by one of its witnesses, Dr. Rao, describing Ms. Rimondi's condition early on June 4, 1984. According to this statement Ms. Rimondi was too "cool and collected." This was inconsistent with testimony from Ms. Rimondi, Ms. Campbell, and Mr. Riley. The statement also reflected Ms. Rimondi's statement that her last coitus had been on June 3, 1984, at 10:00 a.m., although she was "not sure." This too was inconsistent with Ms. Rimondi's trial testimony. Again, trial counsel has testified that he was unaware of the information contained in these notes. The notes concerning Dr.

Rao are a summary of a "statement" by Dr. Rao expressing her opinion that she "didn't clearly believe V's story." These notes indicate that Ms. Rimondi's demeanor was not consistent with having witnessed a murder; it also contradicted Ms. Rimondi's trial testimony as to the time of her last coitus. It contradicted Ms. Rimondi's claim that she was hysterical. Dr. Rao stated that she appeared too "cool and collected." Further, there was no evidence of physical trauma consistent with a rape. The jury should have learned about Dr. Rao's doubts.

At trial, Dr. Rao was called by the State as an expert doctor in dealing with rape victims (R. 1830). Over defense counsel's objection she was qualified as such an expert (R. 1842). Yet, the State was very careful not to ask Dr. Rao's opinion as to whether Ms. Rimondi was raped. Certainly, in a case where the only issue was whether to believe Ms. Rimondi or Mr. Roberts, the nondisclosure of Dr. Rao's statement undermines confidence in the outcome and creates a reasonable probability of a different outcome when considered cumulatively with the other favorable information that the State did not disclose.

Ms. Rimondi presented a dubious account of a sexual battery. According to another State's witness, Ian Riley, Ms. Rimondi failed to reveal the sexual battery when she first told him about the offense (R. 2030). Michelle Rimondi was unsure

about where the assault had occurred. She told different people that she was assaulted in the car and then told others that the assault occurred on the ground. Even more specious is her story, not told until a year and half after the offense, of a second assault after leaving the crime scene (R. 2334-35). Mr. Roberts was never indicted for the second sexual assault. These various accounts given by Ms. Rimondi show that her credibility was more than in dispute -- it was pivotal, as were her motives. Yet the jury was kept in the dark because the State did not disclose favorable information to the defense in violation of Brady.

The State has previously conceded that Mr. Roberts' theory of defense was to show someone else working with Ms. Rimondi committed the murder:

> In his opening statement and closing argument, defense counsel theorized that either the rape victim's boyfriend, Manuel Cebey, or Joe Gary Ward, at whose house the rape victim and Jamie Campbell were staying that weekend, had murdered the victim because they were jealous of his being with the rape victim that evening,and that the rape victim blamed the defendant to protect either one or both of them.

(Florida Supreme Court Response in Case No. 74,920 at 13-14).

Defense counsel, as the State concedes, presented evidence that "Ward was a violent man who sometimes carried a firearm (R. 1595-1600)." (Florida Supreme Court Response in Case No. 74,920 at 30). "Michelle Rimondi, also testified that Ward had a bad temper and was a violent person (R. 2269)." (Florida Supreme Court Response in Case No. 74,920 at 30). However, the defense was unable to provide the jury with information which the State withheld and which was necessary to complete the picture. Since the trial amounted to Ms. Rimondi's word as buttressed by Ms. Haines against Mr. Roberts's word, it was very important for Mr. Roberts to be able to defend by explaining fully why his testimony had the earmarkings of truth.

Mr. Roberts was previously denied relief on his Brady claim relating to Ms. Rimondi because Ms. Haines' testimony remained untainted. The Eleventh Circuit Court of Appeals addressed one aspect of the undisclosed evidence in saying that any further impeachment of Michelle Rimondi "would not have changed the outcome of the trial." Roberts v. Singletary, 29 F.3d 1474, 14 (11th Cir. 1994), cert. denied, 115 S. Ct. 2560 (1995). In making this

determination, the Eleventh Circuit relied on the fact that "Roberts' girlfriend testified that Roberts told her he killed a man." Id. at 14. Whatever weaknesses were found in Michelle Rimondi's testimony, the court found, were compensated for in Rhonda Haines' testimony. Thus, the undisclosed impeachment evidence of Rhonda Haines, when considered cumulatively with the previously presented Brady material, demonstrates that the conviction is unreliable. The failure to disclose all of the favorable information in the State's possession violated due process. Here, when the proper cumulative consideration is given to all of the withheld material, confidence is undermined in the reliability of the outcome. A new trial is warranted.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Roberts respectfully urges the Court to reverse the lower court's denial of 3.850 relief and grant Mr. Roberts a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131 on April 25, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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