

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

Case No. SC01-2671

Lower Tribunal No. 86-8931

RUDOLPH HOLTON,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's granting of Appellee's motion for postconviction relief. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"DAR:___." - record on direct appeal to this Court;

"PCR:___." - record on appeal from the postconviction proceedings;

"PCT:___." - transcript of postconviction evidentiary hearing;

"SPC:___." - supplemental volumes of postconviction proceedings.

STATEMENT OF THE CASE

On July 9, 1986, the grand jury in and for Hillsborough County returned an indictment charging Rudolph Holton with one count of first degree premeditated murder, one count of sexual battery, and one count of arson. (DAR:794-95). Holton proceeded to jury trial on the charges on December 1-5, 1986. Following deliberations, the jury returned verdicts finding Holton guilty as charged on all counts. (DAR:862-63; 879). After the penalty phase, the jury returned a recommendation for death by a vote of 7-5. (DAR:864). The trial judge followed the jury's recommendation and sentenced Holton to death. The court found four aggravating circumstances: (1) the defendant has been previously convicted of a felony involving the use or threat of violence; (2) the murder was committed while the defendant was engaged in the commission of sexual battery; and (3) the murder was especially wicked, evil, atrocious or cruel, and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the court considered the age of the defendant and the fact that he has two children and is a drug addict. (DAR:976-78).

On direct appeal, this Court affirmed Holton's convictions and sentence of death, but remanded the case for resentencing on the charges of arson and sexual battery. Holton v. State, 573 So. 2d 284 (Fla. 1990). The United States Supreme

Court denied certiorari on June 3, 1991. Holton v. Florida, 500 U.S. 960 (1991).

On July 21, 1992, Holton filed his initial motion for postconviction relief and filed amended postconviction motions on January 12, 1993, April 15, 1998, July 1, 1998, and January 8, 2001. (PCR:23-45; 46-91; 123-39; 140-266; 545-633). On December 3, 1998, the trial court conducted a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) on Holton's second amended motion for postconviction relief. (SPC:287-341). The court entered an order on January 29, 1999, granting an evidentiary hearing on several issues, and denying relief on numerous claims. (PCR:360-83).

On August 3, 2000, the State and Holton entered a Joint Stipulation wherein the State conceded error regarding Claim X of Holton's second amended postconviction motion and stipulated that Holton was entitled to a new penalty phase proceeding. (SPC:121-22). Because of the joint stipulation, the parties agreed that an evidentiary hearing was unnecessary as to the remaining penalty phase claims.

On January 8, 2001, Holton filed his "third" amended postconviction motion.¹ (PCR:545-633). The trial court entered an order expanding the evidentiary hearing to include Appellee's Brady claim regarding witness Flemmie Birkins and set the

¹This was actually the fifth amended motion for postconviction relief.

evidentiary hearing for April 18-20, 2001. (PCR:634-35). After conducting the evidentiary hearing, the court entered an order on November 2, 2001, denying in part, and granting in part, Appellee's motion to vacate his judgment and sentence. The State timely filed its Notice of Appeal on November 13, 2001.

STATEMENT OF THE FACTS

THE TRIAL

Prior to Appellee's December 1986 trial, his defense attorney, Mina Morgan, filed a motion to incur additional costs for her investigator. Among the many reasons detailed in the motion, counsel indicated:

The defense investigator spent numerous hours trying to determine the true name of "Pine." A friend of the victim told the defense investigator that "Pine" had raped the victim approximately one week before she was killed. The rape was reported but the victim used a false name because there was a warrant out for her arrest, according to her friend. The investigator ascertained "Pine's" true name, secured his criminal record, and his photograph.

(DAR:824-25). The court granted Appellee's motion and allowed the expenditure of \$1,000 in investigative costs. (DAR:828).

At the outset of Appellee's trial, defense counsel moved for a one week continuance. (DAR:852-54). The court denied the motion and the trial began on December 1, 1986.

The State presented testimony at trial that the victim was found in a burning, vacant crack house in the early morning hours of June 23, 1986. Firefighters responded to the house at 1236 E. Scott Street at 6:33 a.m. and determined that the fire had been burning for about 3-4 hours. (DAR:204-21). Fire investigator G.K. Brown testified that the incendiary fire was in a circular pattern surrounding the victim's body.

She was laying on the floor in a spread eagle position, with a cloth tied around her throat and one of her wrists, and a bottle inserted into her anus. (DAR:217-18). Photographs of the scene depicted numerous cigarette packages in the room, including a pack of Kool cigarettes containing Appellee's fingerprints. (DAR:396-407).

The medical examiner testified that the cloth ligature was wrapped around the victim's neck four times. (DAR:263-64). Over eighty-five percent of her body was burned, but the medical examiner determined that the victim was dead prior to the start of the fire. (DAR:266-70). The medical examiner did not detect the presence of any sperm in the victim's vagina, anus, or mouth. (DAR:271-72). The State also showed the medical examiner pictures of Holton which, according to the medical examiner, depicted scratch marks on Holton's chest that were consistent with having been made within 24-36 hours. The photographs were taken on June 24, 1986 at approximately 3 p.m., and the murder occurred in the early morning hours of June 23, 1986. (DAR:376).

At the medical examiner's office, three hairs were removed from the victim's mouth and sent to the FBI for analysis. (DAR:311-12). FBI agent John Quill testified that the hair fragments were of insufficient length for comparison purposes, but he determined that the hairs exhibited Negroid characteristics. (DAR:316-17). One of the three hairs were characterized as a transitional body hair that originated from one of

three possible areas: from the area on the back of the head to the nape of the neck; the area from the lower abdomen into the pubic area; or from the lower pubic area to the anus. (DAR:321-22). Agent Quill could not identify what body area the other two hairs originated from because the fragments were too small. (DAR:321-22). The agent testified that the three hairs could belong to anyone with Negroid hair, including the victim. (DAR:320).

When law enforcement officers responded to the scene of the murder on the morning of June 23, 1986, they located a car parked across the street with a person asleep in the car. Carl Schenck testified that he picked up a black male hitchhiker in St. Petersburg and drove him across the bridge into Tampa. (DAR:324-29). Mr. Schenck described the hitchhiker as wearing a white t-shirt with lettering on it, a ball cap with something embroidered on it, dark blue pants, and he carried a black shaving kit. (DAR:326). The black shaving kit was discovered in Mr. Schenck's car when law enforcement officers woke him up. Mr. Schenck did not positively identify Appellee as the hitchhiker, but picked his photograph out of a photopack and testified at trial that Holton resembled the hitchhiker. (DAR:328, 342-45). The State showed Mr. Schenck a t-shirt seized from the boarding room that Appellee stayed in the night of the murder and Mr. Schenck testified that it looked like the shirt the hitchhiker was wearing. (DAR:326).

After picking up the hitchhiker, Mr. Schenck drove him to the bridge going into Tampa and told him he could take him across the bridge if he gave him \$2 for gas. (DAR:329). The hitchhiker did not have any money, but he told Mr. Schenck that he knew where they could go to get high on marijuana. Mr. Schenck took him to a place where the hitchhiker purchased \$10 worth of marijuana. (DAR:330-31). After purchasing the marijuana, the men went to a bar where they drank a couple of beers. They left the bar to smoke the marijuana, then returned to the bar and drank some more. (DAR:331). About ten or eleven at night, Mr. Schenck managed to drive to Scott Street where the hitchhiker exited the car and Schenck fell asleep in his car. Mr. Schenck woke up the next morning to the sound of fire engines responding to the scene and was immediately questioned by law enforcement officers. (DAR:333). Officers discovered the black shaving kit the hitchhiker had in the backseat of Mr. Schenck's car.

Johnny Lee Newsome testified that he saw Appellee and the victim together at the Scott Street house on the night of the murder. Mr. Newsome was cutting through a path near the house when he saw Appellee and Katrina Grady talking at the side of the house at about 11:00 p.m. (DAR:350-51). Mr. Newsome testified that Appellee had a "little black purse" in his hands that evening, and when shown the black shaving kit introduced into evidence, the witness stated that was the item Appellee had with

him. Mr. Newsome also saw Mr. Schenck in his car parked across the street. (DAR:352).

Tampa Police Department Detective Kevin Durkin testified that he questioned Appellee on June 24, 1986 at around noon. After reading Appellee his rights, the detective asked Appellee if he had ever been inside the house at 1236 Scott Street. (DAR:375). Appellee responded that he had not been inside the house since about June 12th. Appellee claimed he entered through the rear of the house and never entered the front room at any time. (DAR:375). Appellee told the detective that on the night of the murder he was wearing a blue t-shirt and black shorts, but he threw them away. (DAR:376, 384). Detective Durkin took photographs of Appellee and questioned him about scratches on his knuckles. Appellee originally told the detective that he cut his knuckles in a fight, but he subsequently changed his story and told the detective he cut them on a window. (DAR:377). At the conclusion of the questioning, Appellee asked the detective to bring him a pack of Kool cigarettes if they ever spoke again. (DAR:377).

The next day, June 25th, Detective Durkin returned to the crime scene and located a hypodermic needle on the interior windowsill in the front room near where the victim was located. (DAR:378). The detective then went to a house on Charlotte Street to interview Soldon "Red" Clemmons. Detective Durkin seized a white t-shirt

with the City of Clearwater emblem on it from the room where Appellee stayed on the night of the murder. (DAR:378-79; 930).

The following day, while at the crime scene, Detective Durkin noticed a pack of Kool cigarettes on the floor inside the room adjacent to where the victim's body had been found. (DAR:379-81). Later that day, Detective Durkin again questioned Appellee. When asked if he had been near the house on the night of the murder, Appellee responded that he "was nowhere near the house." (DAR:381-82). When confronted with Johnny Newsome's statement that he had seen Appellee at the house, Appellee changed his story and admitted that he had seen Johnny Newsome at the house that day, but claimed it was approximately 2:00 or 3:00 in the afternoon. (DAR:382). When asked if he had left anything inside the house, Appellee replied that he had not been inside the house that day. When shown photographs of the pack of Kools found inside the house, Appellee changed his story and told the detective that he had been inside the front room of the house approximately one week before the interview which was conducted on June 26, 1986. (DAR:383). He told the detective that there was a heater can in the room, a pie plate, and a blanket. Appellee left two hypodermic needles in the room, one on a windowsill and one on the floor. (DAR:383).

Flemmie Birkins, an inmate trustee at the Hillsborough County Jail, testified that

he had two conversations with Appellee on June 26, 1986 at the jail. Appellee told Birkins that he had strangled a girl with his hands, went to the Star Service Station on Nebraska Avenue and got a can gas, and returned to the house and set it on fire. (DAR:289;297). Birkins testified on cross-examination that he did not know how old the victim was when she was murdered, and Appellee did not tell him her age.² (DAR:296). Birkins reported Appellee's confession to an officer at the jail that evening. About five days later, homicide detectives took Birkins' statement. (DAR:289-90). Birkins never told his defense attorney about his conversations with law enforcement officers and he did not request any favors from the State on his pending charges in exchange for this information. (DAR:290-92).

On cross-examination, defense counsel established that Birkins was awaiting sentencing on his pending burglary and grand theft charges and would not be sentenced until about three weeks after his testimony. (DAR:292-93). Birkins had eight prior felony convictions at the time and could be subject to sentencing as a habitual felony offender. (DAR:300-01). Birkins sentencing scoresheet called for a sentence of 3½ to 5½ years in prison. (DAR:308-09).

²During the defense's case, two homicide detectives testified that Birkins told them his motivation for telling the authorities about Appellee's confession was because he did not think it was right for a seventeen-year-old to get murdered. (DAR:456, 463). Birkins testified he told the officers it was not right for anybody to kill a young girl. (DAR:297).

Defense counsel also questioned Birkins about a pro se motion he wrote to a judge wherein he requested that he be released on his own recognizance because his mother was very ill and he needed to take care of her and he also indicated that he was a witness for the State against another inmate charged with first degree murder. (DAR:302-06; 963-66). Birkins wrote in his motion that he had several members of law enforcement that would be willing to testify on his behalf. (DAR:304). Birkins testified that the “members of law enforcement” were the ones he worked for at the county jail. (DAR:304).

After the State rested its case-in-chief, defense counsel called Tampa Police Department Officer Salvatore Ruggiero who testified that he responded to the crime scene in the early morning hours and spoke with Carl Schenck. (DAR:418-19). Officer Ruggiero testified that Mr. Schenck described the hitchhiker as wearing a red t-shirt rather than a white t-shirt. (DAR:420). The officer also stated that Mr. Schenck described the hitchhiker as having a mustache. (DAR: 421).

The defense called Detective Aubrey Black who also testified that Mr. Schenck described the hitchhiker as wearing a red t-shirt. (DAR:425). According to the detective, Mr. Schenck told him the hitchhiker directed him to Scott Street so he could

get some dope from “his brothers.”³ (DAR:426). Detective Black interviewed Appellee after he had been interviewed twice by other detectives and Appellee told the detective that he went to Middleton High School.⁴ (DAR:429). Appellee told Detective Black that he had been inside the Scott Street house on the night preceding the murder and Appellee saw Johnny Newsome (aka Georgia Boy) outside the house at that time. (DAR:431). Appellee stated that he had not been inside the house on Sunday night/Monday morning, but had spent the night at Red’s boarding house after doing some heroin and cocaine that evening. (DAR:432). On the night of the murder, Appellee claimed he was wearing a black t-shirt, blue short pants and white tennis shoes. Appellee told the detective that he threw those clothes away. (DAR:433).

Defense counsel called Paulette Leonard, an employee of the Star Service Station on Nebraska Avenue. She testified that she went to work at the station at 10:00 p.m. on the night of June 22nd, and was the only employee working until 6:00 a.m. on June 23rd. (DAR:479). During that time, Appellee did not purchase any gas from her station. (DAR:479-83).

³Appellee’s only sibling is a sister who did not live in the immediate vicinity. (DAR:444).

⁴A 20-year reunion announcement for Gibbs High School in St. Petersburg was found in the hitchhiker’s black shaving bag. (DAR:972-73). Among the numerous other items found in the shaving kit were an earring with a hair attached to it and a wire ring with a hair attached to it. (DAR:448-51).

Soldon “Red” Clemmons testified that Appellee arrived at his boarding house at approximately 9:00 or 10:00 p.m. on the night of June 22, 1986.⁵ (DAR:491-95). The following morning, Mr. Clemmons observed Appellee sleeping in his bed. (DAR:496, 515). According to Mr. Clemmons, his mean dog would have “raised cane” had Appellee gotten up during the night and moved around. (DAR:498). Because he lived next to a high-crime area called “the hole,” Mr. Clemmons nailed his windows shut and locked his door at night. Appellee did not have a key to the house. (DAR:499-500).

The victim’s mother, Eva Graddy Lee, testified that her daughter left her house on the night of June 22nd at approximately 10:00 - 10:30 p.m. (DAR:522-24). Bernard Black lived with Eva Lee and was like a stepfather to Katrina Graddy. (DAR:526). He testified that she left the house by herself between 11:00 - 11:30 p.m. (DAR:527). The house where the victim was found was only a couple of blocks away from her home. (DAR:526). Soldon Clemmons’ boarding house was also only a couple blocks away from the burned house. (DAR:529-30).

A defense witness did not show up for her trial testimony, and after extensive discussion, the trial judge ruled that he would read relevant portions of the witness’s

⁵Appellee told Detective Durkin that he arrived there at 11:00 p.m. or midnight. (DAR:395).

deposition testimony to the jury. (DAR:530-87). The following testimony was presented to the jury by the trial court:

Ladies and gentlemen of the jury, Pamela Woods was served as a witness to be here today by the defense and has not responded to the witness subpoena. Therefore, the rules provide that you may hear relevant portions of a deposition taken of Pamela Woods, said deposition being taken on October 22, 1986.

The witness, Pamela Woods, is a known prostitute. A deposition is a pretrial statement taken under oath.

The defense attorney was present. The witness, Pamela Woods, was present, the court reporter was present, the prosecutor was present. The defendant was not present.

You are to take the following statements that I am to read to you from me and judge their credibility as though the witness was here testifying.

The witness, Pamela Woods, said at the deposition that the alleged victim got into an automobile with a black male, the black male not being the defendant, at the intersection of Scott and Nebraska going on midnight, something to twelve o'clock midnight, June 22, 1986, and that's the last time the witness, Pamela Woods, saw her, that is, the alleged victim.

The witness, Pamela Woods, further testified at her deposition that she, Pamela Woods, having been shown a picture of the witness Schenck . . . said he looked familiar, that she thinks she had seen him in the area on the night Katrina disappeared, that the witness, Schenck, was buying drugs.

The witness, Pamela Woods, and the alleged victim, Katrina Ann Graddy, were good friends. The witness further testified on her deposition that the alleged victim, Katrina Ann Grady, was not wearing earrings on the night of her disappearance.

Pamela Woods and the alleged victim, Katrina Ann Graddy, passed by the defendant on two different nights. Once the defendant asked the two where he could get some money from. The second time he asked where he could get some coke from.

The witness, Pamela Woods, gave no time frame as to when these

two alleged encounters with the defendant took place.

The witness, Pamela Woods, stated at her deposition other than the two occurrences just mentioned that she had never seen the defendant with the victim. The witness, Pamela Woods, stated at her deposition that she and the victim got together about 10:00 p.m. on the evening before the disappearance of the alleged victim, Katrina Ann Graddy, and she thinks that they went out on the streets about 11:30 or 12:00 midnight, the evening just before the alleged incident.

The witness, Pamela Woods, had never seen the defendant with a little black case, a shaving kit type. The witness, Pamela Woods, at her deposition stated that she saw the defendant on June 22, 1986, when it was dark out, approximately 8:00 p.m., in the hole with a black bag, the approximate height and length of a legal file, this being a legal file, one foot thick.

The witness, Pamela Woods, further said that the defendant had a lot of change. The witness, Pamela Woods, further stated during her deposition that sometime during the evening of June 22, 1986, that she, Pamela Woods, had smoked some cocaine.

(DAR:587-90). After the witness's deposition testimony was presented to the jury, the defense rested its case. (DAR:590).

In rebuttal, the State recalled Johnny Newsome who testified that he saw Appellee and the victim at the house on Scott Street on Sunday evening, but he denied ever telling the police that he saw Appellee the following day. (DAR:591).

The State also called Carrie Nelson, a woman who lived across the street from the scene of the murder. She testified that she and two other people were sitting on her front porch on Sunday night and saw Appellee go into the Scott Street house at approximately 11:00 p.m. (DAR:593-96). Ms. Nelson went into her house at about

midnight and never saw Appellee exit the house. (DAR:594). Ms. Nelson testified that Appellee was wearing a white t-shirt with red lettering on it. (DAR:597).

On cross-examination, defense counsel elicited testimony from Ms. Nelson that Appellee had burglarized her house on four previous occasions. (DAR:594-95). In addition, Ms. Nelson testified that she had a pending charge for aggravated assault that carried a possible five year prison sentence. (DAR:595). Ms. Nelson knew Katrina Graddy, but did not see her with Appellee that evening. (DAR:597-98).

During the State's rebuttal closing argument, the prosecuting attorney eluded to Flemmie Birkins' prior record and indicated that his sentencing guidelines scoresheet indicated that he scored to a possible sentence of 3½ to 4½ years. (DAR:707). The prosecutor also argued that the hairs found in the victim's mouth could not be linked to the defendant. However, the prosecutor asserted that the hairs were probably not the victim's because FBI agent Quill had testified that one of the hairs came from either an area around her pubic area or an area on the back of her neck. The prosecutor rhetorically asked, "I would just defy anybody to tell me how those are her hairs, how she got them." (DAR:708). After hearing the arguments and the instructions on the law, the jury deliberated and returned a verdict of guilt on all counts. (DAR:745).

At the penalty phase proceedings, the State relied on the evidence presented

during the guilt phase. Appellee called four witnesses and testified on his own behalf. Bernard Black, the victim's stepfather, testified that he has known Appellee for fifteen years and found him to be a thief and a drug user, but he doubted that Appellee could have committed such a violent crime against Katrina Graddy. (DAR:751-52). Appellee's uncle, Calvin Mack, testified that Appellee was a good worker. According to Mr. Mack, Appellee's father died when he was about eleven or twelve years old. (DAR:755). Appellee's sister, Annie Bellenger, testified that their father died when she was only three days old, and her mother died when she was twenty-five years old. (DAR:757-58).

Appellee's fifteen-year-old daughter, Sandravetta Holton, testified that she also had a younger brother named Rudolph Holton. (DAR:759-60). She spoke with her father about his drug problem and he told her that he wanted to stop doing drugs and make something out of himself. (DAR:760).

Appellee testified on his own behalf and acknowledged that he has thirteen prior convictions. (DAR:762). Appellee denied killing Katrina Graddy and claimed that he was at Red's house. Prior to arriving at Red's, he was shooting cocaine. (DAR:763). Appellee saw Flemmie Birkins at the jail, but denied telling him anything about Katrina Graddy. (DAR:764). Appellee testified that he did not know Katrina Graddy and had never seen her before. (DAR:765).

After hearing argument from counsel and the instructions on the law, the jury recommended by a vote of 7-5 that Appellee be sentenced to death. (DAR:784). The trial judge followed the jury's recommendation and sentenced Appellee to death.

Postconviction Evidentiary Hearing

At the evidentiary hearing before the Honorable Daniel L. Peery, Appellee called Dr. Terry Melton to testify about the mitochondrial DNA (mtDNA) results from the three hairs found in the victim's mouth. (PCT:8-33). Dr. Melton concluded that the three hairs found in the victim's mouth did not belong to Appellee, but originated from the victim or possibly a relative of the victim. (PCT:29-33).

Appellee next called Joe Episcopo, an Assistant State Attorney in 1986 who was responsible for prosecuting Appellee's capital murder trial. Collateral counsel showed the witness some exhibits from Flemmie Birkins' court file. Mr. Episcopo did not recall ever seeing a handwritten request by Mr. Birkins for probation, and could not recall whether that document had been turned over to defense counsel Mina Morgan in discovery. (PCT:39). Collateral counsel showed Mr. Episcopo an FDLE rap sheet

printed out on Flemmie Birkins days before Appellee's December 1, 1986 trial which was copied to the State Attorney's Office. (PCT:39). Mr. Episcopo did not recall having access to the rap sheet because Mr. Birkins' case was in another division and he did not recall whether it was disclosed to Appellee's defense attorney, but he assumed it would have been disclosed. (PCT:39-40).

Mr. Episcopo did not recall being present at Flemmie Birkins' sentencing proceeding on December 19, 1986, although the transcript indicated that he was present. (PCT:40-41). At Mr. Birkins' sentencing hearing, it was determined that his original scoresheet had been miscalculated and he actually faced a range between 9 to 12 years. (PCT:41-43). Mr. Episcopo indicated that he provided a copy of Mr. Birkins' presentence investigation report (PSI) to defense counsel prior to trial. (PCT:43).

Mr. Episcopo was shown defense counsel Mina Morgan's motions wherein she indicated that she wanted a continuance because she was investigating an alleged rape of the victim, Katrina Graddy, by a man known as Pine. (PCT:47-53). Collateral counsel showed Mr. Episcopo a police report filed by "Katrina Grant" ten days before the murder alleging a sexual battery by a man named David Pearson. David Pearson gave a false name at the time and also was charged with obstruction by disguise or false identity. (PCT:50-53). Mr. Episcopo was not aware of the two police reports

generated from these two incidents. (PCT:53).

On cross-examination, Mr. Episcopo testified that Flemmie Birkins did not ask for any leniency on his pending charges in exchange for his testimony. (PCT:60). Mr. Episcopo was not responsible for prosecuting Mr. Birkins or for preparing the scoresheet that indicated Birkins scored from 9 to 12 years in prison. (PCT:59-60). Mr. Birkins pleaded open to the court on August 11, 1986, approximately four months before Appellee's trial. Mr. Episcopo explained that an open plea "means you either didn't get or you rejected the state attorney's offer and you're going to take your chances on a judge with an open plea." (PCT:60). During Birkins' open plea to the judge, it was understood that he would be sentenced to 2½ to 3½ years, although the statutory maximum sentence for his offenses was ten years. (PCT:61-64). According to the judge in Mr. Birkins' case, Birkins may have possibly faced life in prison if he was sentenced as a habitual felony offender. (PCT:64).

During Appellee's original trial, he was represented by Mina Morgan. Mrs. Morgan utilized Sonny Fernandez as her investigator for the case. (PCT:70). Mr. Fernandez testified at the postconviction evidentiary hearing that during his investigation, Red Clemmons told him that when the police were searching Appellee's room at the boarding house, a member of law enforcement took a pack of cigarettes off the night stand next to the bed. (PCT:73-74). Although the police interviewed Mr.

Clemmons, Sonny Fernandez was unaware of any police report regarding the interview, but he was aware of a police report indicating that a pack of cigarettes were taken from the crime scene. (PCT:74-75).

Sonny Fernandez did not recall seeing a supplemental report written by Officer Lawless detailing a conversation with David Lamar Smith at the crime scene regarding the murder.⁶ (PCT:82-84). The officer wrote that an individual named David Lamar Smith approached him at the crime scene and asked him who got choked. (PCT:84). The report listed David Smith's date of birth, Tampa Police Department number, and his address according to the police department's rotary file. (PCT:84). Mr. Fernandez did not recall ever attempting to locate this person, but he did recall attempting to find an individual named "Pine." (PCT:84-85).

Mr. Fernandez testified that he never discovered Pine's real name. (PCT:85). When asked by collateral counsel if the name David Pearson rang a bell, the investigator testified that he believed he had something in his files about him but he was not sure. (PCT:85). Mr. Fernandez obtained information that Pine allegedly raped Katrina Graddy. (PCT:85-88). Collateral counsel showed the investigator two police

⁶On cross-examination, the witness conceded that it was possible that he had seen the police report at the time of trial and that it was also possible that Appellee's attorney received the report prior to trial. (PCT:96-97).

reports dated June 13, 1986 regarding the sexual battery and obstruction by disguise or identity. The name of the suspect in these reports were David Lorenzo Pearson,⁷ and the victim was Katrina Grant. (PCT:89). Mr. Fernandez testified that he did not have those reports at the time of Appellee's trial. (PCT:89). Collateral counsel showed the witness that the address on the sexual battery police report was 1035 Joy Court in Tampa and the victim's address on her death certificate was the same. Katrina Graddy's date of birth according to her death certificate was March 29, 1969, and the complainant's date of birth in the police report was March 29, 1968. (PCT:90). Mr. Fernandez testified that it would have been helpful to have those reports at the time of trial because he would have discovered Pine's real name was David Pearson and he would have noted the details of the alleged rape and the waiver of prosecution signed by the victim. (PCT:91-93).

Dr. Edward Willey testified at the evidentiary hearing that he examined the photographs taken of Appellee after his arrest and concluded that the scratch marks on Appellee's body were weeks, or even months, old. (PCT:108-09). While acknowledging the difficulty in estimating the age of wounds, the doctor based his opinion on his interpretation of the photographs that the white areas surrounding the

⁷The suspect originally utilized the name "David Lamar Smith" when officers investigated the crime. (PCT:92).

scratches were scars. (PCT:109-13). The doctor testified that the wounds could have been made by fingernails or some other sharp object. (PCT:113).

Flemmie Birkins testified that he had grown up with Appellee and known him his whole life. (PCT:119-20). In June, 1986, Birkins was incarcerated in the Hillsborough County Jail when he saw Appellee at the jail. Mr. Birkins was facing charges and the possibility of being sentenced to 12 -15 years as a habitual offender. (PCT:120-22). Birkins testified at the evidentiary hearing that he lied when he testified at Appellee's trial in 1986. Birkins claimed he never spoke with Appellee about the crime and Appellee never confessed to him; Birkins was able to get the details of the crime through the news and the jail guards. (PCT:122-24). Mr. Birkins testified that he was under the impression the state was going to assist him with his pending charges based on his testimony against Appellee. (PCT:125).

On cross-examination, Mr. Birkins admitted that he talked to Appellee in the jail. (PCT:129). Birkins called detectives out to the jail and told them that Appellee strangled the victim and burned the house afterwards. (PCT:128-30). Birkins told the detectives that Appellee and the victim were going to the house on Scott Street for the purposes of exchanging drugs for sex. (PCT:130-31). In his statement to detectives, Birkins stated that Appellee told him he did not have any drugs to give the girl on him and he strangled her with his hands while having sex with her. (PCT:131-33). Mr.

Birkins admitted that he took and passed a polygraph test regarding his original statements to detectives.⁸ (PCT:133-34). Birkins also gave a deposition under oath to Appellee's trial attorney, Mina Morgan, and testified that Appellee confessed to the murder in jail and gave him details about the murder. Birkins' admitted that his statement to detectives, his deposition testimony, and his trial testimony were all consistent. (PCT:139).

According to Fleddie Birkins, when Detective Noblitt took his statement, the detective promised him that he would do no time. (PCT:137). Mr. Birkins admitted that he told Detective Noblitt that he did not want anything in return for his testimony. (PCT:138). Mr. Birkins also admitted that he was originally offered a three year deal on his pending charges, but he rejected the offer and pleaded open to the court. (PCT:138).

According to Mr. Birkins, he was contacted by a CCR investigator three weeks

⁸Birkins claimed he took a pill to relax before the polygraph so he could beat the test. (PCT:147). In rebuttal, the State called Jack Mehl, an expert on polygraphs, to testify that Birkins could not have taken any type of tranquilizer and been able to give a valid test. (PCT:351-56). During the test, Birkins showed reaction to the control questions which indicated that he not under the influence of any medication. (PCT:356). The test results indicated that Birkins showed no deception when asked three relevant questions: did Appellee tell you he killed a girl, did Appellee tell you he choked a girl while having sex, and did Appellee tell you he set fire to a house with a girl in it. (PCT:357).

before the evidentiary hearing. (PCT:142). This was the one and only conversation Birkins ever had with any members of CCR. (PCT:143). He testified that the investigator found him on the street and asked him if he was “ready to come tell the truth.” (PCT:145). In the five to ten minute conversation with the investigator, Mr. Birkins, for the very first time in his life, confessed to committing perjury at Mr. Holton’s murder trial. (PCT:145).

Bernoris Smith and Donald Lamar Smith both testified at the evidentiary hearing. Bernoris Smith testified that her husband was living with her in 1986. (PCT:149). In June, 1986, Katrina Graddy came to her house and she overheard Katrina tell Donald Smith that David “Pine” Pearson had raped her and when law enforcement officers investigated the crime, David Pearson used the name “Donald Smith.” (PCT:150-52). Mrs. Smith knew that her husband talked to the police about this incident. (PCT:155-56).

Donald Smith, an incarcerated felon at the time of the evidentiary hearing, reiterated his wife’s testimony regarding Katrina Graddy’s visit to his house. (PCT:154, 259). Mr. Smith noted that she had bruises on her neck and Katrina told him that Pine had choked her. (PCT:238-41). Katrina told Mr. Smith that Pine had given her rock cocaine, and when she would not have sex with him, he raped her. (PCT:241-42). Katrina asked Mr. Smith to go and beat up Pine for her. (PCT:242).

Mr. Smith and Katrina went looking for Pine and saw him on the street. According to Mr. Smith, all the parties yelled at each other and Pine told Katrina that he was going to kill her ass for calling the cops on him. (PCT:243).

On the night of the murder, Mr. Smith testified that he went over to the house on Scott Street when he saw smoke and he saw Pine walking towards him. (PCT:244). Pine told him that Katrina had been found inside the house strangled. (PCT:244). Mr. Smith walked up to the house and asked police if they had found Katrina in the house strangled. (PCT:244). When the police asked him where he heard this, Mr. Smith told them some guy told him; he did not want to reveal Pine's name because there were a lot of people there and he did not want to be a snitch. (PCT:245).

According to Mr. Smith, Pine came to his house a few weeks after the murder for a haircut and they had a conversation "about killing Katrina and he said bitch did smoke my shit and called the police."⁹ (PCT:246). Mr. Smith never informed law enforcement or Appellee's counsel about this "confession" because Pine was a close friend.¹⁰ (PCT:248-49). However, on cross-examination, Mr. Smith testified that he

⁹In subsequent questioning, this conversation was referred to as a "confession" by Pine that he killed Katrina. (PCT:248).

¹⁰Mr. Smith testified that he told a friend, George Smith, about Pine's statement. George Smith testified at the evidentiary hearing that Donald Smith told him Pine had

did tell the “police” about the confession. (PCT:251-52). Mr. Smith said a man named Darryl came to see him in 1998 and showed him a badge and said he was the police.¹¹ (PCT:251-52, 254). Darryl told Mr. Smith that there was an innocent man in prison and they needed his testimony to prove the man was innocent. (PCT:257). Mr. Smith was partially drunk at the time he gave his statement. (PCT:255-56).

Carl Schenck gave testimony similar to his testimony at Appellee’s trial. He discussed picking out a photograph of Appellee from a photopack, but as he did at the trial in 1986, Mr. Schenck again reiterated that he picked the person the hitchhiker most resembled, but he was not absolutely sure of the identification. (PCT:160-61). Almost fifteen years after the murder, an employee of CCR came to Mr. Schenck and showed him a photograph of David Pearson. (PCT:169). Mr. Schenck testified that David Pearson looked more like the hitchhiker than the photograph of Appellee he picked out in 1986, but he could not make a positive identification based solely on a photograph. (PCT:161-69).

Johnny Newsome testified at Appellee’s trial in 1986 that he saw Appellee and the victim outside the Scott Street house on the night of the murder. At the

confessed to killing Katrina Graddy. (PCT:196). When George Smith approached Pine and asked him if he killed her, Pine just walked away and did not say anything. (PCT:197).

¹¹Darryl Jackson, an investigator for CCR, interviewed Donald Smith. (PCT:219-22).

postconviction evidentiary hearing, Mr. Newsome initially testified that he saw Appellee at the house on the night of the murder, but immediately changed his testimony and claimed that he saw Appellee at the house about three days before the murder. (PCT:173). Mr. Newsome testified that he lied at Appellee's trial because he was afraid.¹² (PCT:177).

On cross-examination, Mr. Newsome admitted that the police did not threaten him and promise him anything for his testimony. (PCT:181). Mr. Newsome denied telling the police that he had seen Appellee and the victim at the house on the night of the murder and denied telling the police that he said "hello" to Appellee that evening. (PCT:182-82). Mr. Newsome admitted that he told the police Appellee had a black shaving kit with him when he saw him at the house. (PCT:182-83). Mr. Newsome "couldn't be too sure about the day" he saw Appellee at the house, but testified that it was three days before the murder. (PCT:183). Mr. Newsome admitted that he also lied under oath at his deposition when he testified that he saw Appellee and the victim at the house and Appellee was wearing a t-shirt with a design on it like a circle with writing.¹³ (PCT:186-87).

¹²On cross-examination, Mr. Newsome admitted that he had no reason to lie. (PCT:191-92).

¹³Law enforcement officers seized a t-shirt with a "City of Clearwater" circular emblem on it from Appellee's room the day after the murder. (DAR:378-79; 930).

Elasise Moore, a next door neighbor of the victim, testified that she was with Johnny Newsome in a vacant house on the night of the murder from 9:00 p.m. until the following morning. Ms. Moore testified that they were drinking, smoking, and having sex all night. (PCT:268-69). Ms. Moore also testified that Carrie Nelson told her she lied to the police about Appellee entering the house because Appellee had stolen from her and she wanted to get even with him. (PCT:270-71).

Debra Williams, an investigator for the Office of Capital Collateral Counsel, testified that she attempted to locate an individual named Willie Dan Simmons who had been on the front porch of Carrie Nelson's house on the night of the murder. Ms. Nelson testified at Appellee's trial that she saw Appellee go into the Scott Street house at about 11:00 p.m. on the night of the murder. When investigator Williams finally located Dan Simmons, he told her they saw Appellee pass the Scott Street house at about 9:00 p.m. while Appellee was heading to "the hole." (PCT:207). Mr. Simmons told the investigator he was at Carrie Nelson's house until 4:30 in the morning. (PCT:208). According to the investigator, Dan Simmons told her he saw Carrie Nelson the next morning at the scene of the fire and Carrie Nelson told him she had finally found a way to keep Appellee from breaking into her home; she told police Appellee had gone inside the house the night before. (PCT:208). Mr. Simmons allegedly went to the police at the scene and informed them that Carrie Nelson was

lying. (PCT:208). Ms. Williams never located a police report detailing statements made by Dan Simmons. (PCT:211). At the time of the evidentiary hearing, both Dan Simmons and Carrie Nelson were deceased. (PCT:212).

Appellee's trial counsel, Mina Morgan, testified that she was very busy with another trial prior to Appellee's trial and moved for a continuance. (PCT:279-83). In the motion for continuance, counsel indicated that she had information indicating that Pine may have been involved in the murder. (PCT:283-85). Counsel acknowledged that she indicated in a motion that she had obtained Pine's real name and criminal record, but she testified at the evidentiary hearing that she was not sure that was an accurate statement. (PCT:286-87).

Collateral counsel showed Mina Morgan the two police reports regarding David Lorenzo Pearson's alleged rape of Katrina Grant and his charge of obstruction by disguise or identity. Ms. Morgan indicated that she did not have those police reports at the time of Appellee's trial. (PCT:289). She testified the police reports would have been beneficial because she could have determined Pine's real name and she would have known that he was friends with Donald Smith. Furthermore, she believed the fact that Pine allegedly anally raped the victim was relevant given the fact that the victim

was found with a bottle inserted into her anus after her murder. (PCT:291-92).¹⁴

Collateral counsel questioned Ms. Morgan regarding exhibit 18, a police report authored by T.A. Lawless regarding statements made at the crime scene by Donald Smith. (PCT:292). Ms. Morgan indicated that she was given this report prior to trial because she had a copy in her files. (PCT:292-93). However, on subsequent questioning, she indicated that she did not have the report. (PCT:294-300). She testified that the report would have allowed her to locate Donald Smith. (PCT:300-01).

When questioned about Fleddie Birkins, Ms. Morgan testified that she never saw his presentence investigation report (PSI). (PCT:311). She thought he scored between 3½ to 4½ years, but had she seen his PSI, she thought she would be able to determine that he actually faced a greater sentence. (PCT:311-12). Ms. Morgan testified that she did not have a copy of Mr. Birkins' handwritten motion for probation at the time of trial, and she did not believe she had a copy of his FDLE rap sheet, or a copy of a letter he wrote indicating that he worked for the Tampa Police Department as a confidential informant and helped "cut down the crime rate." (PCT:312, 316-17). Ms. Morgan did not have a copy of Birkins's sentencing hearing

¹⁴Ms. Morgan was also shown a police report from April 1986 involving David Pearson that referenced his possession of a black or brown leather pouch. (PCT:307-08). Ms. Morgan believed this was significant based on the black shaving kit found in Mr. Schenck's car. (PCT:308).

which took place after Appellee's trial on December 19, 1986. (PCT:312-13). On cross-examination, Ms. Morgan indicated that she was aware that Birkins qualified as a habitual felony offender and she recalled that point was a major focus of her cross-examination of Birkins at Appellee's trial. (PCT:336-37). She also acknowledged that Birkins pleaded open to the court and had rejected a plea deal of three years. (PCT:335-36).

In rebuttal, the State called Detective Sandy Noblitt who testified that he recovered a pack of Kool cigarettes from the Scott Street house with Appellee's fingerprints. (PCT:361-65). Detective Noblitt noted that Appellee initially told him he did not know the victim and that he had never been inside the front room of the house. (PCT:362-63). Detectives Noblitt and Durkin investigated Appellee's alibi that he was at Red's boarding house by interviewing Red Clemmons. Mr. Clemmons told them that he rented a room to Appellee that night and "he didn't know anything beyond when [Appellee] went to bed that night." (PCT:366). The detectives seized a City of Clearwater t-shirt from Appellee's room, but did not take a pack of cigarettes.¹⁵

¹⁵Red Clemmons claimed the police took a pack of cigarettes from Appellee's room. (PCT:74, 320). Defense counsel Morgan testified that she did not try and sell the theory that police planted evidence. (PCT:321-22). Obviously, such a theory would have proved unsuccessful given the fact that photographs of the cigarette pack were taken immediately at the crime scene prior to detectives going to Red Clemmons' house. Furthermore, as Mina Morgan testified, the cigarette pack was not that damaging

(PCT:366-67, 376-77).

In addressing the issue of how a bystander at the crime scene may have known the victim was strangled, Detective Noblitt explained the crime scene and the likelihood that bystanders overheard the firemen talking to law enforcement officers after extinguishing the fire. (PCT:367-68). Detective Noblitt also testified that he was surprised that Flemmie Birkins was helping out because he had tried to stay away from the police in the past. (PCT:372).

given Appellee's confession to being inside the house doing drugs. (PCT:322).

SUMMARY OF ARGUMENT

The trial judge erred in granting Appellee relief on his Brady claim. The trial judge determined that the State inadvertently suppressed eight items that would have been favorable to Appellee for impeachment or exculpatory value. The court made a generic statement that Appellee suffered prejudice as a result of the alleged suppression of these items. The State submits that a number of these items were not suppressed by the State. Furthermore, some of the items would not have provided impeachment or exculpatory value to Appellee. Most importantly, however, the trial judge erred in finding that Appellee suffered prejudice as a result of the alleged suppression of these items.

The trial judge also erred in finding that Appellee was entitled to relief based on his claim of newly discovered evidence. Appellee introduced evidence from a mtDNA forensic expert that the three hairs found in the victim's mouth were not Appellee's hair and were most likely the victim's hair. In ruling that Appellee was entitled to relief on this issue, the trial judge concluded that the underlying testimony at Appellee's trial was "incorrect." The court also noted that the argument made by counsel during Appellee's trial is now unsupported. The court's factual findings are clearly erroneous and not supported by the record. The evidence at Appellee's trial was that the hairs were of Negroid origin. The expert at trial could not determine where the hairs

originated from, but he testified that they could have come from Appellee, the victim, or any other person with Negroid hair. There is nothing “incorrect” about his testimony. Subsequent mtDNA evidence has established that the hairs were not Appellee’s hair, but this was argued to the jury below by defense counsel. Certainly, this newly discovered evidence is not of such a nature that it would probably produce an acquittal on retrial.

Finally, when viewing the two alleged errors cumulatively, the trial judge ruled that he could not determine that the errors were harmless. Accordingly, the trial judge granted Appellee relief and ordered a new trial. The State submits that the court erred in concluding that the Brady claim and the newly discovered evidence claim, when viewed collectively, required reversal of Appellee’s conviction. The majority of the information Appellee would have obtained from the Brady items and the newly discovered evidence was presented in some form by defense counsel in an attempt to establish Appellee’s defense. The jury rejected the arguments at that time and there is no “reasonable probability” of a different result based on Appellee’s Brady claim, nor is the mtDNA results evidence of such a nature that it would probably produce an acquittal on retrial. Accordingly, this Court should reverse the trial court’s order granting Appellee relief on his postconviction claims.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN FINDING THAT THE STATE VIOLATED BRADY V. MARYLAND, 373 U.S. 83 (1963) BY FAILING TO DISCLOSE A NUMBER OF ITEMS TO DEFENSE COUNSEL PRIOR TO APPELLEE'S TRIAL.

After conducting the evidentiary hearing, the trial court issued an order denying, in part, and granting in part, Appellee's motion to vacate judgment and sentence. The court granted Appellee relief based on three claims: (1) a Brady claim, (2) a newly discovered evidence claim, and (3) a cumulative error claim. (PCR:800-20). Each of the court's findings will be addressed separately; and as will be seen, the facts of this case do not compel a new trial under the application of any relevant legal principles.

During the postconviction proceedings, Appellee asserted that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose the following evidence:

1. A police report regarding a sexual assault of "Katrina Grant" who had the same address as the victim.
2. A police report regarding Donald Smith at the crime scene.
3. A police report regarding an interview with Donald Smith.
4. A PSI regarding Mr. Birkins' criminal history.
5. A motion drafted by Mr. Birkins.

6. The transcript of Mr. Birkins' sentencing hearing.
7. A FDLE report.
8. A letter from Mr. Birkins indicating he was a confidential informant.

In granting relief on this claim, the trial court found that this evidence would have been favorable for impeachment value and exculpatory value. The court stated:

The Court finds that the evidence was inadvertently suppressed by the State *and that the Defendant suffered prejudice from the suppression of the evidence*. The Court specifically finds that the State did not act in bad faith and did not willfully suppress any evidence in this case. It was only through inadvertence or neglect that the evidence was suppressed. Consequently, the Court finds merit to the Defendant's Brady claims. As such, the Defendant is entitled to relief with regard to this claim.

(PCR:809) (emphasis added).

The standard of review in determining whether the trial court erred in determining that the State failed to disclose Brady material is a factual finding that should be upheld as long as it is supported by competent, substantial evidence. Way v. State, 760 So. 2d 903, 911 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999). In this case, competent, substantial evidence does not support the trial court's determination. The trial court's ruling lacks support in the record and is entirely devoid of *any* analysis. The State submits that this Court must reverse the trial court's ruling and find that the State did not violate Brady by failing to disclose the evidence.

The United States Supreme Court has stated that there are three components of a Brady violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Where evidence has been withheld, the ultimate test under Brady becomes whether the disclosed information is of such a nature and weight that "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." Young v. State, 739 So. 2d 553, 559 (Fla. 1999). The question of whether a reasonable probability exists that the disclosure of the suppressed evidence would have changed the outcome of the trial is a mixed question of law and fact. Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001). "The standard requires an independent review of the legal question of prejudice while giving deference to the trial court's factual finding and ensures the uniform application of law." Id.

A. A Police Report Regarding a Sexual Assault of "Katrina Grant" who had the Same Address as the Victim.

The trial judge concluded that the police report filed by "Katrina Grant"

regarding a sexual assault committed by David Pearson was inadvertently suppressed by the State and Appellee suffered prejudice from the alleged suppression. Contrary to the trial court's conclusion, the police report was not suppressed by the State, nor did Appellee suffer any prejudice.

The State first questions the trial court's finding that the police report regarding the alleged rape of "Katrina Grant" was Brady material. In order to constitute Brady material, the evidence must be favorable to the accused because it is either exculpatory or because it has impeachment value. Clearly, the police report did not impeach any person's testimony at trial. The only remaining question is whether the report filed by "Katrina Grant" was exculpatory to Appellee. Although Appellee will obviously assert that this report would have allowed defense counsel to discover the real name on Pine,¹⁶ and argue at trial that Pine was responsible for the murder, it does not necessarily follow that the evidence was exculpatory to Appellee's murder charge.

There are a number of problems with automatically concluding that the police report of the alleged sexual assault was exculpatory. First, it has never been established that the victim of the alleged assault, Katrina Grant, was in fact the murder

¹⁶It should be noted that at the time of Appellee's trial, defense counsel acknowledged that she had obtained Pine's real name, his criminal record, and his photograph. (DAR:824-25). At the evidentiary hearing, defense counsel indicated that she was not sure whether they actually ever obtained Pine's true name. (PCT:286-87).

victim, Katrina Graddy. Although Katrina Grant used the victim's address in the police report, the name and date of birth are both different from Katrina Grant. Second, the victim signed a waiver of prosecution. The victim was a known prostitute and David "Pine" Pearson told law enforcement officers that he had engaged in consensual sex with Katrina Grant.

The State submits that even if Appellee could establish that Katrina Grant was actually Katrina Graddy, the evidence of the prior sexual assault would not have been admissible. There were very few similarities between the reported sexual assault of Katrina Grant and the murder of Katrina Graddy; certainly not enough similarity to be admissible as reverse Williams rule evidence. The only way the evidence of the prior sexual assault could be material to Appellee's trial is if he was allowed to argue that David Pearson committed the murder, as reverse Williams rule evidence.

At the time of Appellee's trial, Florida Statutes, section 90.404 provided:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.*

§ 90.404(2)(a), Fla. Stat. (1985) (emphasis added).

This Court addressed the proper standard regarding the admissibility of reverse Williams rule evidence in State v. Savino, 567 So. 2d 892 (Fla. 1990). In Savino, the

defendant was charged with the first degree murder of his stepson by blunt trauma to the stomach. Id. at 894. In his defense, Savino sought to introduce evidence that his wife, the boy's natural mother, allegedly killed her one-month-old daughter with a blunt instrument seven years previously. Id. The trial judge refused to allow him to introduce this evidence. In upholding the court's discretionary ruling, this Court stated:

The test for admissibility of similar-fact evidence is relevancy. Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. Drake v. State, 400 So. 2d 1217 (Fla. 1981); State v. Maisto, 427 So. 2d 1120 (Fla. 3d DCA 1983); Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA), review denied, 424 So. 2d 763 (Fla. 1982). If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

Id. The Savino court found that the trial court did not abuse its discretion in finding that the wife's alleged abuse of a one-month-old child, in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in

Savino's trial.

Likewise, in the instant case, assuming Appellee could establish that Katrina Graddy was the actual complainant of the sexual assault, there is not the type of "fingerprint" similarity required to be admissible as reverse Williams rule evidence. See also Traina v. State, 657 So. 2d 1227 (Fla. 4th DCA 1995) (stating that evidence of past crime must meet "fingerprint type" of similarity test to be admissible as reverse Williams rule evidence). The murder in this case was done by strangulation with a cloth ligature. Admittedly, the victim was found nude with a bottle inserted in her rectum, but there was no evidence of any type of forced sexual intercourse before her murder. There were no trauma injuries to her mouth, vagina, or anus, and no semen was found. (DAR:270-72). Additionally, the victim was set on fire after she was murdered. This is in stark contrast to the alleged sexual assault by David Pearson described in the police report. In that case, the victim reported that she was anally raped, but the perpetrator claimed it was consensual sex and the victim signed a waiver of prosecution. This incident, some ten days before Katrina Graddy's murder, does not meet the "fingerprint" type of similarity required to be admissible reverse Williams rule evidence.

In addition to not being exculpatory or admissible, the trial court also erred in concluding that the report was "suppressed" by the State. In Kyles v. Whitley, 514

U.S. 419, 437 (1995), the Supreme Court stated that the duty to disclose favorable evidence encompasses evidence known to the prosecutor and those acting on behalf of the government, including the police. More recently, in Strickler v. Greene, 527 U.S. 263 (1999), the Court addressed the three components of a Brady claim. The Strickler court further explained that the Brady element of “due diligence” was not reached, “because it [was] not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them.” Id. at 287 n.33.¹⁷

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Prior to Strickler, countless cases reference diligent discovery in connection with Brady claims. See e.g., United States v. Rodriguez, 162 F.3d 135 (1st Cir. 1998) (government has no Brady burden to disclose evidence readily available to a diligent defender); United States v. Jones, 160 F.3d 473, 479-80 (8th Cir. 1998) (no Brady violation if the defendants, using reasonable diligence, could have obtained the information themselves); United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997) (to establish Brady violation, defendant must prove, *inter alia*, he did not possess evidence nor could he have obtained it himself with any reasonable diligence); United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982) (evidence is not “suppressed” within the meaning of Brady if the defendant knew or should have known of “essential facts permitting him to take advantage of any exculpatory evidence”); United States v. Stewart, 513 F.2d 957, 960 (2d Cir. 1975) (government not required to disclose a witness's prior testimony if the defendant is “on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish”). Since Strickler, numerous federal decisions interpreting Brady continue to include “due diligence” as an element of Brady. See e.g., United States v. Grintjes, 237 F.3d 876, 880 (7th Cir. 2001) (this court has repeatedly held that Brady does not apply to evidence that a defendant would have been able to discover himself through reasonable diligence);

In this case, the police report of the sexual assault could have easily been discovered with due diligence. Defense counsel was aware that the victim was allegedly raped by Pine about a week before her murder. (DAR:818). Counsel was aware that the victim reported the rape and that she probably did not use her real name because there was a warrant out for her arrest. (DAR:824-25). Given this information, defense counsel could have ascertained the existence of the police report with due diligence.

Finally, the State submits that the trial court erred in concluding that Appellee suffered prejudice from the suppression of this evidence. The court's conclusion is simply unsupported by the record. Furthermore, this Court cannot give any meaningful review of the trial court's order due to the trial judge's complete lack of any analysis. The court simply concluded that "the Defendant suffered prejudice from the suppression of the evidence." (PCR:809). As noted above, Appellee did not suffer any prejudice because the information contained in the police report would not have led to any admissible, exculpatory evidence. Furthermore, by defense counsel's own account, she knew that Pine had allegedly raped the victim about a week before

Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir.) (there is no suppression of evidence if the defendant could have learned of the information through reasonable diligence), cert. denied, 121 S. Ct. 629 (2000).

the murder and she knew that the victim reported the rape by using a false name. Defense counsel also stated that she had Pine's real name, criminal history, and his photograph. Because defense counsel had all of this information, and could have easily obtained the police report with due diligence, this Court should find that the trial court erred in granting Appellee relief on his Brady claim.

B. A Police Report Regarding Donald Smith at the Crime Scene.

Defense investigator Sonny Fernandez testified that he did not recall having received a supplemental police report prepared by Tampa Police Officer T.A. Lawless regarding statements made by Donald Smith at the crime scene. (PCT:82-85). Defense counsel Mina Morgan, on the other hand, testified that she had the report in her files. (PCT:292-93). Ms. Morgan testified that she would have wanted to interview Donald Smith, but she probably ran out of time. (PCT:293). She further acknowledged that Officer "T.A. Lawless"¹⁸ was listed on the State's notice of discovery. Ms. Morgan excused the officer without taking his deposition. (PCT:295-96). Upon further questioning, Ms. Morgan indicated that she probably excused Officer Lawless from his deposition because she did not have his report. (PCT:296-

¹⁸There was a typographical error on Officer Lawless' last name and also on his badge number. Ms. Morgan testified that the police report listed Officer Lawless' badge number as 627, whereas the State's notice of discovery listed his number as 62. (PCT:295).

300).¹⁹ Ms. Morgan testified that had she seen the report, she would have been able to locate Donald Smith and ask him how he had knowledge about the murder while standing outside the crime scene. (PCT:300-02).

Clearly, the State did not suppress the report filed by Officer Lawless. Ms. Morgan initially acknowledged that she had the report, but subsequently speculated that her decision to excuse the officer from his deposition was because she probably did not have the report. See Jennings v. State, 782 So. 2d 853, 861 (Fla. 2001) (stating that if defense counsel knows of information prior to trial, there can be no Brady violation). In this case, there were indications in the original trial record that the State provided supplemental crime scene reports in additional discovery.²⁰ (DCAR:822). Given defense counsel's testimony that she had the police report in her files, it cannot be established that the State suppressed the supplemental police report.

Even if defense counsel did not have the report, Officer Lawless was listed on the State's notice of discovery and was available for deposition. (DAR:812). With the exercise of due diligence, defense counsel would have obtained the information

¹⁹Ms. Morgan did not offer an explanation as to her earlier testimony that she had the report. (PCT:292-93).

²⁰At the evidentiary hearing, the police report was marked as exhibit 18, a copy of a TPD auxiliary report (PCR:650), and the State's notice of additional discovery filed in October, 1986, lists a TPD Auxiliary Report. (DAR:822).

contained in the police report authored by Officer Lawless. See Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (stating 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 trial judge found that counsel was not ineffective for failing to properly investigate Appellee's case. However, this Court should find that the trial judge erred in granting relief on this aspect of Appellee's Brady claim because the police report was not withheld from defense counsel.

In addition, Appellee did not suffer any prejudice from not obtaining the report. Even assuming counsel could locate Donald Smith in time for trial, and assuming Smith gave credible testimony at the evidentiary hearing, it is clear that Mr. Smith would not have testified about his conversations with David Pearson. As a review of Mr. Smith's testimony at the evidentiary hearing establishes, David Pearson was one of his closest friends and Donald Smith would not have "snitched" on him. At the crime scene, Smith would not tell the police who gave him the information that someone had been choked, but he claimed he would have told them if they approached him later. (PCT:245). Despite this claim, Smith stated that he never went to the police with his information because he was best friends with David "Pine" Pearson and he lived in the projects and could not be labeled a snitch. (PCT:248-51).

Thus, even if Appellee had obtained Officer Lawless' report, it would not have produced any admissible exculpatory or impeachment evidence.

C. A Police Report Regarding an Interview with Donald Smith.

The trial court's order granting Appellee relief mentions "[a] police report regarding an interview with Donald Smith" as Brady material that the State suppressed. (PCR:808). Undersigned counsel is unaware of any police report detailing an interview with Donald Smith (other than Defense Exhibit 18, the TPD auxiliary report authored by Officer Lawless discussed in subsection B, supra). In fact, Donald Smith testified at the evidentiary hearing that he never spoke with the police other than at the crime scene. (PCT:245-62). Because the witness, by his own testimony, never gave an interview to the police other than at the crime scene, the trial court erred in finding that the State suppressed an apparently nonexistent police report.

D. A PSI Regarding Mr. Birkins' Criminal History.

Mina Morgan testified that she did not receive Flemmie Birkins' presentence investigative report (PSI) prior to trial.²¹ (PCT:311). Ms. Morgan testified that the PSI, along with an FDLE rap sheet, would probably have allowed her to realize that the scoresheet she was provided was inaccurate. (PCT:311-12). The scoresheet

²¹At Mr. Birkins sentencing hearing, the prosecutor, Joe Episcopo, stated that he had previously provided Birkins' PSI to Mina Morgan and it was available at Appellee's trial. (PCT:43).

provided to her prior to trial indicated that Mr. Birkins scored to a range between 3½ to 4½ years. (PCT:312). According to the prosecutor, Mr. Birkins' original scoresheet was incorrectly computed by another prosecutor and Birkins really scored between 9 to 12 years. (PCT:336; Defense Exhibit 10).

At Appellee's trial, defense counsel established that Birkins was awaiting sentencing on his pending burglary and grand theft charges and he would not be sentenced on his open plea until December 19, 1986, about three weeks after his testimony. (DAR:292-93). Defense counsel was also aware that Birkins had eight prior felony convictions and could be sentenced as a habitual felony offender. (DAR:300-01). Both the prosecuting attorney and defense counsel questioned Birkins about his sentencing scoresheet range of 3½ to 5½ years in prison. (DAR:308-09).

Even resolving the conflicting testimony in Appellee's favor and assuming the PSI was suppressed by the State,²² the trial court's finding that he suffered prejudice from the non-disclosure is erroneous. As explained by the United States Supreme Court in Kyles v. Whitley, 514 U.S. 419, 437 (1995) a "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more." In addition, the defendant must establish that his

²²At Birkins' sentencing hearing, the prosecutor stated that he had provided defense counsel a copy of the PSI prior to trial. See Defense Exhibit 10.

defense was prejudiced by the State's suppression of evidence, in other words, that the evidence was material. The United States Supreme Court articulated the specific test for determining the materiality of evidence in order to meet the prejudice prong of

Brady:

[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 682 (1985). A showing of materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal." Kyles, 514 U.S. at 434.

Rather, as the Supreme Court explained:

[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Strickler, 527 U.S. at 290 (quoting Kyles, 514 U.S. at 435) (citations omitted).

In this case, the alleged suppression of Flemmie Birkins' PSI had absolutely no effect on the proceedings. Defense counsel indicated that if she had seen the PSI and FDLE rap sheet, she would have probably figured out that Birkins scoresheet range was incorrectly scored. Although this is pure after-the-fact speculation on trial

counsel's part, the fact remains that she effectively cross-examined Mr. Birkins at Appellee's trial and established that he had eight felony convictions and could be sentenced as a habitual felony offender on his burglary and grand theft charges. Despite his extensive record, Mr. Birkins expected to receive a 3 year sentence on his pending charges based on his open plea. (DAR:293). Defense counsel also elicited the fact that Birkins had filed a pro se motion for release on recognizance wherein he asked to be released on his pending charges and mentioned that he was a witness for the State in a first-degree murder case. (DAR:302-10).

Clearly, even if the jury was aware that Birkins scored between 9 and 12 years on the sentencing scoresheet, rather than the reported 3½ to 4½ years, such a fact would not have affected the jury's credibility determination of Birkins. The jury was aware that Birkins had an extensive record and faced a possible lengthy prison sentence on his pending charges, perhaps even being sentenced as a habitual felony offender. Birkins testified that he was not seeking any type of deal for his testimony. In fact, Birkins did not even inform his own attorney that he was speaking with law enforcement officers about Appellee's jail-house confession. The jury was aware, however, that Birkins had written his judge seeking a release on his own recognizance for, among other reasons, being a State witness in Appellee's trial. Given this information, the fact that Birkins may have scored to a slightly higher range would not

have affected the jury's perception of Birkins' testimony. Accordingly, the State submits that the trial judge in the instant case erred in making his nonspecific finding that Appellee was prejudiced by the State's alleged suppression of Flemmie Birkins' presentence investigation report.

E. A Motion Drafted by Mr. Birkins.

In August 1986, Flemmie Birkins filed a handwritten motion for probation in his pending case that was contained in his court file. (PCT:39, 57). Defense counsel Mina Morgan testified that she did not have the document at the time of trial. (PCT:312). Ms. Morgan did not testify that the document contained any impeachment evidence. In fact, collateral counsel never questioned any of the postconviction witnesses about this document in any detail. (PCT:39, 312). When briefly discussing Birkins' motion, the prosecuting attorney, Joe Episcopo, noted that Birkins did not ask his judge for any type of break because he was a witness in the Holton case.²³

The postconviction trial judge clearly erred in finding that Birkins' pro se motion for probation constituted Brady material that was suppressed by the State and resulted in prejudice to Appellee. First, the State questions whether this document contained any impeachment or exculpatory material. Defense counsel never identified how she

²³In the motion, Birkins stated that he could help the Tampa Police Department and narcotic squad as an informant. See Defense Exhibit 6.

would have used this document to impeach Birkins. Counsel may have been allowed to confront Birkins with the fact that he indicated in his motion that he could potentially help the police as an informant, but this is not necessarily impeaching evidence. Obviously, if the motion contained any substantial impeachment value, trial counsel would have, at a minimum, identified it at the evidentiary hearing and discussed how it affected Appellee's case.

Second, the motion was never suppressed by the State. Although defense counsel testified that she did not have the motion at the time of trial, it was undisputed that the document was contained in Birkins' court file; a public record contained in a court file that could have easily been inspected by counsel prior to trial. See § 119.01(1), Fla. Stat. (1985) (stating that it is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person). Finally, the fact that defense counsel did not have the motion obviously did not result in any prejudice to Appellee. As noted, defense counsel never testified to any impeachment value to the motion and never claimed that the disclosed information was of such a nature that confidence in the outcome of the trial was undermined. Accordingly, this Court should find that the trial judge erred in granting Appellee relief as to this claim.

F. The Transcript of Mr. Birkins' Sentencing Hearing.

Mina Morgan testified at the evidentiary hearing that she was never given a copy of Flemmie Birkins' sentencing hearing held on December 19, 1986, some two weeks after the conclusion of Appellee's trial. (PCT:312-13). Ms. Morgan did not file her notice of appeal in Appellee's case until January, 1987. (PCT:313). She testified that she never knew Flemmie Birkins' sentence until a few years before Appellee's postconviction evidentiary hearing. (PCT:313).

At Appellee's trial, Ms. Morgan questioned Birkins extensively about his pending charges, his open guilty plea to the court, and his anticipated three year sentence. (DAR:292-310). Mr. Birkins testified that he entered a guilty plea, open to the court, but he expected to be sentenced to three years, with credit for time served.²⁴ (DAR:293, 310). Defense counsel was aware of Birkins scheduled sentencing hearing on December 19, 1986, and was also aware of the presiding judge.

The State submits that the trial judge incorrectly concluded that the transcript of Birkins' sentencing hearing constituted Brady material. Although the court proceeding took place in December, 1986, the hearing was not transcribed until February 10, 1988. See Defense Exhibit 10. The sentencing hearing took place in open court on a date defense counsel was well aware of, thus, had counsel found it

²⁴Birkins originally testified that he had already been sentenced to three years, but clarified that his final sentence hearing was scheduled for December 19, 1986. (DAR:292-93).

relevant and important to attend, she could have easily attended the hearing. Even if she did not attend the hearing, it would not be difficult to determine the sentence imposed on that date. In short, had counsel exercised any diligence, she would have been able to ascertain the sentence Birkins received.

Additionally, Appellee suffered no prejudice from failing to have Birkins' sentencing transcript. Admittedly, the prosecutor acknowledged at Birkins' sentencing hearing that the scoresheet had been improperly calculated, see sub-issue D supra, but this fact would not have affected the jury's credibility determination of Birkins' testimony. At the evidentiary hearing, Birkins testified that he rejected a plea deal to three years in prison and was ultimately sentenced pursuant to his open guilty plea to jail, community control, house arrest, and probation. (PCT:138-39). Mr. Birkins was unhappy with this sentence and indicated that he would have never taken a plea to "all that." (PCT:139). Even if defense counsel was aware that Birkins scored to a range of 9 to 12 years, this would not have altered the jury's view of his testimony. Accordingly, the trial judge erred in granting Appellee postconviction relief on this claim.

G. A FDLE Report.

Mina Morgan testified that she did not believe that she received a copy of an FDLE rap sheet on Flemmie Birkins. (PCT:312). She stated that if she had this

document, she could have counted Birkins' prior convictions and realized that his scoresheet was miscalculated. (PCT:312). Of course, at Appellee's trial, counsel questioned Birkins about his eight prior felony convictions. Counsel also noted that each of Birkins' pending offenses carried five years each, and there was a possibility that those terms could be doubled if he was sentenced as a habitual felony offender. (DAR:301).

Even if this Court finds that the State did not disclose the FDLE rap sheet based on defense counsel's equivocal statements, there was no showing that Appellee suffered any prejudice from the alleged suppression. As previously argued, even if counsel discovered that Birkins' scoresheet range had been miscalculated, such a revelation would not have affected the outcome of the proceedings. Defense counsel made sure the jury was aware that Birkins had eight prior felony convictions and had served time in prison on four occasions.²⁵ At the time of his testimony, Birkins had two pending charges that carried five year terms, with the possibility of having the terms increased if he was sentenced as a habitual offender. Despite this record,

²⁵Of course, the rap sheet itself would not have been admissible in evidence. If Birkins had denied his prior eight convictions, defense counsel would have only been allowed to impeach him with certified records of his convictions, not the rap sheet. See Irvin v. State, 324 So. 2d 684 (Fla. 4th DCA), cert. denied, 334 So. 2d 608 (Fla. 1976); Peterson v. State, 645 So. 2d 10 (Fla. 4th DCA 1994).

Birkins testified that he expected to be sentenced to three years. The jury had all of this information and could factor it into their credibility determination. Thus, there was no prejudice suffered by Appellee given the alleged suppression of the rap sheet.

H. A Letter From Mr. Birkins Indicating he was a Confidential Informant.²⁶

Mina Morgan testified that she did not have a handwritten letter from Flemmie Birkins to the Department of Corrections wherein he indicated that he had assisted the Tampa Police Department in cutting down the crime rate. (PCT:315-17). Ms. Morgan stated that she would have used the letter to cross-examine Birkins. (PCT:317).

At Appellee's trial, Ms. Morgan questioned Birkins about his pro-se motion for

²⁶The letter the trial judge is apparently referring to did not specifically state that Birkins was a confidential informant, rather Birkins stated in a 1978 letter to the parole board that he had "help[ed] the Tampa Police Department to cut down own (sic) the crime rate." (PCR:564). According to collateral counsel's third amended postconviction motion, Birkins also indicated in a separate interview with police in 1984 that "he worked for the police as a C.I.." (PCR:564). Defense counsel did not allege that the State failed to disclose this information under Brady, rather this allegation was made in the context of an ineffective assistance of counsel claim. (PCR:564). As previously noted, the trial judge rejected defense counsel's ineffective of assistance claims.

release on recognizance. (DAR:303-05). In his motion, Birkins stated that he knew “several members of law enforcement who are willing to come and testify in my behalf.” (DAR:304). As previously discussed, defense counsel also effectively cross-examined Birkins on a number of other issues, including his prior record, his pending charges, and any possible deal he had in exchange for his testimony. Admittedly, defense counsel was unable to cross-examine Birkins about his assistance with the Tampa Police Department “in cutting down the crime rate,” but such an omission was not so prejudicial as to create a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to defense counsel or discovered by counsel with reasonable diligence. See Young v. State, 739 So. 2d 553, 559 (Fla. 1999) (stating that “[t]he ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different”). Accordingly, this Court should reverse the trial court’s generic finding under Brady that Appellee suffered prejudice from the alleged suppression of this evidence.

ISSUE II

THE TRIAL JUDGE ERRED IN GRANTING APPELLEE RELIEF ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE.

In Claim III of Appellee's postconviction motion, Appellee claimed that newly discovered evidence consisting of mitochondrial DNA (mtDNA) testing disproved testimony presented at Appellee's trial. Specifically, three hairs were recovered from the victim's mouth at the medical examiner's office. At trial, the State presented the testimony of FBI agent John Quill who testified that the hairs exhibited Negroid characteristics. (DAR:313-17). As such, the agent could not exclude Appellee as the contributor. (DAR:317). Of the three hairs found, two were of insufficient length to determine their origin. One of the hairs came from a transitional area of the body; either from an area on the back of the neck or from an area between the lower abdomen into the pubic area or the lower pubic area to the anus. (DAR:321-22). The agent further testified that he could not exclude *any* person with Negroid hair as the contributor of the hair, including the victim. (DAR:320).

During Appellee's closing argument, defense counsel argued that the hairs were consistent with any black person. Given the fact that the victim was found in a black neighborhood, this was not surprising. Defense counsel effectively argued that the hairs could have belonged to a number of people, including Appellee, the victim, or

the person defense counsel argued may have committed the offenses, Johnny Lee Newsome. (DAR:664-65). During his closing argument, the prosecutor admitted that the hairs found in the victim's mouth could not be linked to the defendant. However, the prosecutor asserted that the hairs were probably not the victim's because FBI agent Quill had testified that one of the hairs came from either an area around her pubic area or an area on the back of her neck. The prosecutor rhetorically asked, "I would just defy anybody to tell me how those are her hairs, how she got them." (DAR:708).

At the postconviction evidentiary hearing, testimony was presented from Dr. Terry Melton, a mtDNA forensic expert, that the three hairs did not match Appellee and were exclusively different than his hair. (PCT:29). The three hairs were consistent with originating from the victim, or a relative of the victim. (PCT:33).

In granting Appellee relief on this claim, the trial judge found:

As to claim III-f, Defendant fails to meet the standard of newly discovered evidence and requests leave to amend this claim pending further investigation. However, the Court held an evidentiary hearing on this claim. During the evidentiary hearing, evidence was presented regarding the mitochondrial DNA testing of three hairs found in the victim's mouth. (See Hearing Transcript, attached). During trial, testimony was presented that attempted to link these hairs to the Defendant. The testimony of the DNA expert conclusively excluded the Defendant as a contributor of these hairs. The testimony presented indicated that the hairs were most likely from the victim herself. Consequently, the Court finds merit with regard to claim III-f of Defendant's Motion as it pertains to the DNA evidence and the hairs in the victim's mouth.

The Court does not find that the State intentionally mislead (sic) the jury or presented false evidence. The State presented evidence based on the medical technology available at the time of Defendant's trial. Subsequent advancements in DNA testing now show that this testimony was incorrect. Consequently, the evidence which may have been relied on by the jury is false. The argument made during the trial is now unsupported. As such, the Defendant is entitled to relief on this claim.

(PCR:813). The State submits that the trial court erred in his factual findings which formed the basis of his legal analysis under this claim. Furthermore, the trial judge erred in his application of the applicable legal standard.

Appellee raised this claim as a newly discovered evidence claim. The trial court initially stated in his order that Appellee "fails to meet this standard," but the court continued to address the claim and ultimately granted Appellee relief under this theory. In Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991), this Court stated that newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of the evidence by the use of diligence. For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Id. at 915. In order to determine whether the newly discovered evidence would be of such a nature as to produce an acquittal on retrial, the trial judge 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 trial. Id. at 916.

In reviewing a trial court's order following an evidentiary hearing on a claim of newly discovered evidence, this Court must determine whether the trial court applied the right rule of law, and whether competent, substantial evidence supports the court's ruling. Jones v. State, 709 So. 2d 512, 532 (Fla. 1998) (Shaw, J., dissenting).

In reviewing a trial court's application of the [relevant] law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, “this Court will not ‘substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.’”

Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)).

In the case at bar, the trial court initially stated that Appellee failed to meet the standard for a newly discovered evidence claim. Although silent as to his reasoning for this conclusion, the State submits that Appellee has failed to meet the two prongs outlined in Jones in that the claim is not “newly discovered” and the mtDNA evidence would not be evidence of such a nature that it would probably produce an acquittal on retrial.

As to the first prong of Jones, any claim of newly discovered evidence in a

death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence. See Buenoano v. State, 708 So. 2d 941, 947-48 (Fla. 1998); see also Fla. R. Crim. Pro. 3.851(b)(4) (providing for extension of time for filing of motion for postconviction relief where counsel makes a showing of good cause for the inability to file the postconviction pleadings within the one-year time period). Collateral counsel did not raise the instant claim until his “third” amended motion filed on January 8, 2001.²⁷ (PCR:582-84). Clearly, counsel did not timely raise this claim. Counsel could have discovered that the hairs were not Appellee’s long before he filed his motion to inspect the hairs in January, 1999 and his newly discovered evidence claim in January, 2001. See generally Zeigler v. State, 654 So. 2d 1162 (Fla. 1995) (upholding trial court’s rejection of newly discovered evidence claim based on DNA evidence as time barred because DNA testing was recognized in this State as valid in 1988); Bolin v. State, Case No. 95775, 793 So. 2d 894 (Fla. 2001) (although not discussed in its written opinion, this Court may take judicial notice of the briefs filed in this case wherein it was discussed that mtDNA testing was done by the FBI in 1992).

²⁷This was actually Appellee’s fifth amended motion. His four previous motions were filed on July 21, 1992, January 12, 1993, April 15, 1998, and July 1, 1998. (PCR:23-45; 46-91; 123-39; 140-266).

More importantly, however, the State submits that Appellee cannot establish the second prong of Jones, i.e., that the mtDNA evidence would be of such a nature that it would probably produce an acquittal on retrial. In fact, the trial judge never made a finding that the evidence was of such a nature that it would probably result in an acquittal. (PCR:813). In granting Appellee relief on this claim, the postconviction judge found that the trial testimony regarding the hairs was “incorrect.” (PCR:813). The State submits that the judge misinterpreted the underlying trial testimony and his findings are not supported by the record.

As previously discussed, the evidence at Appellee’s trial from FBI agent Quill was simply that three hairs were discovered in the victim’s mouth and the hairs were of Negroid origin. There is nothing “incorrect” about this testimony. Admittedly, subsequent mtDNA testing established that the hairs were not Appellee’s and were probably the victim’s hair, but this scenario was presented at trial below by defense counsel during her closing argument. Furthermore, the hairs were not a critical piece of evidence given the other evidence of Appellee’s guilt. Thus, it cannot be said that the mtDNA evidence is of such a nature that it would probably produce an acquittal.

In addition, the court granted relief on this claim based on a finding that “[t]he argument made during the trial is now unsupported.” Defense counsel argued in her

closing argument that the hairs found in the victim's mouth were Negroid hairs that could have come from *any* black person, including Appellee, the victim, or other suspects. The prosecutor responded to this argument and admitted that the evidence introduced did not establish that the hairs belonged to Appellee. The prosecutor then asked the jury to use their common sense and presented them with a rhetorical question: "I would just defy anybody to tell me how those are her hairs, how she got them." (DAR:708).

Arguably, the prosecutor's rhetorical question has now been answered with the evidence of the mtDNA testing, but when viewed in the context of both the defense and State's closing arguments, this evidence has not called into question the validity of the jury's verdict. Obviously, the jury was not "misled" as the trial judge properly found. The State's argument was a common sense argument based on the evidence introduced. The jury was well aware that the attorneys' arguments were not evidence and that they should rely on the evidence presented from the witness stand. Furthermore, defense counsel made a counter argument that was based on the evidence, i.e., the hair could have belonged to any person with Negroid hair, including the victim herself. Thus, the State submits that the trial judge erred in concluding that Appellee was entitled to relief based on this claim. Accordingly, this Court should reverse the trial court's order based on his erroneous finding that newly discovered

evidence entitles Appellee to relief.

ISSUE III

THE TRIAL JUDGE ERRED IN CONCLUDING THAT THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS DEPRIVED APPELLEE OF A FAIR TRIAL.

The trial judge concluded that the Brady errors and the newly discovered evidence claim based on the mtDNA test results, when viewed cumulatively, could not be considered harmless. The cumulative analysis standard that must be conducted when considering these two claims is similar in nature. See Lightbourne v. State, 742 So. 2d 238, 247-48 (Fla. 1999) (reviewing Brady and newly discovered evidence claim and finding that there was no “reasonable probability” of a different result in the guilt phase under the defendant’s Brady claim and, even if considered as newly discovered evidence, the evidence would not “probably produce an acquittal on retrial”) (citations omitted).

In this case, there is no “reasonable probability” of a different result based on Appellee’s Brady claim, nor is the mtDNA test results evidence of such a nature that it would probably produce an acquittal on retrial. The Brady claim centered around evidence regarding Flemmie Birkins and evidence that David “Pine” Pearson allegedly raped the victim a week or so before her murder. The other item involved Donald Smith’s statements at the scene of the crime, which as previously discussed, would not have resulted in linking David Pearson to the crime scene. This evidence, viewed

cumulatively with the mtDNA test results establishing that the hair in the victim's mouth was probably her own, does not establish that Appellee would obtain a different result on retrial.

The evidence at trial established that Appellee used cocaine and had sought drugs from the victim prior to her death. On the night of her murder, Johnny Newsome and Carrie Nelson observed Appellee at the abandoned crack house on Scott Street. Johnny Newsome testified that Appellee was talking with the victim at approximately 11:00 p.m., and Carrie Nelson testified that she saw Appellee enter the house around 11:00 p.m. According to Mr. Newsome, Appellee had in his possession that evening a shaving kit that was similar to the kit found in Mr. Schenck's vehicle the following morning.²⁸

Mr. Schenck testified about picking up a hitchhiker with a shaving kit and driving to the house where the murder occurred. After the hitchhiker exited the vehicle, Mr. Schenck fell asleep in his car and did not wake up until the next morning when the house was on fire. When shown a photopack containing a picture of Appellee, Mr. Schenck said that Appellee looked most like the hitchhiker, but he could

²⁸Although Mr. Newsome recanted his testimony at the evidentiary hearing, the trial judge did not find that he was credible. The court noted that Mr. Newsome had given consistent statements under oath at deposition and to law enforcement officers. (PCR:811-12).

not positively identify Appellee. He also picked Appellee out of the courtroom and testified that he looked like the hitchhiker. Mr. Schenck described the hitchhiker and testified that he was wearing a white T-shirt with red letters and the hitchhiker had mentioned something about Clearwater.²⁹ When shown a picture of the shirt seized from Appellee's room, Mr. Schenck testified that the shirt looked like the one the hitchhiker wore.

When questioned by law enforcement officers, Appellee initially stated that he had not been inside the house for a couple of weeks before the murder and he had never been inside the front of the house where the victim was found. The detective took photographs of scratch marks on Appellee's chest³⁰ and questioned him about scratches on his knuckle. Appellee gave varying stories about how he injured his knuckle, first he said he was in a fight, then he claimed he cut it on a window. After discovering a pack of cigarettes in the front room with Appellee's fingerprints, Detective Durkin again questioned Appellee. When shown the photograph of the crime scene, Appellee changed his story and admitted to being in the front of the house and claimed he had not been there for approximately a week before the

²⁹The shirt had an emblem from the Building & Maintenance Division of the city of Clearwater on it. (DAR:930).

³⁰The medical examiner testified that the scratches were consistent with having been made within the last 2-3 days. (DAR:285).

interview.³¹ Appellee again denied being anywhere around the house on the day of the murder. When confronted with information that Johnny Newsome had seen him there that night, Appellee again changed his story and acknowledged that he was there, but claimed it was in the afternoon.

While in jail, Appellee confessed to Flemmie Birkins that he had strangled the victim and then went and bought gas and set the house on fire. As noted in Issue I, Flemmie Birkins recanted and testified at the evidentiary hearing that he had lied at trial. The State noted that Mr. Birkins had given consistent statements to law enforcement officers and while under oath in a deposition and while under oath at Appellee's trial. In addition, Mr. Birkins was given a lie detector test which revealed that he showed no deception when giving these statements. Although the postconviction trial judge did not address Mr. Birkins' credibility in his order, the same analysis the court utilized in determining that Mr. Newsome's recantation was unpersuasive applies to Mr. Birkins' recantation; both men gave consistent statements to law enforcement officers and while under oath at depositions and trial.³² Thus, the State submits that Mr. Birkins' recantation is unpersuasive.

³¹The interview was on June 26, 1986, and the victim was discovered in the burning house in the early morning hours of June 23, 1986.

³²Mr. Birkins also gave a consistent statement while taking a polygraph examination.

Appellee presented an alibi defense in an attempt to show that he was at Soldon “Red” Clemmons house on the night of the murder. Defense counsel also attacked Mr. Schenck’s inability to positively identify the hitchhiker as Appellee. Defense counsel cross-examined Flemmie Birkins about his pending charges and his cooperation with law enforcement officers. Appellee also called a couple of detectives and a gas station attendant to establish that Birkins’s jailhouse confession testimony was not credible. Defense counsel was allowed to present deposition testimony from an unavailable witness that the victim, a prostitute, had got into a car with a black male who was not the defendant at about midnight on the night of her murder. The jury rejected Appellee’s defense.

Based on this evidence, the State submits that even viewing the alleged Brady violations and mtDNA evidence collectively, the trial judge erred in finding that Appellee was entitled to relief. Once again, it must be noted that the trial court never stated that any of these errors would have “probably produced an acquittal on retrial,” Jones v. State, 709 So. 2d 512, 521 (Fla. 1998), or that there was a “reasonable probability” of a different result in the guilt phase, Kyles v. Whitley, 514 U.S. 419, 434 (1995). In addition to failing to apply the proper standard when analyzing Appellee’s claims, the trial court erred in his findings of fact. As argued in Issues I and II, supra, the trial judge erred in finding that Appellee was entitled to relief on either of these

claims. Accordingly, Appellee is unable to combine two meritless claims together in an attempt to create a valid “cumulative error” claim. See Spencer v. State, 27 Fla. L. Weekly S323 (Fla. 2002) (denying defendant’s claims that he was deprived of a fair trial by the cumulative errors that occurred during his trial proceedings because claims of error are either procedurally barred or without merit); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred).

CONCLUSION

In conclusion, Appellant respectfully requests that this Honorable Court reverse the trial court's order granting Appellee a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Linda McDermott, Assistant Capital Collateral Counsel, Capital Collateral Counsel - Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, on this 19th day of July, 2002.

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT COMPLIANCE

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

COUNSEL FOR APPELLANT