

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

CASE NO. SC01-2671

RUDOLPH HOLTON,

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's grant of Mr. Holton's third amended motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The State stipulated that Mr. Holton was entitled to a new penalty phase because of a due process error that occurred during Mr. Holton's capital trial. Thereafter, the circuit court granted Mr. Holton a new trial based upon his Brady claim.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

- "R." - record on direct appeal to this Court;
- "PC-R." - postconviction record on appeal;
- "T." - transcript of the evidentiary hearing;
- "Supp. PC-R." - supplemental record on appeal.

INTRODUCTION

This is an appeal from an order granting Rudolph Holton a new trial. The State's Initial Brief completely omits certain procedural peculiarities that are illuminating when considered in context.

At the evidentiary hearing in April of 2001, Mr. Holton presented previously undisclosed police reports detailing a complaint by Katrina "Grant" that she had been raped on June 13, 1986 (Def. Ex. 13); this was ten days prior to the murder of Katrina Graddy on June 23, 1986. Katrina told a police officer that "Pine" (aka David Pearson) had raped her in a Tampa motel room. It is very important to note that in the State's closing argument on June 29, 2001, Assistant State Wayne Chalu **did not challenge** Mr. Holton's claim that Katrina "Grant" was in fact Katrina Graddy.

The reason that the State did not challenge the fact that Katrina "Grant" was in fact Katrina Graddy was that on June 28, 2001, ASA Wayne Chalu obtained a sworn statement from David Pearson. In this statement, Mr. Pearson advised that he had known Katrina Graddy all of his life and that Katrina Graddy had accused him of rape days before her murder:

Q: Okay. During our conversation I asked you about an incident that Katrina reported where she alleged that you forced sexual relations on her; is

that correct?

A: Yes.

Q: And you explained that to us.

A: Yes.

Q: And how that occurred and where that occurred?

A: At the Hancock Motel on Florida Avenue.

Q: Did you get arrested for that that night.

A: No.

Q: Did she - tell us what she told the police once you were talking to the police in regards to you being arrested.

A: Yeah. She obviously had told them that I had raped her.

Q: Okay.

* * *

Q: Did you - did you force sex on her?

A: No. No.

Q: We talked about this yesterday. Why did she have sex with you?

A: It was for crack cocaine.

Q: Okay. And where was that sexual act performed at?

A: At the Hancock Motel.

Q: In a motel room?

A: Yes.

Q: Was it vaginal? Oral?

A: It was in her butt.

Q: I'm sorry?

A: Up in her butt.

Q: So it's anal sex?

A: Anal sex, yeah.

Q: Okay. And she did that consensually?

A: She did that with me.

Q: After you completed having sex with her anally, what did she want from you?

A: Some crack.

Q: Did you have any?

A: Yes.

Q: Okay. Did you give it to her?

A: No, she stole it.

Q: Was there some kind of disagreement or argument that at that time?

A: Yes.

Q: The next question is: Did she go to a phone and call the police? Or how did it come about that she notified a police officer?

A: No, actually the police was already at the motel. I didn't know it. She didn't know it neither. After I slapped her and the crack fell out of her mouth she said, "I'm going to call the cops on you." I said, "Well, go ahead." So she went to the door she said, "They're out here." So I came to look, right?

Q: Okay.

A: So she left storming out. So rather than to let the cops come in the room and find the crack, I just took the crack and I hid it and I met them, right? So I walked up to the cops, right, and they asked me did I know her. I said, yeah. He said, "Well, she's - she's trying to say that you raped her," you know. I said, "No, I didn't rape her."

So he asked me what happened, and I told him it was about crack. It was like the whole ordeal was about crack. It was a trick - sex for drugs.

(Supp. PC-R. 164-8). Pearson also admitted that he used Donald Smith's name in the past when he was arrested (Supp. PC-R. 177).

In fact, the undisclosed police report introduced at the evidentiary hearing indicated that "Pine" gave the false name of Donald Lamar Smith when questioned on June 13, 1986 (Def. Ex. 13). As a result, a second undisclosed police report was written on June 13, 1986, alleging that David Pearson had obstructed a police investigation by giving a false name (Def. Ex. 14). This police report was also introduced into evidence at the 2001 evidentiary hearing.

Yet, another undisclosed police report was introduced into evidence in 2001. It was concerning the homicide on June 23, 1986, and indicated that an individual by the name of Donald Lamar Smith was questioned at the scene of the homicide after Mr. Smith indicated he knew information about the manner

of death that had not been released to the public (Def. Ex. 18).

Donald Lamar Smith testified at Mr. Holton's 2001 evidentiary hearing. Mr. Smith told the court that he knew David Pearson, aka "Pine", because they grew up together (T. 238). One morning, in June, 1986, Katrina Graddy came to Mr. Smith's house on Harrison Street. Mr. Smith testified:

. . . she came up and asked me to come, can I ask you something and I said what and she said that Pine had just raped me. Um, she say that she said what is your full name and I said Donald Lamar Smith and she said is your birth date 9-25-57, and I said, yeah.

* * *

She said well, Pine used your name last night, yesterday, I think. She said to me Pine raped me and used your name and told the police --

(T. 240). Mr. Smith testified that Ms. Graddy had bruising on her neck and she told Mr. Smith that "Pine" choked her and forced her to have sex (T. 241). Mr. Smith testified that Ms. Graddy explained that Pine gave her some [crack] rocks, but she would not have sex with him, so Pine raped her (T. 242). Thereupon, Mr. Smith and Ms. Graddy left his house and ran into Pearson (T. 242). Donald Smith testified:

Q: (By Ms. McDermott) Did you say anything to Pine?

A: Yes, I said, Pine, I said why in the f**k did you use my name and did this girl.

Q: Okay, you told him that why did he use your name when he raped that girl . . .?

A: Yes, but before I got finished she went hollering at him.

Q: What did she say to Mr. Pearson?

A: She's going to get his ass if that's, that's what she's going to do, you know, you smoked my s**t.

Q: Okay, and did Pine also tell her that I'm going to kill your ass?

A: Yes.

Q: For calling the police on me?

A: Yes.

Q: Mr. Smith, when Katrina and Pine were arguing what happened?

A: Oh, well I kept walking about but people started coming out.

Q: Okay and why did people start coming out of their houses?

A: They were getting to loud.

(T. 243).

A week or so later in June of 1986, Mr. Smith noticed that a house on Scott Street was on fire (T. 244). Mr. Smith went over to see what was happening (T. 244). On his way to the house, he saw Pearson "walking fast towards" him (T. 244). Pearson told him that Katrina was found in the house strangled (T. 244). Mr. Smith proceeded to walk to the crime scene and

when he got near the abandoned house he said: "they found Katrina strangled" (T. 244). The police questioned Mr. Smith and asked how he knew the information about Katrina (T. 245). Mr. Smith told them that someone had told him, but he did not mention Pearson's name because there were several people in the area (T. 245). After producing identification and answering questions, the police released Mr. Smith (See Def. Ex. 22).

At the 2001 evidentiary hearing, Donald Lamar Smith testified that a few weeks after Ms. Graddy's murder in 1986, Pearson was at Mr. Smith's house getting a haircut (T. 246). At that time, Pearson told Mr. Smith that he, Pearson, had killed Katrina (T. 252-53).

At the close of the evidentiary hearing in April of 2001, the presiding judge indicated his desire to have all of the physical evidence tested for DNA (T. 384-87). When the testing was completed, closing arguments were scheduled for June 25, 2001. ASA Chalu appeared on that date and asked for a continuance "until I've had an opportunity to have a conference in my office to determine exactly what position we're going to take and what argument needs to be made" (T. 494). Mr. Holton did not oppose the continuance "as long as we can get this matter set as quickly as possible" (T. 498).

ASA Chalu responded, "I'm going to try to get this in front of our homicide committee on a regular scheduled meeting for Thursday afternoon" (T. 498). Thereupon, closings were scheduled for Friday, June 29, 2001.

On June 29th, ASA Chalu appeared and asked for another continuance of the closing arguments. He explained that David Pearson had been located and had provided a saliva sample (T. 394). ASA Chalu argued:

Your Honor, notwithstanding the fact that Mr. Holton is - - has been convicted of this offense, the defense has always maintained that he was innocent and his primary argument has been this alternative suspect of David Pearson.

Well now we know where David Pearson is. We have David Pearson's DNA and it seems to me that the defense would be willing to agree to have this DNA tested for the purposes of determining either including or excluding Mr. Pearson as a suspect.

So, Your Honor, notwithstanding the State has maintained that Mr. Holton is the perpetrator of this crime and he stands convicted of that we think it's in the interest of justice and the interest of pragmatics to have all of this tested and also compared to Mr. Pearson's DNA before a final determination is made.

(T. 395-96).

Mr. Holton's collateral counsel responded first by noting that "the State has Mr. Pearson out there right now and I can wave to him, he's out there [in the hallway]. They brought him into the courthouse today, you know, this is an odd

arrangement" (T. 396). Mr. Holton's collateral counsel then argued against a further continuance noting the period of time that had already past in the postconviction process:

An amended 3.850 was filed in January of this year and thus the evidentiary hearing. The State did nothing. The evidentiary hearing happened April 18th through the 20th. The State rests. Did nothing.

And so, you know, now suddenly you know on this past Monday when we were supposed to have closing arguments Mr. Chalu takes Ms. McDermott aside in the hallway and says, you know, it may be in your interest to agree for a little continuous [sic] here because because [sic] we're having a committee meeting on Thursday and, you know, if you don't agree to this my position is going to have to be the 3.850 should be denied but I may be able to take a different position after the committee meeting. So we agreed.

(T. 399-400).

The continuance was denied, and the parties gave their closing arguments. Mr. Holton's collateral counsel argued that the State's requests to continue the closing argument amply demonstrated that even the State's confidence in the outcome was undermined:

When you examine this case in its entirety I mean, I understand the State's predicament. I understand the desire of the DNA testing. It's because in fact the confidence is undermined in the reliability of the outcome of this trial because this information is huge and completely changes and alters the case.

(T. 440-41).

At the outset of his closing, ASA Chalu stated:

Judge, in view of the fact that we're going to be testing doing DNA testing regarding not only Mr. Holton but Mr. Pearson I'm asking the Court for leave to submit the transcript of our interview with Mr. Pearson yesterday to the Court with a copy to the defense counsel because I think it may be very relevant to this Court's determination later in this matter.

And, Judge, I would point out that we have been looking for Mr. Pearson for quite some time. He had been at large for quite some time and when he was released from the county jail and he was arrested on a new charge which occurred about the same time that this evidentiary hearing in this case was back in April and when he was released on Sunday we asked to speak to him and got that transcript I think that's highly relevant, Judge, and this request that you permit leave to file that with the Court and a copy to counsel in conjunction with the DNA inquiries.

(T. 443-44). Over objection, the circuit court granted the State the opportunity to submit the June 28, 2001, transcript of Mr. Pearson's sworn statement (Supp. PC-R. 160).

In his closing, ASA Chalu conceded that Katrina Graddy had reported that she had been raped by David Pearson. He argued that she waived prosecution because she had not in fact been raped, "Katrina Graddy was not telling the truth about that she was not raped and the fact that it was a sex for drug deal it would not have changed the outcome of the proceeding" (T. 448-49). As for Donald Smith's testimony that David Pearson had admitted the murder of Katrina Graddy, ASA Chalu argued that Donald Smith's testimony was "not credible, Your Honor, it's not believable. It's not entitled to any weight

at all" (T. 450).

After the closing arguments were concluded, the presiding judge took the matter under advisement. On November 2, 2001, the circuit court issued its order vacating Mr. Holton's conviction and granting him a new trial (PC-R. 800-20).

Shortly thereafter, the State announced it would be appealing the order, but that in the meantime it wished to withdraw the physical evidence and conduct further forensic testing. ASA Chalu explained that this request was "so that we can then move forward and prepare for trial while the appeal is pending" (T. 517). After the State's request was granted, ASA Chalu requested the circuit court "to extend speedy trial" (T. 520). Mr. Holton's collateral counsel opposed the request explaining, "[i]t seems like the State is going to extend speedy trial and do the notice of appeal in order to get time to investigate the case and come up with some evidence against Mr. Holton which they have none now" (T. 520).

Under these circumstances, it is clear that not only was confidence undermined in outcome, but that the State's purpose in filing this appeal was simply to keep Mr. Holton on death row while it tried to find some evidence to justify a retrial.

STATEMENT OF THE CASE AND FACTS

TRIAL - THE PROSECUTION'S CASE

At approximately 6:00 a.m. on June 23, 1986, the Tampa Fire Department was dispatched to 1236 E. Scott Street because an abandoned house was on fire (R. 205). Upon arriving at the house the firefighters found Katrina Graddy's¹ body surrounded by garbage and debris (R. 209). Fire Investigator Brown testified:

I observed the victim, a black female, who was laying on her back in a spread eagle position with her head to the east and her feet to the west. She was laying on what appeared to be her clothing, and she had a cloth tied around her throat and one of her wrists, and a bottle lying between her legs.

(R. 217). The fire fighters extinguished the incendiary fire that was estimated to have burned for three to four hours (R. 213).

Later that morning, the police spoke with Carrie Nelson, a woman who lived behind the abandoned house. She told the police that she and Willie Dan Simmons sat on her porch the evening before the fire and she saw Rudolph Holton enter the house at approximately 11:00 p.m. (R. 592). According to Nelson, Mr. Holton wore a white tee shirt with red writing on

¹Appellant misspells the victim's name (Initial Brief at 8, 15)(hereinafter IB). The correct spelling of the victim's name is Katrina Graddy.

it² (R. 597). Nelson did not see Mr. Holton leave, but she went into her house around midnight (R. 594).

That same day, the police interviewed Johnny Newsome. The police approached Newsome and requested that he speak to them at the police station (R. 358, 464). The police informed Newsome that they were looking for Rudolph Holton (R. 464). Newsome placed Mr. Holton, carrying a black shaving bag, with Ms. Graddy at the abandoned house (R. 350). Newsome testified at trial that on June 22nd, at 11:00 p.m., he saw Mr. Holton and Ms. Graddy on the side of the abandoned house, talking (R. 351). However, Newsome's testimony about the time was inconsistent with the statement he provided to the police. In his statement, Newsome told the police that he saw Mr. Holton "just after dark" or at "dusk" (R. 465). Newsome also told the police that he saw Mr. Holton on the morning Ms. Graddy's body was found and Mr. Holton was in possession of the black shaving bag (R. 466).

On July 9, 1986, Mr. Holton was charged by indictment of first degree murder, sexual battery and arson in the first

²Appellant asserts that Nelson testified that Mr. Holton wore a white tee shirt with red lettering, (IB at 16), however, Appellant fails to point out that Nelson testified that it was not the tee shirt that had been obtained from Mr. Holton's room at Mr. Clemmons' house and introduced into evidence (R. 597).

degree (R. 795).

On July 25, 1986, defense counsel, Mina Morgan, filed a Motion for Police Reports in which she requested "any police reports" (R. 799). Trial counsel renewed this request the weekend before trial (R. 847).

During the defense's investigation, counsel learned from the victim's family and friends that Ms. Graddy had reported that she was raped approximately a week before her murder by a man who used the street name of "Pine". In her first motion for continuance, trial counsel informed the court that she was investigating the information about Pine's rape of Katrina Graddy (R. 817-9). The court denied defense counsel's motion. Further, on October 29, 1986, trial counsel requested additional funds for her private investigator. Among the reasons why counsel needed additional funds was that she believed she had ascertained the true identity of Pine and was investigating the rape further (R. 823-6). The court authorized additional funds for the defense investigator (R. 828).

On December 1, 1986, just five months after Ms. Graddy's murder and Mr. Holton was indicted, Mr. Holton's capital trial began.

At trial, the State presented the testimony of Nelson and

Newsome (R. 592-7, 347-68, 591). In addition to Nelson and Newsome placing Mr. Holton at the abandoned house, the State elicited testimony from Carl Schenck that Mr. Holton resembled the person he dropped off across the street from the abandoned house (R. 328). On the afternoon of June 22nd, Schenck picked up a hitchhiker (R. 325). He described the hitchhiker as, "A black male with pretty frizzy hair, a good amount of it, wearing a white t-shirt with lettering on it, a ball cap with something embroidered on it . . . and dark blue pants and a black shaving bag."³ (R. 326). Schenck candidly testified that when shown the photo array he could not make a positive identification of Mr. Holton and that Mr. Holton's photo only "resembled [the hitchhiker] by the shaving bumps and hair." (R. 344).

Schenck drove the hitchhiker to Tampa and spent several hours with him smoking marijuana, drinking and going to bars (R. 331). Around 10:00 or 11:00 p.m., the hitchhiker left Schenck on Scott Street, near the abandoned house (R. 332). Schenck passed out in his car and awoke the next morning to the sound of fire engines (R. 333). The police obtained the hitchhiker's black shaving bag from Schenck's car, where it

³In his initial statement to the police, Schenck said that the hitchhiker's tee shirt was red (R. 420, 425).

had been left by the hitchhiker the previous night (R. 333).

The medical examiner testified that the cause of death was strangulation (R. 268). Further, Dr. Lardizbal testified at trial that the fire occurred postmortem (R. 270), and he noted that the only harm to the victim, other than the strangulation was that a broken bottle was partially inserted into the victim's anus (R. 266).

The State also inquired about the photographs of the marks on Mr. Holton's chest. Dr. Lardizbal testified that the marks appearing in the photographs were consistent with scratches caused by a hand (R. 278). Dr. Lardizbal opined that the marks were consistent with healing abrasions that were between twenty-four and thirty-six hours old at the time of the photographs (R. 285).

The State's key witness in the prosecution of Mr. Holton was Flemmie Birkins, a jailhouse snitch.⁴ Birkins testified that he was incarcerated with Mr. Holton on June 26, 1986. Birkins stated that on June 26th, Mr. Holton and he spoke twice. During the first conversation Mr. Holton asked Birkins for a cigarette and told Birkins that he was charged with murder (R. 288). Shortly thereafter, around 5:00 p.m., Mr.

⁴Appellant misspells Birkins' first name throughout the Initial Brief (IB at 10, 17, 18, 19, 20, 23, 25, 32). The correct spelling of Birkins' first name is Flemmie.

Holton met Birkins in the clinic and told Birkins that: "he had killed a girl, that he had strangled her." (R. 295, 289). Mr. Holton then told Mr. Birkins that after he killed the victim, he went to the Star Service Station on Nebraska to get a can of gas and he set the house on fire (R. 289).

Birkins adamantly denied that he wanted or was receiving any benefit for his testimony (R. 290, 301). He initially told the jury that the three year sentence he was receiving was based on the sentencing guidelines and accounted for his prior criminal history⁵ (R. 308). However, Birkins also testified that he "pled open" which meant that he rejected the State's plea offer of three years and would allow the judge to decide on his sentence (R. 293). Birkins told the jury that he came forward because "it's not right for anyone to kill a young girl" (R. 297).

In regard to physical evidence, the State presented the testimony of John Quill, a special agent with the Federal Bureau of Investigation. Agent Quill testified about the three hairs collected from the victim's mouth. Agent Quill conducted microscopic analysis on the hairs and determined

⁵Appellant's statement of facts incorrectly represents that Birkins' guidelines "called for a sentence of 3 ½ to 5 ½ years in prison" (IB at 11). In truth, at Mr. Holton's trial the jury was told that Birkins' guidelines called for a sentence of 3 ½ to 4 ½ years in prison.

that the hairs exhibited, "Negroid characteristics" (R. 316), and one of the hairs was a "transitional" body hair, i.e. a hair from the nape of the neck to the head or from the lower abdomen to the pubic area (R. 322). Agent Quill told the jury, that based upon the characteristics of the hairs he could not exclude Mr. Holton as being the source of the hair (R. 317).

Detective Kevin Durkin testified at trial that he was the lead detective in the investigation of Katrina Graddy's murder (R. 371). Det. Durkin testified that Mr. Holton initially made a statement that he had previously been in the abandoned house to use drugs, but that he had not been in the front room of the house⁶ (R. 375). On June 26th, Det. Durkin returned to the abandoned house, which had not been secured, and located an empty Kool cigarette pack and a syringe in the front room of the house (R. 379). Mr. Holton had already told Det. Durkin that he used the syringe a few weeks before the crime and left it on a windowsill in the house. Upon questioning Mr. Holton on the 26th, Mr. Holton told Det. Durkin that he saw Newsome near the house the day of the crime, but it was in the afternoon and Mr. Holton did not enter the house (R. 382,

⁶The victim's body was not found in the front room of the house.

388). Mr. Holton denied that he left the cigarette pack in the house on the day of the crime and said that the last time he was in the front room of the house was a few days before the crime (R. 382-383). A latent fingerprint on the cigarette pack was identified as Mr. Holton's right, middle fingerprint (R. 405).

Mr. Holton voluntarily provided hair, blood and fingernail scrapings. No other physical evidence, including items found at the crime scene or in the black shaving bag were connected to Mr. Holton.

In his defense, Mr. Holton presented an alibi. Consistent with Mr. Holton's initial statement to the detectives, Solodon "Red" Clemmons testified that he lived in a house Charlotte Street (R. 388, 491). On the night of June 22nd, Mr. Holton stayed at Mr. Clemmons' house, like he had for the preceding week or so (R. 494). Mr. Clemmons recalled the night because Ms. Graddy's body was found the next morning and it caused a scene in the neighborhood (R. 496). Mr. Clemmons testified that Mr. Holton arrived at the house between 9:00 and 10:00 p.m. and went to sleep (R. 495). He saw Mr. Holton sleeping at 6:00 a.m. when he awoke to take his medicine (R. 497).

Mr. Clemmons believed that Mr. Holton did not leave the

house during the night because: 1) he did not hear any noise; 2) his dog had young puppies at the time and would bark if anyone moved around the house and there was no barking that night; 3) he didn't sleep much at night and was not a heavy sleeper when he did; and 4) his door was locked when he awoke; the door locked automatically after opening it so it was necessary to have a key to reenter the house. Mr. Holton did not have a key to the door (R. 497-9).

Katrina Graddy's mother testified that she believed Katrina left her house between 10:00 and 10:30 p.m. on the 22nd (R. 524). Bernard Black, Katrina's stepfather, recalled that Katrina left the house a little later, between 11:00 and 11:30 p.m. (R. 527).

In order to further undermine the State's case, particularly the jailhouse snitch's testimony, Mr. Holton presented the testimony of Paulette Leonard, the attendant who worked at the Star Service Station on Nebraska Avenue on the late evening/early morning of the crime. Ms. Leonard testified that she worked from 10:00 p.m. on June 22nd until 6:00 a.m. on June 23rd (R. 479). When the police interviewed her they showed her a picture of Mr. Holton and Ms. Leonard told the police that "she was sure" Mr. Holton did not purchase gas from the station while she was at work on the 22nd

or 23rd (R. 481). Ms. Leonard informed the police that only two (2) people purchased gas in a container during her shift, an elderly woman with her son and a man she described in his mid-forties with black and gray hair (R. 482).

At the trial, the defense wanted to present the testimony of Pamela Woods, one of the last people to see Katrina Graddy alive. Ms. Woods was properly subpoenaed by defense counsel (R. 487). Defense counsel requested that the Judge Coe assist her in locating and bringing Pamela Woods to court because she was an "essential defense witness" and Mr. Holton could not secure a fair trial without her testimony (R. 487). Judge Coe told trial counsel, "There is nothing I can do about it." (R. 489).

When Ms. Woods did not appear, trial counsel was allowed to present portions of Ms. Woods' deposition to the jury. The Assistant State Attorney strenuously objected, "She wants to be able to argue that somebody else did it named Pine, and the case law says you are not supposed to do that. You don't point fingers at people during trial." (R. 545). Thereafter, Judge Coe prohibited the defense from introducing portions of the deposition which discussed the individual known as "Pine" (R. 548, 551).

The jury heard the following about Pam Woods' account of

the night of Ms. Graddy's murder:

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.

* * *

. . . 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. . . .

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 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.

(R. 588-90).

What defense counsel wanted the jury to hear from Pamela Woods also included that the individual with whom Ms. Graddy left the area was a man with whom Ms. Woods had "tricked" previously (Def. Ex. 33, p. 10). The man "kind of scared" Ms. Woods (Def. Ex. 33, p. 10). Ms. Woods testified that she felt "[l]ike he would take something, or make you do it if you didn't want to do it. Something, he was weird" (Def. Ex. 33, p. 10). Ms. Woods testified at her deposition that the man had been rough with her so she got out of the car (Def. Ex. 33, p. 16-17).

Ms. Woods also described her interview with the police officers about the night of Ms. Graddy's murder, "[T]hey was trying to ask me, did Rudolph did it, you know, like they was saying already that he did it, you know? Trying to make me say, "Yeah," you know, "he did it," not make me but by them talking to me and me listening to them . . ." (Def. Ex. 33, p. 14).

As to "Pine", Ms. Woods testified at her deposition that when she asked if anyone had seen Ms. Graddy on the night of her murder, she was told that Ms. Graddy walked through the

park with "Pine" (Def. Ex. 33, p. 29). Ms. Woods also described a rape that she and Katrina witnessed take place in the abandoned house on Scott Street. Ms. Woods said that the rape occurred the night before Ms. Graddy's murder and they could see the male individual hitting the female (Def. Ex. 33, p. 18-20). Ms. Graddy insisted that the male was "Pine", but Ms. Woods did not think it looked like "Pine" (Def. Ex. 33, p. 20). Ms. Woods also linked "Pine" to Schenck because she testified that "Pine" brought white individuals to the area in order to buy drugs (Def. Ex. 33, p. 28). Additionally, Ms. Woods linked "Pine" to the black bag. When shown the black shaving kit, she remarked, "Pine had something like that" (Def. Ex. 33, p. 35). However, all reference to "Pine" was excluded from the statement the jury heard.

The State's argument to the jury focused on Flemmie Birkins. Assistant State Attorney Joe Episcopo argued:

For the State Attorney's Office, this case really begins with Flemmie Birkins. Flemmie Birkins hears about the murder of the victim and how it was done. In effect, he becomes an indirect eyewitness to the account that was given to him by that man. What motive does Flemmie Birkins have to frame him? He tells the deputy that same day, four days later, he talks to our detectives.

What did he get for telling the deputy and telling the detectives? He lost his trustyship status. His life was threatened and when he tried to get an ROR, he couldn't get it. That's what he got. And he still came into court yesterday or the day after yesterday and, under oath from this stand,

told you the same exact account that he told those, the deputy and detectives months ago. What is his motive?

* * *

. . . What is the crux of that confession? "I killed the girl and burned her and strangled her." Those are the three key elements, burning, stragglng, (sic), killing and sex and rape. They are all there. There are some details that are not exact, that's right, but what is his motive to lie?

* * *

Detective Childers tells you he is a unique informant, and he is a unique informant and a unique snitch. Why? I'll tell you why. Because, ladies and gentleman, this is a horrible crime, and that's why he came forward. That's right. He has got eight convictions but under the sentencing guidelines, he scores out to three-and-a-half to four-and-a-half years, and those are scored in, and he's got two more waiting.

So for his ten crimes, he gets three-and-a-half to four-and-a-half. That is how horrible a criminal he is.

(R. 705-7). The State also focused on the hairs found on the victim's mouth and argued that the hairs linked Mr. Holton to the crime:

Hairs. No, we can't say these are the hairs of the defendant. We never purported to say they were the hairs of the defendant. We wanted to show that she died with Negro hairs in her mouth. We can say that they are not her hairs. You know why? Because they came from either here or here or back here. That is what Quill said.

How are hairs down there going to get in her mouth? And there are no Caucasian hairs. Proof beyond a reasonable doubt, Negro hairs in her mouth from a certain location on the body, and I would just defy anybody to tell me how those are her

hairs, how she got them.

(R. 707-8). In response to defense counsel's argument that the State had not proved a motive, the State hypothesized that Mr. Holton and Katrina Graddy agreed to exchange drugs for sex (R. 716-7). The State argued that Mr. Holton and Ms. Graddy met in the abandoned house between 11:00 p.m. and midnight and they decided to meet later at the house so that they could have sex and Mr. Holton would provide drugs for Ms. Graddy (R. 717). The State told the jury that, "sometime, 2:00, 3:00 in the morning, whatever, they met. They went into the house and something went wrong" (R. 717). The State concluded by telling the jury:

He doesn't like this woman. He hates this woman. Why does he hate this woman? Because you can see what he did with this bottle. That's the charge he has been charged with. That's right. There is no evidence of semen. But that was because our bigshot over here couldn't do it, and he killed her because he couldn't, because she wouldn't help him, because she wouldn't satisfy him. Maybe she hurt him with that free hand. Maybe she grabbed him somewhere and squeezed him. Maybe he lost his temper.

(R. 719).

During the jury's deliberations, Pam Woods arrived at the courthouse. The court did not interrupt the deliberations to allow the defense to present Ms. Woods' testimony. Oddly enough, during the deliberations, the jury requested a copy of

Ms. Woods' statement and without objection from the parties the court provided the jury with the written statement the court had previously read (R. 744). The jury found Mr. Holton guilty as charged (R. 745, 885).⁷

On December 15, 1986, trial counsel filed a Motion for New Trial which included the argument that Mr. Holton did not receive a fair trial because of the court's failure to grant a continuance so that the defense could present the testimony of Pamela Woods (R. 867-8). On December 30, 1986, a hearing was held in which Judge Coe denied the defense's motion for new trial (R. 985).

On January 5, 1987, Mr. Holton filed a Notice of Appeal.

Postconviction - The Case in a Whole New Light

Mr. Holton filed his initial Rule 3.850 motion in January, 1993 (PC-R. 46-91). After filing his motion, the parties litigated public records (Supp. PC-R. 18-24, 35-7).

In August, 1996, the State responded to Mr. Holton's

⁷The State stipulated in circuit court that ex parte contact occurred between the State and Judge Coe in preparation of a sentencing order imposing a death sentence, and that as a result, a re-sentencing was required. Accordingly, discussion of the penalty phase proceedings of Mr. Holton's trial is unnecessary. Mr. Holton would just note that the entire penalty phase lasted less than an hour (R. 885), and that the jury, after deliberating 37 minutes, recommended a death sentence by a vote of 7 to 5.

initial 3.850 motion (PC-R. 92-103).

Mr. Holton filed his second amended Rule 3.850 in July, 1998, and he asserted that he was innocent of the crimes for which he was convicted and sentenced (PC-R. 140-266).

A few days after filing his motion, Mr. Holton also filed a motion to perpetuate the testimony of Willie Dan Simmons, a critical defense witness, because Mr. Simmons was ill with lung cancer (PC-R. 339-41). On September 2, 1998, the court granted the motion (PC-R. 342).

In August, 1998, Mr. Holton sought the disclosure of grand jury testimony because notes in the State's files reflected a material discrepancy between Detective Durkin's testimony before the grand jury and his trial testimony (Supp. PC-R. 76-8). The State informed Mr. Holton and the circuit court that the court reporter's notes from the grand jury proceedings had not been transcribed and were destroyed (Supp. PC-R. 268-9).

On September 29, 1998, the State responded to Mr. Holton's second amended Rule 3.850 and urged the circuit court to summarily deny Mr. Holton's claims (PC-R. 267-338).

On December 22, 1998, Mr. Holton filed a Motion to Inspect, Examine and Test Evidence (PC-R. 357-8). Mr. Holton requested that he be allowed to test the three hairs found on

the victim's mouth with mitochondrial DNA (mt DNA), testing.

After a Huff hearing was held, on January 29, 1999, the circuit court granted Mr. Holton an evidentiary hearing on several claims (PC-R. 360-83).

In February, 1999, the State filed a Motion for Rehearing requesting the circuit court to limit the scope of the evidentiary hearing. (PC-R. 439-42).

Also in February, 1999, Mr. Holton's counsel left her employ with the Capital Collateral Counsel for the Middle Region (CCC-MR). Mr. Holton requested that the circuit court allow his former attorney to continue to represent him, *pro bono*, while holding CCC-MR responsible for the costs associated with litigating his Rule 3.850 motion (Supp. PC-R. 358-80, 381-91). The court granted Mr. Holton's motion (PC-R. 443). CCC-MR appealed the court's order. Holton v. State, Case No. 95,141. In May, 1999, Mr. Holton requested that the circuit court transfer the representation of his case from his *pro bono* counsel to the Capital Collateral Counsel for the Northern Region, because his attorney had accepted a position with CCC-NR (PC-R. 458-9, Supp. PC-R. 397-403). In June, 1999, the court granted Mr. Holton's motion (PC-R. 460-1). CCC-MR moved to dismiss the appeal to this Court and this Court granted that motion.

In September, 1999, Mr. Holton filed an extensive memorandum in support of his motion to test evidence (PC-R. 480-8). On December 6, 1999, the court granted Mr. Holton's motion for DNA testing on the three hairs obtained from the victim's mouth (PC-R. 500-2; Supp. PC-R. 419-25). That same day the court denied the State's motion to limit the scope of the evidentiary hearing (PC-R. 543-4; Supp. PC-R. 419-25).

On August 3, 2000, the State and Mr. Holton entered a Joint Stipulation stating, "The State concedes error which requires a new penalty phase. Specifically, the State acknowledges error as to Claim X of Defendant Holton's Rule 3.850 motion." (Supp. PC-R. 121-2). Claim X was the claim regarding the State's improper preparation of the Mr. Holton's sentencing order. Due to the stipulation, Mr. Holton withdrew his claims regarding penalty phase errors (Supp. PC-R. 121-2; Supp. PC-R. 464-9).

On January 8, 2001, Mr. Holton amended his Rule 3.850 with the results of the mt DNA analysis, which excluded Mr. Holton from being the source of the hairs found on the victim's mouth (PC-R. 545-633).

After a hearing on February 19, 2001, wherein the State conceded that an evidentiary hearing should be held on Mr. Holton's Brady and Giglio claims, the circuit court entered an

order expanding the scope of the evidentiary hearing to include those issues (PC-R. 634-5; Supp. PC-R. 473-9).

The evidentiary hearing was held on April 18 - 20 with closing argument on June 29, 2001. At the evidentiary hearing, Mr. Holton presented evidence that David Pearson, aka "Pine", the individual who Katrina Graddy maintained anally raped her ten days before her murder, confessed to murdering Ms. Graddy shortly after the crime.

Mina Morgan, Rudolph Holton's trial attorney testified that she had been appointed in July, 1986, to represent Mr. Holton (T. 280). In discussing her representation of Mr. Holton, Ms. Morgan testified about her schedule in the four months from her appointment to Mr. Holton's capital trial. In those months, Ms. Morgan was involved with several trials, including a two week trial that immediately preceded Mr. Holton's case (T. 282). The two weeks preceding Mr. Holton's trial, Ms. Morgan worked eighteen hour days on another case (T. 283). Essentially, Ms. Morgan prepared for Mr. Holton's trial over Thanksgiving weekend (T. 283). She testified, "I went to trial in December because I was dragged there screaming and kicking and knowing that I wasn't adequately prepared." (T. 333).

As to her theory of defense, Ms. Morgan wanted to prove

that Mr. Holton was innocent (T. 287). In order to establish that Mr. Holton was innocent, Ms. Morgan tried to investigate other suspects (T. 287-8). Ms. Morgan hired Sonny Fernandez to assist in the investigation of Mr. Holton's case (T. 70).

During the pretrial investigation, the defense learned that the victim claimed she had been raped about a week before her murder by an individual who used the street name "Pine" (T. 284). The victim's family and friends told Ms. Morgan and her investigator about the rape (T. 85-6, 285, Def. Exs. 19, 20, 21, 31 & 32). The victim's stepfather, Bernard Black, testified at his deposition:

A: . . . Katrina had told me a week before this happened to her, that Pine had raped her and then, see they had picked him up but he had used another name by the name of Donald something. And that's about all I know about Pine.

Q: Did Katrina tell you whether or not she reported the rape to the police?

A: Yes, she did. She said she reported it.

Q: Do you know if she used her own name when she reported it or if she was --

A: No, she - I don't think so. I don't think so because she had a warrant out on her, too, because she had got picked up for prostitution . . .

(Def. Ex. 20, p. 6). "Pine" became Ms. Morgan's primary suspect (T. 288).

Despite her investigation, trial counsel could not

ascertain the true identity of "Pine", although at one time she thought that she had discovered who "Pine" was (T. 287). Mr. Fernandez corroborated trial counsel's recollection as to the defense's inability to ever learn "Pine's" true identity (T. 85). Mr. Fernandez also testified to his efforts in attempting to ascertain "Pine's" identity, "I contacted the informants. I was up and down Nebraska Avenue talking to different people and I'd go to the Kentucky Fried Chicken and sit there for a couple of hours talking to people that came in and out. It was right down the street from the crime scene." (T. 98). To Mr. Fernandez' knowledge, the police did not investigate "Pine" in regards to Ms. Graddy's murder (T. 99).

At the evidentiary hearing, Ms. Morgan reviewed two police reports, both arising out of the same incident and dated June 13, 1986, ten days before Ms. Graddy's murder. Ms. Morgan testified that neither document was disclosed to her before Mr. Holton's trial (T. 289)

In fact, the police report introduced as exhibit 13 stated:

INTERVIEW: B/F complainant stated that she voluntarily went to the suspect (sic) room at the Park II Motel to engage in conversation. After (10) minutes the suspect ordered her to remove her clothes "or else". She became frightened and removed her clothes. He then grabbed her from

behind the neck and forced her face down on the bed. He then forced anal intercourse on her against her will. The complainant also advised that they had both smoked rock cocaine voluntarily prior to this sex act. The complainant does not wish to have the suspect arrested at this time.

(Def. Ex. 13). The police report also reflects that Ms. Graddy signed a complaint withdrawal affidavit which stated, "I may request an arrest warrant at a later date if I so desire." (Def. Ex. 13). And, despite the fact that Ms. Graddy withdrew the complaint regarding the sexual battery, Pearson was arrested and charged with obstruction by disguising identity (Def. Ex. 14).

In her testimony, Ms. Morgan noted that the reports included information that David Lorenzo Pearson identified himself as Donald Lamar Smith⁸ (T. 291). Ms. Morgan explained the significance of the undisclosed reports:

[H]ad I had exhibit 13 and 14 I would have seen a tie between Pine, David, David Pearson. Pine being David Pearson and also a connection between him and Donald Smith.

Through Donald Smith I would have known they knew each other and I could perhaps have gotten out of Donald Smith where to find Pine, what Pine's real name was and could run him down. It would also have been very significant to know that Katrina Graddy ten days before her death had made a complaint about Pearson claiming that he had anal intercourse with

⁸Appellant erroneously identified Mr. Smith as "David" Lamar Smith. (IB at 21, 22). Mr. Smith's first name is Donald.

her. That she eventually dropped that charge but that he did get, he did get interviewed for it and ended up being arrested not for that charge but for giving a false name.

* * *

Q: (By Mr. McClain) . . . In terms of the anal sexual assault did that in fact tie into the manner in which she was found dead?

A: It did in my mind because it was a broken bottle crammed up her anus.

Q: So that would be something that from your perspective as a defense attorney would have been significant if you had the report showing that it had been an anal sexual assault?

A: Yes, it would have.

(T. 291-2). Mr. Fernandez agreed with Ms. Morgan's assessment that the police reports were relevant and significant (T. 91).

Indeed, ASA Episcopo testified that he was aware that Ms. Morgan was pursuing a lead regarding a prior alleged rape of the victim (T. 49). Mr. Episcopo also stated that had he had any reports about the rape he would have disclosed them (T. 50). After reviewing the police report regarding the June 13th rape, Mr. Episcopo agreed that, "[t]here was, could be a connection" (T. 51). Mr. Episcopo had no recollection as to whether he turned over the police reports to defense counsel (T. 53).

Ms. Morgan also reviewed a police report dated June 23,

1986, which contained information about Donald Lamar Smith and placed Mr. Smith at the crime scene on the morning of the 23rd asking if Katrina had been "choked" (T. 291; Def. Ex. 18). Initially, Ms. Morgan believed that she had received the report at the time of Mr. Holton's trial. (T. 293). However, after reviewing her original trial file and notes, Ms. Morgan did not find the report and stated that she did not receive Officer Lawless' report concerning Donald Smith because she released him from his deposition⁹ (T. 296, 300; Def. Ex. 22). Further, Mr. Fernandez, the trial investigator never saw the report at the time of Mr. Holton's trial (T. 82).

Mr. Smith was not listed on the State's discovery to Ms. Morgan (T. 295, R. 810-5, 822). The report indicates that Mr. Smith was interviewed by Det. Durkin, the lead detective in the investigation, and Det. Durkin testified at the evidentiary hearing that he had no recollection of such an interview (T. 378). Further, despite the indication that Det. Durkin interviewed Mr. Smith, none of his reports indicate

⁹Ms. Morgan testified that it was her practice to conduct depositions of any officer who submitted a report. Officer Lawless signed a report, other than the "Donald Smith" report with Officer Southwick. Thus, Ms. Morgan was led to believe that Officer Lawless did not have any additional information from Officer Southwick and she only deposed Officer Southwick (T. 296-9, Def. Ex. 30).

that an interview occurred or the substance of the interview.¹⁰

Trial counsel testified that the Donald Smith police report contained specific identifying information for Mr. Smith, including his address and Florida driver's license number (T. 300). Ms. Morgan believed that with this information she could have located Mr. Smith (T. 300). In assessing the value of the police report, Ms. Morgan testified, "I would have wondered how this individual would know [the victim] was choked at all . . . he would have been a suspect in my mind." (T. 301). Likewise, Mr. Fernandez testified, "someone came up . . . and was giving information that the general public would not have knowledge of." (T. 84).

The connection of Pearson to "Pine" was also significant to trial counsel because during Pamela Woods' deposition, she testified that "Pine" brought white people into the

¹⁰Likewise, no reports exist which indicate that a police interview occurred with Paulette Leonard, Solodon "Red" Clemmons or Willie Dan Simmons, yet, all three individuals were interviewed by the police. In addition to Donald Smith, Leonard, Clemmons and Simmons all had information that supported Mr. Holton's claim of innocence and undermined the prosecution's case. At the evidentiary hearing, Detective Noblitt characterized Mr. Clemmons alibi, "He didn't know anything beyond when Mr. Holton went to bed that night." (T. 366). Det. Noblitt indicated that he did not think this information was relevant.

neighborhood to buy drugs (T. 305). Thus, Ms. Morgan would have shown a picture of Pearson to Carl Schenck, the white male who brought the hitchhiker from St. Pete to Tampa, in order to purchase marijuana¹¹ (T. 306).

In fact, Carl Schenck testified at the evidentiary hearing. He reiterated that, at trial, he did not positively identify Mr. Holton as the hitchhiker. After viewing photos of Mr. Holton and Pearson from 1986, (not knowing who was depicted in the photos), Schenck selected the photo of Pearson as resembling the hitchhiker more than the photo of Mr. Holton (T. 163; see also Def. Ex. 26). Schenck testified that the hitchhiker did not have any teeth missing¹² (T. 165). When Schenck identified Mr. Holton's photo in 1986, he remarked to the officer that Mr. Holton had "cleaned up" and the officer told him, "they had to do everything they can to change his appearance." (T. 169). Schenck also revealed that before he testified in 1986, the police told him that they had the right guy and Mr. Episcopo showed him a photo of the victim at the crime scene, nude (T. 170-1).

¹¹In postconviction, when Carl Schenck viewed a photograph of Pearson. He testified that Pearson resembled the hitchhiker more than Mr. Holton.

¹²On June 22, 1986, Mr. Holton was missing his dentures (Def. Exs. 40, 43 & 44).

Pearson's connection to Ms. Graddy's murder was further developed because Pearson's criminal records included references that Pearson carried a black leather pouch, with a description similar to the shaving bag obtained from Schenck's car the morning that Katrina Graddy's body was discovered (Def. Ex. 15 & 16). In fact, Pam Woods testified in her deposition that "Pine" carried a small black pouch (T. 309, Def. Ex. 33, p. 35). Trial counsel testified that she would have followed the Pearson connection to the black pouch had she had "Pine's" name so that she could research his criminal history (T. 308).

ASA Episcopo did not recall turning over the documents regarding David Pearson being seen with a black pouch (T. 54). Additionally, he believed that the documents were too vague for him to even be aware of them, but he did concede that Pearson's case was in the division which he oversaw (T. 54, 56).

Unfortunately, trial counsel never discovered that "Pine" was David Pearson or Donald Smith's connection to the Graddy homicide. Had trial counsel known of Donald Smith's statement at the crime scene or his connection to Pearson, aka, "Pine", she would have discovered that Donald Smith provided evidence that Pearson killed Ms. Graddy.

Donald Smith testified at Mr. Holton's evidentiary hearing. Mr. Smith told the court that he knew David Pearson, aka, "Pine", because they grew up together (T. 238). One morning, in June, 1986, Katrina Graddy came to Mr. Smith's house on Harrison Street.¹³ Mr. Smith testified:

. . . she came up and asked me to come, can I ask you something and I said what and she said that Pine had just raped me. Um, she say that she said what is your full name and I said Donald Lamar Smith and she said is your birth date 9-25-57, and I said, yeah.

* * *

She said well, Pine used your name last night, yesterday, I think. She said to me Pine raped me and used your name and told the police -

(T. 240). Mr. Smith testified that Ms. Graddy had bruising on her neck and she told Mr. Smith that "Pine" choked her and forced her to have sex (T. 241). Mr. Smith testified that Ms. Graddy explained that Pine gave her some crack rocks, but she would not have sex with him, so Pine raped her (T. 242).¹⁴

¹³In 1998, when CCR investigator Darrell Jackson interviewed Mr. Smith he lived in a house on Harrison Street - the same house he lived in since 1986.

¹⁴Berndoris Smith, Donald Smith's wife, corroborated Mr. Smith's testimony about the events that transpired a few days before Ms. Graddy's murder. Ms. Smith testified that in 1986, she and Donald Smith lived together on Harrison Street (T. 149). Ms. Smith knew Pearson, or "Pine" as she called him, from grade school (T. 150). Ms. Smith was also familiar with Katrina Graddy because she went to school with her sister (T. 150). Ms. Smith recalled that sometime in mid-June, 1986,

When Mr. Smith and Ms. Graddy left his house they ran into Pearson (T. 242). Donald Smith testified:

Q: (By Ms. McDermott) Did you say anything to Pine?

A: Yes, I said, Pine, I said why in the f**k did you use my name and did this girl.

Q: Okay, you told him that why did he use your name when he raped that girl . . .?

A: Yes, but before I got finished she went hollering at him.

Q: What did she say to Mr. Pearson?

A: She's going to get his ass if that's, that's what she's going to do, you know, you smoked my s**t.

Q: Okay, and did Pine also tell her that I'm going to kill your ass?

A: Yes.

Q: For calling the police on me?

A: Yes.

Q: Mr. Smith, when Katrina and Pine were arguing what happened?

A: Oh, well I kept walking about but people started coming out.

Q: Okay and why did people start coming out of their houses?

Katrina came to the Smith house and asked for Big Donald (T. 151). Ms. Smith was present when Katrina told her husband that Pearson raped her and used Donald Smith's name when he spoke to the police (T. 151). Mr. Smith told Katrina that he would straighten it out (T. 152).

A: They were getting to loud.

(T. 243).

A week or so later, Mr. Smith noticed that a house on Scott Street was on fire (T. 244). Mr. Smith went over to see what was happening (T. 244). On his way to the house, he saw Pearson "walking fast towards" him (T. 244). Pearson told him that Katrina was found in the house strangled (T. 244). Mr. Smith proceeded to walk to the crime scene and when he got near the abandoned house he said, "they found Katrina strangled" (T. 244). The police questioned Mr. Smith and asked how he knew the information about Katrina (T. 245). Mr. Smith told them that someone had told him, but he did not mention Pearson's name because there were several people in the area (T. 245). After producing identification and answering questions, the police released Mr. Smith.

A few weeks after Ms. Graddy's murder, Pearson was at Mr. Smith's house getting a hair cut. (T. 246). Mr. Smith and Pearson discussed Ms. Graddy's murder and Pearson explained why he killed her, "b***h did smoke my s**t and called the police, f**k you." (T. 246). Mr. Smith informed his girlfriend and future wife, Berndoris, and his friend George Smith about what Pearson told him (T. 246). Mr. Smith testified that in 1986, if he had been asked he would have

testified at Mr. Holton's trial about the information he possessed about the rape and subsequent murder of Katrina Graddy (T. 248).

George Dewey Smith corroborated Donald Smith's testimony. George Smith grew up with Pearson and Donald Smith (T. 195). After Ms. Graddy's murder, Donald Smith told the witness that, "Pine had told [Donald] that he had did it" (T. 196). George Smith confronted Pearson about the confession, and Pearson did not deny it, but he walked away (T. 197). George Smith also commented that Pearson was never the same after Ms. Graddy's murder (T. 197).

In addition to the compelling evidence of Pearson's guilt, at the evidentiary hearing, Mr. Holton also presented evidence that several documents relating to Flemmie Birkins and other witnesses had been suppressed.

Assistant State Attorney Joe Episcopo testified that he prosecuted Mr. Holton in 1986 (T. 37). Mr. Episcopo recalled that Flemmie Birkins testified that Mr. Holton confessed to Birkins while they were incarcerated in the jail (T. 38). Mr. Episcopo reviewed several documents regarding Birkins including a handwritten Motion for Probation executed by Birkins and filed in August, 1986 (Def. Ex. 6). In the motion Birkins requested that the court impose a sentence of

probation and as one of the reasons for the sentence he told the court that he would assist the Tampa Police Department as an informant (Def. Ex. 6). Mr. Episcopo could not recall ever seeing the handwritten motion (T. 39). Ms. Morgan unequivocally testified that she never received this document at the time of Mr. Holton's trial (T. 312).

Mr. Episcopo also reviewed a rap sheet regarding Flemmie Birkins generated by the Florida Department of Law Enforcement (FDLE), on November 29, 1986, two days before Mr. Holton's capital trial began (Def. Ex. 7). Again, Mr. Episcopo did not recall disclosing Birkins' criminal history (T. 40), and Ms. Morgan was certain that she did not receive this document, despite her request (T. 312). Ms. Morgan testified that had she had Birkins' criminal history she could and would have correctly computed his sentencing guidelines (T. 312).

Ms. Morgan also reviewed a sentencing guidelines scoresheet prepared for Birkins (Def. Ex. 9). The document reflected that Birkins sentencing guidelines required that he serve a sentence between nine to twelve years for his pending offenses. Ms. Morgan was never made aware that Birkins faced more than three-and-a-half to four-and-a-half years in prison (T. 311).

Approximately two weeks after Mr. Holton was convicted

and sentenced to death, but before his motion for new trial was argued, Birkins was sentenced. Mr. Episcopo appeared at Birkins' sentencing hearing (Def. Ex. 10). At Birkins' sentencing hearing the following exchange occurred:

MR. EPISCOPO: The first score sheet was incorrectly computed by Mr. Byrd of our office at three and a half to four and a half years and he took a plea to three years. The true score sheet is nine to twelve and I guess if you look at the prior record and the PSI you would see it's nine to twelve.

Now here's what happens: This summer we had a horrible homicide occur on East Scott Street. On the morning of June 23rd a fire was reported at a burned out building and when the firemen entered the building they found a seventeen year old female naked, strangled to death with a bottle inserted in her anus and set on fire. It was truly a horrible homicide. We had a lot of debris in the house and just outside a door where the body was found we located a pack, empty pack of cigarettes, which had the fingerprint of Rudolph Holton. That discovery led to the development of Case No. 86-8931. An indictment for first degree murder, arson and sexual battery.

On about the fourth day that the defendant Holton was confined in the Hillsborough County Jail he told this defendant that he did it. That coupled with the circumstantial evidence of the fingerprint and some other witnesses who could put the defendant near the scene resulted in that indictment.

* * *

I have to say that his testimony, which was the first thing that we presented in the trial and then, of course corroborated by the other evidence, led to the conviction of the defendant. Actually the jury was out less than four hours in a case that was very circumstantial and then they recommended death and he was sentenced to death, and I think that is significant and his cooperation was significant and

the fact that he was never asking for anything enabled us to present testimony that in itself is very unusual and went to corroborate his testimony along with the other evidence in the polygraph. I think that has to be given some consideration in this sentencing.

* * *

THE COURT: Mr. Episcopo, you have had a chance to read the presentence investigation?

MR. EPISCOPO: Yes, I have. **We have provided that to Ms. Morgan and it was available at the trial when he testified and that record was made known to the jury in [Holton's] case.**

THE COURT: The presentence investigation says it was an open plea. If I understand what you said just now, Mr. Episcopo, he pled to two and half to three and a half.

MR. EPISCOPO: Well, from the first time I met him I asked him what did you plead to and he said three years. That's always been his understanding. That was his testimony on the stand and, of course, it was presented to the jury that was below the guidelines. I suppose as some form of impeachment so his understanding has always been three years. That's what is written on the original score sheet that was prepared by Mr. Byrd. They have crossed out three and a half to four and a half and have written in three.

But he does score out clearly out to nine to twelve and, of course, I would like him to be aware of that fact there is no question about that.

* * *

THE COURT: Anything you want to say, Mr. Birkins? I have read your letter.

THE DEFENDANT: I would just like to have a chance.

THE COURT: Well, you have had many chances.

THE DEFENDANT: I realize that, sir.

THE COURT: You have committed some of the most atrocious crimes. You have certainly committed some of the most atrocious crimes and have admitted committing some of the most atrocious crimes that a person can be charged with, the sexual assaults, attempted murders, armed robberies.

Anybody have anything further they would like to say?

* * *

There is not an appropriate sentence that I can impose in this case. The defendant's background totally justifies him being sentenced to life without the right to parole. This Court and our entire system of justice is based on fairness. The fairness of the defendant was he understood he was pleading to three years when he entered the plea and I feel to some extent that my hands are tied in that regard.

* * *

MR. EPISCOPO: Can I make a suggestion? What if you were to -

THE COURT: I will place him on community control and require three hundred sixty-four days specified residency.

MR. EPISCOPO: I was thinking something more along this line: We do have two counts. You can sentence less than three years on Count I followed by a long period of probation.

(Def. Ex. 10, p. 4-11)(emphasis added). Mr. Holton's trial attorney was never informed about what occurred at Birkins' sentencing hearing or about the State's "error" in computing

Birkins' sentencing guidelines¹⁵ (T. 313).

While Mr. Episcopo informed the court that he had disclosed Birkins' presentence investigation report to Mr. Holton's trial counsel, Ms. Morgan testified that had she did not receive this document (T. 311). Had she been provided with Birkins pre-sentence investigation she would have been able to determine that Birkins faced a much lengthier sentence than what the jury was told (See Def. Ex. 8). In fact, Birkins did not receive a sentence of three years of incarceration, rather he was released from jail approximately one month after Rudolph Holton was convicted and sentenced to death (Def. Ex. 11). Mr. Holton's jury was unaware of the benefit Birkins received: rather than be sentenced between nine and twelve years, he served less than nine months in the county jail and then served a term of probation, including one year on community control (Def. Ex. 11).

At the evidentiary hearing, Mr. Episcopo attempted to explain the circumstances surrounding his contact with Birkins. He testified that despite Birkins conflicting trial testimony about whether or not he had pled to three years or pled "open", that the documents reflected that Birkins did in

¹⁵In reviewing Birkins' file no incorrect score sheet was discovered (T. 204).

fact plead "open" and did not have a specified deal (T. 60). However, Mr. Episcopo stated that he was under the impression at the time of Mr. Holton's trial that Birkins pled to three years (T. 61).

Mr. Episcopo denied that he explicitly promised Birkins anything for his testimony at Mr. Holton's trial; however, he also explained:

Q: [By Mr. Chalu] Wouldn't it sometimes be standard operating procedure when dealing with a cooperating witness who had charges of his own not to make him a specific plea offer prior to his cooperation?

A: Well, no, because you know his testimony would be tainted and it wouldn't be as valuable.

Q: Would it also not be wise to make such an offer before you found out that in fact he was willing and did testify truthfully?

A: Yeah, you also want to see what's going to come out.

(T. 62-3). Mr. Episcopo acknowledged that he in fact provided consideration for Mr. Birkins at his sentencing hearing (T. 67).

Additionally, in regard to the impeachment of Birkins, trial counsel testified that she was not told that Birkins was a confidential informant for the Tampa Police Department (T. 316, see also Def. Ex. 35 & 36). Trial counsel believed that it would have been beneficial to show that prior to Mr.

Holton's trial, when Birkins was arrested or wanted out of prison he offered to assist the Tampa Police Department or he informed the police that he was a confidential informant (Def. Exs. 35 & 36). In fact, following Mr. Holton's trial, in 1987, after being arrested for sexual assault, Birkins contacted Detective Noblitt for assistance (Def. Ex. 37).

At the 2001 evidentiary hearing, Flemmie Birkins testified that he lied at Rudolph Holton's capital trial:

Q: (By Ms. McDermott) Now were you aware of how many years you were facing on the charges . . . what kind of time were you facing?

A: Yes, ma'am.

Q: What was that?

A: It was like twelve, fifteen years.

Q: Okay. And when you saw Mr. Holton at the jail did you see that as an opportunity to decrease the amount of time you were looking at?

A: If you mean that did I see a chance to you know explore or use him, yeah.

Q: Was this --

A: Not the first two days the third day.

Q: Because you knew him, you knew that here was your chance to limit your time of the time you might be looking at?

A: Right.

Q: On your own case. And at that time did you

want to get out of jail?

A: Yes.

Q: When you testified against Rudolph Holton did you tell the truth?

A: No.

Q: And did you, did Rudolph Holton ever discuss his case with you?

A: No, he did not.

Q: Did he ever make any statements regarding -

A: No, he did not.

Q: of the crime with which he was convicted of?

A: No, he did not. All the conversations now all the questions the man never said anything to me about his case or anything.

(T. 122-3)(emphasis added). Birkins indicated that he had also lied during his deposition and when he provided his initial statement to the police (T. 147).

Birkins described the modus operandi of a jailhouse snitch. He explained that he gathered information and details about Mr. Holton's case from the news and from guards (T. 123). After gathering information about Mr. Holton's case he contacted the State. Two detectives were sent to see him (T. 124). At that time he was shown pictures of the crime scene and Ms. Graddy's body (T. 124-5). The detectives made it clear that Birkins would receive consideration on his charges

for assistance in Mr. Holton's case (T. 125). Birkins testified against Mr. Holton because he believed it meant he could get out of jail (T. 127). Birkins was familiar with the system because he had previously assisted the State (T. 126, 146-147, Def. Exs. 35 & 36).

In fact, a police report authored by Detective Durkin, the lead detective in the case, reflects that Mr. Holton was not in the jail at the time that he was allegedly confessing to Birkins (Def. Ex. 34). Mr. Holton was providing a statement to the detectives at the police station (Def. Ex. 34).

Similarly, Johnny Newsome also recanted his trial testimony at the evidentiary hearing. Newsome testified that he lied at Mr. Holton's trial (T. 176-7). On the night of the murder, Newsome did not see Mr. Holton at the vacant house (T. 173). Newsome testified that he never saw Mr. Holton and Ms. Graddy together (T. 177). Newsome lied at Mr. Holton's trial because he was afraid of the police (T. 177, 193).

Indeed, in the months preceding Mr. Holton's trial, Newsome was arrested and charged with multiple crimes. In July, 1986, he was charged with petit theft (Def. Ex. 38). Newsome failed to appear at his court date and the court issued a *capias*. On October 21, Newsome was charged with

disorderly intoxication and arrested. The next day, Newsome was arrested on the outstanding capias for his petit theft (Def. Ex. 38). As to the disorderly intoxication charge, Newsome pled guilty and was sentenced to time served. After being released and failing to appear on his petit theft charge, again, another capias was issued for Newsome (Def. Ex. 38). In November, Newsome was charged with an aggravated assault (T. 366-7), but he was not arrested on the outstanding capias. In fact, the capias existed when Newsome testified at his deposition and at trial, yet he was not taken into custody (Def. Ex. 38). A few days after Mr. Holton's trial, Newsome was arrested and charged with criminal mischief and on the existing capias (Def. Ex. 38). Newsome entered a nolo plea on December 13, 1986, and was given time served (Def. Ex. 38).

Trial counsel was unaware of Newsome's outstanding charge and capias. During Newsome's deposition, trial counsel inquired:

Q: Do you have any kind of charges pending against you?

A: Me?

Q: Yes?

A: No. Well, hold it. Wait a minute. Let me see - no, ma'am. I got another murder case, I mean I'm a witness to it, but that's the charge.

Q: No. Not unless - things you have -

MR. EPISCOPO: She means charges against you.

Q: - been charged with, things that they're prosecuting you for?

A: No.

(Def. Ex. 39, p. 20-21). At trial, Newsome admitted that he had an aggravated assault charge pending against him, but he testified that it was the only charge he had against him (T. 367). The State did not correct Newsome's false testimony during his deposition or at trial.

Further, Eleese Moore knew Johnny Newsome, aka Georgia Boy, in 1986, and spent the night of June 22, 1986, with him (T. 268). Ms. Moore and Newsome spent the night in a vacant house on Estelle Street (T. 268). They met at approximately 9:00 p.m. and they were in the house at 11:00 p.m. (T. 268-9). Ms. Moore and Newsome drank and had sex; Newsome also smoked drugs (T. 269). They left the house the next morning and saw the fire trucks on Scott Street (T. 269). In 1986, Ms. Moore did not know that Newsome testified at Mr. Holton's trial.

In regard to the only direct evidence linking Mr. Holton to Katrina Graddy - the three hairs found on the victim's mouth, Mr. Holton presented evidence that mitochondrial DNA testing conclusively proved that he was not the source of the hairs (T. 29). The State had previously stipulated to Dr.

Terry Melton conducting the mt DNA testing in Mr. Holton's case and at the hearing, the State stipulated to Dr. Melton's qualifications as an expert (T. 8; see also Def. Ex. 1).

Dr. Melton explained that mt DNA testing had been recently accepted by courts in the United States and that at the time of the hearing only five labs conducted mt DNA testing. (T. 11-2, 26). She also described the significance of mt DNA testing:

. . . The part of the DNA I'm talking about is mitochondria DNA. It's actually found outside the nucleus in the cytoplasm or the kind of fluid that is around the nucleus . . .

Mitochondria are like little power houses of energy for the cell. They involve every cellular representation they use for energy for the cell and it turns out they have their very own DNA molecules. And in spite of the fact that there are only two types of DNA in the cell the nucleus, in the mitochondria . . . we have ten to a hundred copies of mitochondrial DNA and the cell itself can have hundreds to thousands of copies of mitochondrial DNA . . .

* * *

It tends to be very useful in cases where nuclear DNA isn't available because there are only two copies of nuclear DNA where a cell has a thousand copies of mitochondrial DNA . . .

(T. 15-16). Dr. Melton testified that she conducted mt DNA testing on the three hairs found on Katrina Graddy's mouth (T. 28). Dr. Melton testified that Mr. Holton's mt DNA type is "exclusively different from the type obtained from the[]

hairs" (T. 29; Def. Ex. 3). She also concluded that all three hairs were the same and matched each other (T. 31; Def. Ex. 3). When she compared them to the mt DNA profile of Ms. Graddy she determined that the profiles were substantially similar and contained a unique trait (T. 33; Def. Ex. 3).¹⁶

Dr. Edward Willey, a medical doctor who practices in the area of pathology, also testified at the evidentiary hearing about the marks that were on Mr. Holton's chest when he was arrested on June 23, 1986 (T. 103). Dr. Willey testified that he reviewed the photos of Mr. Holton, like Dr. Lardizbal did at the time of the trial, and he reviewed the transcripts from the trial. Dr. Willey concluded that the marks on Mr. Holton's chest were "likely to be weeks, even months old" (T. 109). Dr. Willey based his opinion on the appearance of the marks and the literature on how the appearance of wounds change during the healing process (T. 109-110, see also Def. Ex. 25). Dr. Willey testified that the medical examiner's opinion at trial, that the marks were only twenty-four to

¹⁶At the conclusion of the April, 2001, evidentiary hearing, the circuit court requested that further DNA testing occur on the black bag and the contents of the bag (T. 385-6). On May 3, 2001, the circuit court entered an order releasing the black bag and its contents to Dr. Terry Melton for additional DNA testing. (PC-R. 657-8).

thirty-six hours old, was not supported by the photos which illustrated that the healing process was quite advanced (T. 109-10). Dr. Willey identified scarring on the marks, which he testified would not be present in a fresh wound. (T. 110).

Also, at issue during the evidentiary hearing was the credibility of the testimony of Carrie Nelson, the neighbor who lived behind the abandoned house.¹⁷ During her deposition, Nelson testified that Willie Dan Simmons was on the porch with her the night of Ms. Graddy's murder (Def. Ex. 23, p. 12-4). Both the State and trial counsel were aware of Mr. Simmons (T. 46, 323, Def. Ex. 12). Trial counsel attempted to locate Mr. Simmons, but was unable to do so (T. 95, 323). At the evidentiary hearing, Mr. Holton's postconviction investigator, Deborah Williams testified that she located Mr. Simmons during her investigation of Mr. Holton's case (T. 204). Ms. Williams located Mr. Simmons by asking people near the Central Park Homes where she could find "Sissy Dan" (T. 206). Mr. Simmons told Ms. Williams that on the night of the Graddy homicide, "he was with Carrie Nelson . . . They saw Mr. Holton walking along the street passed Carrie Nelson's house and Mr. Simmons

¹⁷Carrie Nelson's death certificate reflects that she died on June 15, 1992 (Def. Ex. 27).

said that [Mr. Holton] was headed towards the hole." (T. 207). Mr. Holton passed by the house around 9:00 p.m. (T. 208). Mr. Simmons also stated that he didn't leave Nelson's house until 4:30 a.m. on the 23rd, and he did not see Mr. Holton in the area after 9:00 p.m. on the 22nd (T. 208). Mr. Simmons also indicated that on June 23, 1986, Nelson spoke to Mr. Simmons and told him that she had finally found a way to stop Mr. Holton from stealing from her (T. 209). She told the police that she had seen Mr. Holton enter the abandoned house the previous night (T. 209). Mr. Simmons argued with Nelson and told the police at the scene that Nelson was lying about seeing Mr. Holton enter the house (T. 208-9). Mr. Simmons told Ms. Williams that he would have testified at Mr. Holton's trial if anyone asked (T. 209).¹⁸

Several months after Ms. Graddy's murder, Nelson admitted to Eleese Moore that she had lied to the police about Mr. Holton entering the abandoned house on June 22nd (T. 270). Nelson told her that she wanted to get even with Mr. Holton

¹⁸Likewise, Darrell Jackson, Mr. Holton's investigator in 1998, interviewed Mr. Simmons at his home and obtained a statement similar to the statement Mr. Simmons provided Ms. Williams (T. 222-3). Mr. Simmons also informed Mr. Jackson of his failing health. When Mr. Jackson attempted to locate Mr. Simmons a few months later, in order to arrange a time to take his deposition, Mr. Simmons was deceased (T. 224, Def. Ex. 28).

because she believed that he had stolen her groceries (T. 270-1).

At the close of the evidence on April 20, 2001, the circuit court indicated that it wanted the parties to conduct additional DNA testing. After the additional testing was concluded, closing arguments were scheduled for June 25, 2001.

On June 25, 2001, the State requested a brief continuance, but the court admitted the results of the mt DNA testing. The parties stipulated to Dr. Melton's report rather than introducing testimony (Supp. PC-R. 491-500). After further mt DNA testing of hairs found in the black bag, Dr. Terry Melton determined that the hairs found in the bag did not match either Mr. Holton or Ms. Graddy's mt DNA profiles; Mr. Holton and Ms. Graddy were excluded from being the source of the unknown hairs. (Def. Ex. 41). Thus, an unknown source of those hairs exists.

On June 27, 2001, the State filed a motion for continuance and a motion for the return of property in order to conduct DNA testing. (Supp. PC-R. 133, 134, 135-6). The next day, the State amended its motions. (Supp. PC-R. 138, 139-40). On June 29, 2001, the State argued the motion to continue:

. . . we were able to locate David Pearson who indicated to us that he would give a DNA sample and

so we took a saliva sample from him for the purposes of analyzing his DNA and perhaps comparing it to any items that was (sic) introduced as evidence at trial and also he was very cooperative and gave us a statement, a sworn statement yesterday which I'm having typed up which will be available next week where he adamantly denied having any participation in this murder for which Mr. Holton stands convicted.

(T. 394). The State argued that they wanted to test Pearson's saliva sample and compare his DNA to the DNA profiles that had been developed in the case but did not match Mr. Holton or Ms. Graddy (T. 396). Additionally, the State requested that DNA testing occur on other items of evidence, including the glass bottle (T. 396).

Mr. Holton objected to any further continuance, arguing that the State had rested at the April hearing (T. 396).

Counsel reminded the court:

At a hearing on August 10th of 1999, um, the question arose before Your Honor to resolve whether or not to test this hair and what was the State's position at that hearing? The State's position at that hearing was to oppose the testing. The State argued quite vigorously against it and the State said, you know, that's going to open a pandora's box . . .

(T. 398). Counsel also stated, "[T]he fact that the State is trying to say Mr. Pearson has agreed to give blood or saliva is somehow significant - it's not significant. Mr. Holton agreed a long time ago." (T. 399). Finally, counsel explained the circumstances about what occurred at the hearing scheduled

for June 25th and why Mr. Holton agreed to a brief continuance:

. . . [T]his past Monday when we were supposed to have closing arguments, Mr. Chalu takes Ms. McDermott aside in the hallway and says, you know, it may be in your interest to agree for a little continuance here because we're having a committee meeting on Thursday and, you know, if you don't agree to this my position is going to have to be the 3.850 should be denied but I may be able to take a different position after that committee meeting. So we agreed.

The next Tuesday, not Thursday when there's supposed to be a meeting, Shirley Williams' secretary calls and says you need to be available at 8:30 a.m. Thursday because we're going to call up a motion for continuance. What about the committee meeting? She explained that they had motions they were going to be doing. They wanted more DNA testing.

So I think for the record the representations made on the record Monday were not correct for whatever reason.

(T. 400). The court denied the State's motion for continuance.

During the State's closing argument, ASA Chalu requested that he be allowed to introduce Pearson's sworn statement into the record "because it may be very relevant to th[e] Court's determination . . .". (T. 443). Over defense counsel's objection, the court granted the State's motion (T. 444).

On July 2, 2001, Mr. Holton objected in writing to the State's request for further DNA testing and the procedures the State sought to employ in obtaining the testing (PC-R. 662-72). An amended objection was filed on July 17, 2001 (PC-R.

703-12). On August 30, 2001, Mr. Holton filed a motion seeking the taped statement that Pearson provided to the Office of the State Attorney in June (PC-R. 752-6). Mr. Holton attached the Tampa Police Department report that indicated that Pearson admitted that he was in fact the individual who Ms. Graddy claimed raped her on June 13, 1986 (PC-R. 752-6). In his statement to the police, Pearson also admitted that he provided drugs to Ms. Graddy and had anal sex with her, though he maintained that it was consensual (PC-R. 758).

On September 17, 2001, Mr. Holton filed a supplemental motion for disclosure of David Pearson's taped statement (PC-R. 759-763). Since the State vouched for Pearson's credibility at Mr. Holton's evidentiary hearing, Mr. Holton attached documents that indicated that after Pearson 'cooperated' with the Tampa Police Department he absconded from his pending criminal charges and was a fugitive from justice (PC-R. 763). Further, a few days later, Mr. Holton filed the records regarding Pearson's pending charges for aggravated battery, wherein the weapon used was a glass bottle and from the crimes involving dishonesty, relating to events that occurred in October, 2000, less than a year before the State vouched for Pearson's credibility (PC-R. 764-95).

In October, 2001, the State disclosed Pearson's statement, at which the State was represented during the statement by ASA Shirley Williams, ASA Wayne Chalu, Detective Sandy Noblitt, and State Attorney Investigator Beiniek (Supp. PC-R. 161). Mr. Holton was not represented at Pearson's statement¹⁹ (Supp. PC-R. 161). In his sworn statement Pearson confirmed much of the substance of the police reports regarding the events that transpired between he and Katrina Graddy on June 13, 1986. However, Pearson denied killing Ms. Graddy:

Q: The reason we came to talk to you is during this motion hearing I pointed out to you that the attorneys representing Mr. Holton have advised the court that you confessed to killing Katrina Graddy to a gentleman by the name of Donald Smith. Is that what I told you?

A: Yes.

Q: And I ask (sic) you on your porch to look me in the eye and asked you if you were responsible for Katrina Graddy's death; is that correct?

A: Yes.

Q: And what was your answer?

¹⁹Curiously, the State had requested that the circuit court admit and consider Pearson's statement in ruling on Mr. Holton's Rule 3.850 claims, yet the statement was transcribed on July 12, 2001, and was not filed with the court until **Mr. Holton filed it after he filed two motions for disclosure and received a copy in October, 2001.**

A: No.

* * *

Q: Okay. During our conversation I asked you about an incident that Katrina reported where she alleged that you forced sexual relations on her; is that correct?

A: Yes.

Q: And you explained that to us.

A: Yes.

Q: And how that occurred and where that occurred?

A: At the Hancock Motel on Florida Avenue.

Q: Did you get arrested for that that night.

A: No.

Q: Did she - tell us what she told the police once you were talking to the police in regards to you being arrested.

A: Yeah. She obviously had told them that I had raped her.

Q: Okay.

* * *

Q: Did you - did you force sex on her?

A: No. No.

Q: We talked about this yesterday. Why did she have sex with you?

A: It was for crack cocaine.

Q: Okay. And where was that sexual act performed at?

A: At the Hancock Motel.

Q: In a motel room?

A: Yes.

Q: Was it vaginal? Oral?

A: It was in her butt.

Q: I'm sorry?

A: Up in her butt.

Q: So it's anal sex?

A: Anal sex, yeah.

Q: Okay. And she did that consensually?

A: She did that with me.

Q: After you completed having sex with her anally, what did she want from you?

A: Some crack.

Q: Did you have any?

A: Yes.

Q: Okay. Did you give it to her?

A: No, she stole it.

Q: Was there some kind of disagreement or argument that at that time?

A: Yes.

Q: The next question is: Did she go to a phone and call the police? Or how did it come about that she notified a police officer?

A: No, actually the police was already at the motel. I didn't know it. She didn't know it

neither. After I slapped her and the crack fell out of her mouth she said, "I'm going to call the cops on you." I said, "Well, go ahead." So she went to the door she said, "They're out here." So I came to look, right?

Q: Okay.

A: So she left storming out. So rather than to let the cops come in the room and find the crack, I just took the crack and I hid it and I met them, right? So I walked up to the cops, right, and they asked me did I know her. I said, yeah. He said, "Well, she's - she's trying to say that you raped her," you know. I said, "No, I didn't rape her."

So he asked me what happened, and I told him it was about crack. It was like the whole ordeal was about crack. It was a trick - sex for drugs.

(Supp. PC-R. 164-8). Pearson also admitted that he used Donald Smith's name in the past when he was arrested (Supp. PC-R. 177). However, Pearson denied that he ever told Mr. Smith that he killed Ms. Graddy (Supp. PC-R. 178).

Toward the end of the statement Pearson admitted that he had approached Donald Smith's wife, Berndoris, since learning of her testimony at the evidentiary hearing (Supp. PC-R. 184). But, Pearson said that he spoke to Ms. Smith in order to "warn her that she can get in trouble for perjury"²⁰ (Supp. PC-R. 184-5).

Indeed, Pearson's statement contained inconsistencies with the version of events he provided to the officers who

²⁰Ms. Smith characterized Pearson's "warning" as a threat (T. 404).

investigated the sexual battery charge on June 13, 1986. For example, Pearson denied being arrested, however, he was arrested on June 13, 1986, for the charge of obstruction by disguising identity (Def. Exs. 13 & 14). Mr. Holton's attorneys were not present at Pearson's statement and thus had no opportunity to confront him with the inconsistencies.

On November 2, 2001, the circuit court vacated Mr. Holton's convictions and sentences and granted him a new trial²¹ (PC-R. 800-20; Supp. PC-R. 503). The court granted relief based on Mr. Holton's Brady claim, newly discovered evidence claim, and under a cumulative error review (PC-R. 800-20).

The following week, the State filed a motion to release property so that the State could conduct DNA testing (PC-R. 829-30). The State also filed a Motion to Stay Proceedings and Extend Speedy Trial (PC-R. 824). The court held a hearing on November 13, 2001, after which the court granted the State's motion to extend the speedy trial time and the State's motion for further DNA testing (PC-R. 825, T. 472, 474).

²¹Appellant identifies the judge incorrectly (IB at 19). The Honorable Daniel L. Perry presided over Mr. Holton's postconviction proceedings and granted Mr. Holton a new trial.

The State filed a Notice of Appeal (PC-R. 833). This appeal follows.

SUMMARY OF ARGUMENT

Mr. Holton is an innocent man who has spent over sixteen years incarcerated on Florida's death row for crimes he did not commit. Meanwhile, Appellant, with no shame, has embraced the individual who most certainly murdered, sexually battered and set on fire Katrina Graddy, David Lorenzo Pearson, in an effort to preserve an unconstitutional conviction.

Mr. Holton has proved that Appellant suppressed material, exculpatory evidence throughout Mr. Holton's trial relating to almost every lay witness who testified against Mr. Holton. Additionally, the detectives who investigated Ms. Graddy's homicide decided that they would not document any evidence that could be favorable for Mr. Holton, including the fact that he had an alibi for the night of the crime, information that undermined the State's star witness and evidence that a witness who placed Mr. Holton at the scene of the crime lied to the police in order to retaliate against Mr. Holton.

While defense counsel was able to obtain some of the information that the police did not want her to uncover, much exculpatory evidence went undiscovered and was never heard by the jury that convicted and sentenced Mr. Holton to death. The jury that convicted Mr. Holton never knew that Ms. Graddy alleged that "Pine" anally raped her ten days before her

murder. Ms. Graddy told the police, her friends, her stepfather, a man named Donald Smith and his girlfriend, Berndoris. "Pine" who we now know is David Pearson admits that Katrina Graddy accused him of anally raping her after a sex for drugs transaction went bad. Pearson was not arrested for the sexual battery because Ms. Graddy signed a waiver of prosecution, but he was arrested for attempting to disguise his identity when the police questioned him. Ms. Graddy was informed that she could reinstate the sexual battery charges at a later date, if she wished to do so.

The State suppressed evidence that would have led the defense to the true story about Ms. Graddy's murder. The State also suppressed other evidence about witnesses and misrepresented evidence to the jury in order to bolster its weak, circumstantial case against Mr. Holton. Confidence is certainly undermined in the reliability of Mr. Holton's convictions.

Additionally, newly discovered DNA evidence now proves that the jury was misled. Evidence that the State argued was connected to Mr. Holton was not connected to him. The new evidence in conjunction with the undisclosed evidence clearly establishes that Mr. Holton would have been acquitted at his trial had the jury known of this evidence.

Serious constitutional violations occurred at Mr. Holton's capital trial. Accordingly, this Court must affirm the circuit court's order vacating Mr. Holton's convictions and granting him a new trial.

ARGUMENT

ISSUE I

MR. HOLTON WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE WHICH WAS NEVER PRESENTED TO THE JURY IN VIOLATION OF BRADY v. MARYLAND, 373 U.S. 83 (1963).

A. INTRODUCTION

In his motion to vacate, Mr. Holton alleged that either his trial counsel was ineffective in failing to discover or the State erroneously failed to disclose exculpatory evidence, and as a result, Mr. Holton was deprived an adequate adversarial testing. As collateral counsel explained in his closing argument in circuit court, "the basis of the motion is that constitutional error occurred depriving Mr. Holton of a fair and reliable result of that trial" (T. 416).

B. CIRCUIT COURT'S RULING

In vacating Mr. Holton's conviction and granting a new trial, the circuit court determined that trial counsel was not ineffective in her efforts on behalf of Mr. Holton, but that the State failed to disclose the exculpatory evidence to trial

counsel (PC-R. 808). Thereupon, the circuit court turned to Mr. Holton's alternative claim that the State had erroneously failed to disclose the evidence:

Throughout this claim, Defendant claims the State violated Brady v. Maryland, 373 U.S. 83, 85 (1963) by failing to disclose facts. First, Defendant claims the State failed 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.

(PC-R. 808-09).

After citing the controlling United States Supreme Court case law, the circuit court found:

The Court finds that the evidence would have been favorable for impeachment value and exculpatory evidence value. 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.

(PC-R. 809)(emphasis added).

C. STATE'S APPELLATE CHALLENGE

1. Standard of review

In its brief, the State incorrectly articulates the standard of review for a Brady claim (IB at 37). This Court has stated:

A trial court's finding after evaluating conflicting evidence that Brady material had been disclosed is a factual finding. As a factual finding, the reviewing court should uphold the finding as long as it is supported by competent, substantial evidence in the record.

Way v. State, 760 So. 2d 903, 911 (Fla. 2000)(citations omitted). However, "the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review." Id. at 913; Cardona v. State, ___ So.2d ___ (Fla. July 11, 2002).

2. Favorable evidence was not disclosed

In its attack upon the circuit court's order, the State overlooks Judge Perry's decision to credit the testimony of trial counsel, Mina Morgan. Ms. Morgan testified that: 1) she was not provided the evidence and information at issue, and 2) such evidence and information would have been used had it been disclosed because it was favorable to Mr. Holton.

As to the police reports, dated June 13, 1986, trial counsel, Mina Morgan, and her investigator, Sonny Fernandez, categorically stated that they did not receive the reports (T. 289, 89). Even the trial prosecutor, Joe Episcopo, recognized that this reports were favorable to Mr. Holton when he testified that had he had any reports about the rape he would have disclosed them (T. 50).

Ms. Morgan explained that her motion to continue reflected the importance she attached to learning "Pine's" true identity (T. 287). Ms. Morgan testified about her motion for continuance:

A: [Reading the motion for continuance]. . . A friend of the victim told the defense investigator that Pine 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, the investigator ascertained Pine's true name through his criminal record and his photograph.

I didn't think we ever did that. **I didn't**

recall ever having the right name for him.

Q: Maybe you received a false lead at that point in time. Do you recall ever being able to actually determine who Pine was?

A: I don't think so. **I know for awhile we thought he was, might have been Johnny Newsome but nobody would ever say that Johnny Newsome went by that name.**

(T. 286-287)(emphasis added). Clearly, trial counsel and her investigator searched for "Pine" and as trial counsel explained at one time they believed that "Pine" was Johnny Newsome. Judge Perry credited Ms. Morgan's testimony when he found that she had not rendered deficient performance, and he similarly did so when he determined that the State had failed to disclose the police reports that would have led Ms. Morgan to "Pine."²²

As to the "Donald Smith" two-page police report authored by Officer Lawless, Mr. Fernandez testified that he had never seen the report until shortly before the evidentiary hearing; he did not have the report at trial (T. 82). Ms. Morgan

²²If the State were correct that Ms. Morgan's testimony should not be credited as to her efforts to unmask "Pine," then the claim would simply be converted back into ineffectiveness of counsel. State v. Gunsby, 670 So.2d 920, 924 (Fla. 1996)(a want of diligence on trial counsel's part constitutes deficient performance); Smith v. Wainwright, 741 F.2d 1248, 1256 (11th Cir. 1981)(if trial counsel's failure to possess exculpatory evidence was due to counsel's failure to obtain as opposed to the State's failure to provide, counsel was ineffective).

initially testified that she believed she had the report at the time of trial (T. 293). However, while upon the witness stand, she examined her file and concluded, "I didn't have it" (T. 296). She found no file existed for Officer Lawless in her trial file.²³ Ms. Morgan testified that it was her routine to depose any police officer who submitted a report (T. 296-9). She excused Officer Lawless from his deposition because he had signed a different six-page police report with Officer Southwick and therefore she believed it was necessary to depose only Officer Southwick (T.296-9).²⁴

²³The State also argues that since Officer Lawless was identified on the State's response to discovery, and thus available for deposition (IB at 46). However, this ignores the fact that Officer Lawless' statement, i.e. his handwritten police report was not disclosed, as required by Rule 3.220(a)(1)(ii), which in 1986 required disclosure of "[t]he statement of any person whose name is furnished in compliance with the preceding paragraph." Moreover, trial counsel requested discovery of all police reports (R. 799). In addition to the State's discovery obligation, the State was required to turn the report over under Brady. And of course, the State fails to acknowledge the real problem, the State did not reveal Donald Smith's name as person known to have information which may be relevant under Rule 3.220(a)(1)(i) (See R. 812).

²⁴The State asserts that trial counsel had the report, yet the circuit court found that trial counsel was not ineffective (IB at 46-7). However, if trial counsel had the "Donald Smith" report and failed to locate, interview and present the evidence she would have learned from Donald Smith she was ineffective. The circuit court did not find trial counsel ineffective with regard to the "Donald Smith" report because the court found that the State suppressed the report. State

To overcome Judge Perry's factual finding premised upon the testimony of Ms. Morgan and her investigator, the State suggests in a footnote that defense counsel might have had the report because the State's additional response to discovery, filed in October 1986, lists an "auxiliary report" (IB at 46, fn. 20). However, several police reports were executed on forms that were labeled "auxiliary reports" (See Def. Exs. 29 & 34). No further information is listed on the notice of discovery, therefore the assumption that the report may have been disclosed does not provide any credible evidence that trial counsel and her investigator were incorrect when they testified that they did not receive the report.²⁵ Certainly,

v. Gunsby; Smith v. Wainwright. Since the prejudice analysis of a Brady claim and an ineffective assistance of counsel claim is the same, relief is still required if confidence is undermined in the outcome. See Robinson v. State, 770 So. 2d 1167, 1172 (Fla. 2000), citing Strickland v. Washington, 466 U.S. 668, 694 (1984).

²⁵Ms. Morgan was the last witness called at the evidentiary hearing by Mr. Holton. After she testified, the State presented no evidence to refute her testimony that she had not received Def. Ex. 18. Mr. Holton's collateral counsel did question the subsequent witnesses called by the State regarding Def. Ex. 18. Det. Noblitt testified and indicated that he had been unfamiliar with the information contained in the exhibit regarding Donald Smith (T. 373). Similarly, Det. Durkin had no recollection of the exhibit, even though the State had shown him the report in the days before his testimony (T. 378). Det. Durkin did indicate in re-direct examination by the State that if he had been aware that the defense did not possess the report, he would have provided it to the defense "[i]f I had known of its existence of course"

the State did not pursue this contention during the evidentiary hearing before Judge Perry.

The State also fails to acknowledge that, according to Officer Lawless' undisclosed report, Detective Kevin Durkin, the lead detective in the investigation, interviewed Donald Smith, yet no report exists and/or no report has ever been disclosed to indicate that an interview occurred or the substance of that interview (See Def. Ex. 18). The circuit court accepted trial counsel's testimony and made a finding of fact that the report was suppressed (PC-R. 808).

As to the numerous Flemmie Birkins documents, the State does not contest Judge Perry's finding that these documents were favorable to Mr. Holton and inadvertently undisclosed by the State. Instead the State assumes non-disclosure and argues that Judge Perry's prejudice finding was erroneous (IB at 49, 56, 58).

3. The mystery element - diligence

Curiously, the State cites the three prong test set forth by the United States Supreme Court in Strickler v. Greene, 527 U.S. 263 (1999), (IB at 37-8), yet argues to this Court that the circuit court's order was in error because defense counsel could have discovered several of the suppressed documents with

(T. 379).

due diligence. The State asserts that under Brady, the Court in Strickler required due diligence by the defense:

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.'

(IB at 43)(citations omitted). However, the passage that the State refers to in the Strickler opinion clearly related to postconviction counsel's attempt to show cause and prejudice as to why his Brady claim was not raised in his state habeas proceedings when the State argued he had procedurally defaulted his claim in federal habeas proceedings. As it relates to a procedural default, the United States Supreme Court did not reach the diligence of collateral counsel in Strickler, 527 U.S. at, 287-288. However, the Supreme Court made it very clear in Strickler that diligence was not and is not a factor to be considered under the proper Brady analysis. Id. at 280. The Court specifically delineated the "three components of a true Brady violation." They are: 1) "The evidence at issue must be favorable to the accused;" 2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and 3) "prejudice must have ensued."

In fact, Strickler, stands for the exact opposite of what

the State has asserted. Trial counsel's diligence is simply not an element of "a true Brady violation". The Court repeated in Strickler that "the duty to disclose [] evidence is applicable even though there has been no request by the accused, and [] the duty encompasses impeachment evidence as well as exculpatory evidence." Id. at 280. The Court made clear that the burden rests with prosecutors who have "a duty to learn of any favorable evidence known to the others acting on the government's behalf . . . including the police. Id. at 281.

This Court has recognized that in light of Strickler the Brady analysis does not include a diligence prong. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)(noting that "'due diligence' requirement is absent from Supreme Court's most recent formulation of the Brady test").²⁶ See Cardona v. State, ___ So.2d ___ (Fla. July 11, 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001). The State's argument that this Court apply a due diligence requirement to the Brady analysis

²⁶Of course, if trial counsel had the exculpatory information, then either the exculpatory information was not suppressed, or the accused was not prejudiced by the State's suppression, but by defense counsel's failure to use the exculpatory information. However, that is not the situation here, where the circuit court credited trial counsel's testimony that she was not provided the exculpatory evidence, but would have used it had she possessed it.

was rejected by the United State Supreme Court in Strickler.

Moreover, even if trial counsel's exercise of diligence was an element of a "true Brady claim," the absence of diligence would constitute deficient performance, as this Court explained in State v. Gunsby, 670 So.2d at 924 ("To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance"). However, the circuit court found that Ms. Morgan's performance was not deficient because the State "inadvertently suppressed" the exculpatory evidence. If the State were to convince this Court that there is no competent evidence supporting the circuit court's determination, then this Court would have to reject the circuit court's finding that counsel's performance was not deficient.²⁷

For example, the State argues that trial counsel had "Pine's" name and knew sufficient facts about the rape so she could "have easily obtained the police report with due diligence."²⁸ (IB at 44-45). The circuit court's factual

²⁷As the circuit court noted Mr. Holton's claim was premised alternatively upon either trial counsel's deficient performance or the State's suppression of favorable evidence (PC-R. 808).

²⁸The State's argument seems to be inconsistent with the assertion that the defense did not establish that Katrina

determinations were contrary to the State's contention. The State's contention regarding diligence should be rejected.

Grant was Katrina Graddy (IB at 39-40). Further, the defense had no idea the date of the alleged rape, where the crime occurred, what name Ms. Graddy used, or the identity of "Pine". Yet, the State had possession of all of the information and did not disclose it.

4. Materiality

As to the finally component of "a true Brady violation," the State ignores the dictates of Kyles v. Whitley, 514 U.S. 419 (1995). Kyles teaches: "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, **not item by item**. Id. at 436 (emphasis added). The State addresses each of the eight documents the circuit court refers to in it's order separately and never considers the totally different picture that would have been presented to Mr. Holton's jury had the evidence not been suppressed.

a. June 13th reports

Even taking the suppressed items individually, the State misrepresents the relevance and significance of the documents. First, the State suggests that the June 13, 1986, police report which indicates a "Katrina Grant of 1035 Joed Court" complained that a man named David Pearson anally raped her at a motel in Tampa, was not material because: 1) Mr. Holton did not establish that Katrina Grant was in fact Katrina Graddy; 2) the complainant signed a waiver of prosecution; and 3) the report was inadmissible as reverse Williams rule evidence (IB at 39-40).

The State's assertion that Mr. Holton failed to establish

that the complainant on June 13, 1986, was not Katrina Graddy is either premised upon a failure to read the record or an offensive effort to obfuscate. Besides the obvious similarities between the June 13th sexual battery report and Ms. Graddy's death certificate; i.e., the same first name, similar last names, the same address, and similar birth dates, only off by one year, (Def. Exs. 13 & 22), David Pearson admitted that Katrina Graddy, the same Katrina Graddy who was the murdered on June 23, 1986, complained to the police that Pearson raped her at the Hancock Motel, in Tampa, on June 13, 1986 (Supp. PC-R. 164-8). And the State in its closing argument did not contest the issue.

At the time of Mr. Holton's trial, the defense knew that Ms. Graddy told several family members and friends that a man named "Pine" raped her shortly before her murder (T. 85-6, 285, Def. Exs. 19, 20, 21, 31 & 32). The defense also knew that Ms. Graddy likely used a false name when she made her complaint. (Def. Ex. 20, p.6). Thus, not only did Pearson verify that Katrina Graddy was the complainant on June 13th, the information trial counsel obtained is entirely consistent with the police report. Indeed, it was "established that the victim of the alleged assault, Katrina Grant, was in fact the murder victim, Katrina Graddy." (IB at 39).

The State next argued that, "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."²⁹ (IB at 40). This argument assumes that Ms. Graddy was not anally raped by Pearson on June 13, 1986, and if she was not raped then the report is not relevant. However, Ms. Graddy's waiver of prosecution does not diminish the significance of the complaint. The waiver clearly indicates that the complainant can "request an arrest warrant at a later date." (Def. Ex. 13). Katrina Graddy could have requested that Pearson be arrested on the day after the rape or the next day or on any other day, including the day she was murdered.

Additionally, unlike Appellant, trial counsel, Mr. Holton and his current postconviction counsel neither believe that a "known prostitute" cannot be raped nor believe that Pearson when faced with the possibility of replacing Mr. Holton on death row told the truth when he was questioned by the police. Whether Ms. Graddy was anally raped on June 13, 1986, or

²⁹Assuming for the sake of argument that Katrina falsely accused David Pearson of rape, such an accusation to the police could certainly produce a homicidal rage, particularly since David Pearson in the course of his interview had to admit to the police that he was a drug dealer. In fact, the State argued at Mr. Holton's trial that the possible motive for the murder was a drug deal gone bad.

whether she lied to the police makes no difference in the Brady analysis. Ms. Graddy reported Pearson to the police for a serious, violent offense. Pearson admitted he supplied Ms. Graddy with crack and had sex with Ms. Graddy. Therefore, Ms. Graddy's complaint caused Pearson to be a suspect in at least four different crimes - sexual battery, delivery of a controlled substance, possession of a controlled substance and solicitation. Pearson admitted in his sworn statement that he slapped Ms. Graddy, thus, even if he did not anally rape her, a violent argument occurred which could have subjected him to criminal prosecution. It further reflects on his emotional feelings regarding Katrina that he resorted to physical violence against her.

Significantly, after June 13th, Ms. Graddy continued to discuss the rape with her family and friends. She was angry, and she went to see Donald Lamar Smith, who testified that Pearson and Ms. Graddy exchanged angry threats when they saw each other the day after the rape (T. 243). Berndoris Smith described how Ms. Graddy wanted to retaliate against Pearson - even asking Donald Smith to beat-up Pearson (T. 151-2).

The State ignores the fact that **Pearson was arrested** on June 13, 1986 (Def. Ex 14). The charge was obstruction by disguising identity (Def. Ex. 14). Pearson repeatedly lied to

the police about his identity (Def. Ex. 14). The only reason Pearson was being interviewed by the police was because Ms. Graddy had complained about the sexual battery (Def. Ex. 13). This would demonstrate that Pearson was not too happy about the arrest and had things to hide.³⁰

At Mr. Holton's trial, Ms. Morgan argued:

Mr. Episcopo told you in the beginning he could not show a motive, that motive was not a factor. Well, it is not a necessary element of any of these offenses but look at what was done to this girl and ask yourself: **Is this the sort of thing that you would expect from someone who barely knows her?**

(R. 702)(emphasis added). Certainly the information contained in the June 13th police reports would have provided a compelling reason for the defense to argue that Pearson

³⁰The State argues that the evidence of a prior sexual assault would not be admissible as reverse Williams rule evidence (IB at 40). The State's argument misses the point. The significance of the alleged sexual battery is not that it proves that Pearson committed the crime because the two crimes were similar. Rather, the allegations of the rape provide a powerful motive for Pearson to murder Katrina Graddy, independent of the similarity or dissimilarity of the crimes. Because of Ms. Graddy's allegations, Pearson was arrested. The police investigated and learned that he committed a number of crimes at the Hancock Motel, including that he was a drug dealer. The fact that Pearson had a motive to murder the victim was relevant and admissible at Mr. Holton's capital trial. The cases cited by the State all concerned the use of similar-fact evidence to prove "identity" of the perpetrator. Those cases do not control in these circumstances.

committed the murder.³¹ At trial, the State argued that Mr. Holton's motive arose from a sex for drugs transaction had gone bad:

He doesn't like this woman. He hates this woman. Why does he hate this woman? Because you can see what he did with this bottle. That's the charge he has been charged with. That's right. There is no evidence of semen. But that was because our bigshot over here couldn't do it, and he killed her because he couldn't, because she wouldn't help him, because she wouldn't satisfy him. Maybe she hurt him with that free hand. Maybe she grabbed him somewhere and squeezed him. Maybe he lost his temper.

(R. 719). The State's argument is remarkably more consistent with Pearson being the murderer, than Rudolph Holton, given the undisclosed evidence.

Further, the information about Pearson was also relevant and admissible as reflecting upon the adequacy of the police investigation. In Kyles v. Whitley, the United States Supreme Court recognized that evidence that impeached the police investigation could establish a Brady violation:

³¹The State expends considerable energy debating whether the facts contained in the June 13th sexual battery allegation were similar to the facts surrounding the June 23rd sexual battery and murder. While it makes no difference in regard to admissibility on motive grounds, defense counsel testified at the evidentiary hearing that it was significant that both crimes involved anal penetration and choking Ms. Graddy (T. 291-2). Certainly, defense counsel would have argued that the murder reflected Pearson's anger toward the victim and desire to humiliate and retaliate against her for reporting the alleged rape to the police.

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. . . . [the evidence's] disclosure would have revealed a remarkably uncritical attitude on the part of the police.

* * *

Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.

514 U.S. 419, 445-6. (citations omitted).

Here, the June 13, 1986, police reports presented valuable evidence to undermine the police investigation of Ms. Graddy's murder. Even when the prosecution was aware that Ms. Graddy complained that she had been raped by "Pine" to her family and friends, (Def. Exs. 20 & 21), it appears the police did not consider that the alleged rape may be connected to the murder.³²

³²Indeed, Pamela Woods testified in her deposition that on the night of Ms. Graddy murder she asked someone on the street if they had seen Ms. Graddy and she was told that Ms. Graddy was seen with "Pine" walking through the park (Def. Ex. 33, p. 29). Still, the police made no attempt to ascertain "Pine's" true identity in order to interview him.

Ms. Morgan testified at the evidentiary hearing that had she known "Pine" was Pearson she would have researched his criminal history and obtained his photo (T. 306). At the evidentiary hearing, trial counsel testified that she could have linked Pearson to the black bag and to Schenck (T. 308). In fact, after reviewing Pearson's photo, Schenck testified that Pearson more resembled the hitchhiker than did Mr. Holton (T. 163).³³

The June 13th police reports also provided the name "Donald Lamar Smith". As Ms. Morgan testified, she would have spoken to Mr. Smith in order to obtain Pearson's location (T. 291-2). This would have led counsel to discovering that according to Mr. Smith, **Pearson had confessed the murder to him.**

b. Donald Lamar Smith police reports

As to the "Donald Smith" police reports, the State argues without any factual basis at all that Donald Smith would not

If Ms. Woods' testimony was reliable, "Pine" may have been one of the last people to see Ms. Graddy alive. Therefore, whether he was a suspect or a potential witness, it is very curious that the police never attempted to speak with him.

³³Further, Ms. Woods' deposition testimony regarding "Pine" becomes even more significant in light of the June 13th police reports. Ms. Woods' also linked Pearson, who she knew as "Pine" to the black bag, Schenck and to Ms. Graddy on the night of the crime (See Def. Ex. 33).

have testified at Mr. Holton's trial because he was Pearson's friend³⁴ (IB at 47). However, Donald Smith testified that he would have testified truthfully to his knowledge of Pearson's involvement in the Graddy homicide at Mr. Holton's trial (T. 248).³⁵ The circuit court accepted Donald Smith's testimony as credible.

In arguing the circuit court's finding is not supported by competent and substantial evidence, the State misrepresents Mr. Smith's testimony. Mr. Smith testified that when he was interviewed by the police at the crime scene he did not reveal Pearson's name because several people were standing around and he did not want to be a snitch (T. 245). However, he testified that had anyone interviewed him in private he would have revealed Pearson's name as the individual who provided him with information about the crime (T. 245).³⁶

³⁴At Mr. Holton's trial, the State argued that Flemmie Birkins and Rudolph Holton had known each other for many years and were friends. The State told the jury that the crime was so horrible, Birkins was compelled to come forward despite his friendship with Mr. Holton (R. 297).

³⁵In fact, Donald Smith was upset with Pearson for using his name when Pearson was questioned about the alleged sexual battery on June 13, 1986 (T. 243). Donald Smith was also not only friends with Pearson, but also with the Graddy family (T. 240).

³⁶Of course on the day of crime when he was questioned by the police, David Pearson had not yet confessed to killing Katrina to Mr. Smith. That occurred later that summer.

Prejudice was caused by the suppression of the two June 13th reports and the Donald Smith report. This particularly true when these reports are considered cumulatively. Had the reports been disclosed, the jury would have seen Mr. Holton's case in a whole new light. This is particularly so given the fact that the reports would have led to Donald Smith who would have testified that **David Pearson confessed the murder to him.**

c. The Flemmie Birkins documents

The State also disputes the circuit court's findings in regard to the numerous documents impeaching Flemmie Birkins' testimony. In its brief, the State argues that the jury heard that Birkins could be given a lengthy sentence and trial counsel effectively cross examined Birkins, so any prejudice to Mr. Holton was minimal (IB at 50 & 51).

However, Birkins had testified inconsistently; initially, he told the jury that he accepted a plea to three years and his sentencing guidelines called for a sentence of three-and-a-half to four-and-a-half years in prison (R. 308). Birkins also testified that he did not accept the plea and that he pled "open" to the charges because "he would not have pled to all that." (R. 293). Likewise, in his argument at Birkins' sentencing hearing, ASA Episcopo made contradictory statements about whether Birkins accepted a plea to three years or not.

(Def. Ex. 10, p. 4-11).

Throughout his closing argument the prosecutor told the jury that Birkins' motivation in coming forward was not based on any benefit he was receiving for his testimony:

Maybe he could have come in and not been such a honest witness now, but he's still telling the truth because, ladies and gentlemen, this is a horrible crime that even a fellow black inmate will not tolerate.

(R. 716).³⁷ In reference to Birkins' credibility, the prosecutor argued:

... He has got eight convictions but under the sentencing guidelines, he scores out to three-and-a-half to four-and-a-half years, and those are scored in, and he's got two more waiting.

So for his ten crimes, he gets three-and-a-half to four-and-a-half. That is how horrible a criminal he is.

(R. 707).

Birkins' sentencing hearing, presentence investigation report and guidelines score sheet indicate that, in reality, Birkins was a "horrible criminal", who was facing nine to twelve years on a grand theft charge. ASA Episcopo conceded in 2001 that in reviewing Birkins' record he saw the error in the calculation of Birkins' sentencing guidelines:

The true score sheet is nine to twelve and I guess if you look at the prior record and the PSI you

³⁷In fact, Mr. Birkins testified in 2001 that he was not telling the truth and that Mr. Holton never confessed to him.

would see it's nine to twelve.

(Def. Ex. 10).

Like the prosecutor, trial counsel testified that had she received any document detailing Birkins' criminal history she would have realized that he was facing a much lengthier prison sentence than she had been told³⁸ (T. 312). The jury would have heard that Birkins' was not coming forward because he felt a moral obligation to help the police, but rather that he was greatly reducing his potential sentence. Birkins' was the State's star witness. ASA Episcopo told Mr. Holton's jury and Birkins' sentencing judge that a conviction could not have been obtained without Birkins (R. 705-7; Def. Ex. 10). See McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982)(recognizing "a particular need for full cross-examination of the State's star witness"). Birkins wanted to be released from prison. He fabricated a story about Mr. Holton confessing, expecting that he would benefit greatly, and he did. Rather than be sentenced between nine and twelve years, Mr. Holton's prosecutor ensured that Birkins received a short period of incarceration at the jail (he was released in

³⁸Appellant argues that trial counsel's testimony was "speculation". (IB at 50). However, even the prosecutor acknowledges that the error was apparent when looking at Birkins' criminal history. (Def. Ex. 10).

January, 1987, almost one month after Mr. Holton was sentenced to death), followed by a year of community control and probation. Yet, the jury did not know this. This must undermine confidence in the reliability of the jury's assessment, particularly Mr. Birkins has now testified that he testimony was false; Mr. Holton never confessed to him.

d. Cumulative consideration

In reviewing the materiality of Mr. Holton's claim, this Court must review the net effect of the suppressed evidence and determine "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000). Further, "[i]n applying these elements, the evidence must be considered in the context of the entire record." Occhicone v. State, 768 So. 2d at 1041.

Without a doubt, had any of the reports been disclosed, trial counsel would have located and interviewed Donald Smith. The information Donald Smith possessed was incredibly important evidence. Not only did the reports provided a compelling motive for Pearson to murder Katrina Graddy, but Donald Smith and his wife testified that Ms. Graddy was upset and wanted to retaliate against Pearson (T. 243). She went so far as to seek out Donald Smith to tell him that Pearson used

his name in speaking to the police (T. 240, 151-2). Mr. Smith saw that Ms. Graddy had bruising on her neck and she told Mr. Smith that "Pine" choked her and forced her to have sex (T. 241). Ms. Graddy explained that Pine gave her some [crack] rocks, but she would not have sex with him, so Pine raped her (T. 242).

The day after the alleged rape, Mr. Smith witnessed an argument between Graddy and Pearson (T. 242). Donald Smith testified in 2001:

Q: Okay, you told him that why did he use your name when he raped that girl . . . ?

A: Yes, but before I got finished she went hollering at him.

Q: What did she say to Mr. Pearson?

A: She's going to get his ass if that's, that's what she's going to do, you know, you smoked my s**t.

Q: Okay, and did Pine also tell her that I'm going to kill your ass?

A: Yes.

Q: For calling the police on me?

A: Yes.

(T. 243).

Donald Smith also possessed crucial information about the day the police found Ms. Graddy's body. On his way to the abandoned house on Scott Street, to see what was happening,

Mr. Smith met Pearson "walking fast towards" him (T. 244). Pearson told him that Katrina was found in the house strangled (T. 244). Mr. Smith proceeded to walk to the crime scene and when he got near the abandoned house he said: "they found Katrina strangled" (T. 244). As Ms. Morgan testified at the evidentiary hearing, Pearson's intimate knowledge of the crime would have been significant in arguing that Pearson must have been involved with Ms. Graddy's murder.³⁹

A few weeks after Ms. Graddy's murder, Pearson was at Mr. Smith's house getting a hair cut (T. 246). Mr. Smith and Pearson explained that he had murdered Ms. Graddy (T. 246). Mr. Smith informed his future wife, Berndoris, and his friend George Smith about Pearson's confession⁴⁰ (T. 246). George Smith corroborated Donald Smith's testimony. After Ms. Graddy's murder, Donald Smith told the witness that, "Pine had

³⁹At the evidentiary hearing, Detective Sandy Noblitt attempted to explain that Mr. Smith could have overheard details about the crime while he stood around the scene (T. 368). Yet at trial, the State presented testimony through Tampa Police detectives that information was not released to public about the crime. Thus, the State argued that Birkins' knowledge of the crime could only have come from Mr. Holton (T. 447).

⁴⁰The State now asserts that Pearson's statement was not a confession. However, during his cross examination of Mr. Smith, ASA Chalu characterized Pearson's comment as a confession, and Mr. Smith agreed (T. 254). The proper time to have disputed whether Pearson confessed to Mr. Smith was in the circuit court.

told [Donald] that he had did it" (T. 196). George Smith confronted Pearson about the confession; Pearson did not deny it, but walked away (T. 197).

In addition to Donald Smith, Berndoris Smith and George Smith's testimony, as stated previously, the police reports would have provided the link between Pearson and the black bag. Trial counsel also could have illustrated the weakness in the investigation of Mr. Holton based on all of the evidence pointing to Pearson.

Contrary to the State's position, the suppression of the June 13th reports and the Donald Smith reports resulted in extreme prejudice to Mr. Holton. Had the jury heard the truth about Pearson and his relationship to Ms. Graddy there is no doubt that the jury would have acquitted Mr. Holton. But, this non-disclosures must still be evaluated cumulatively with the non-disclosures regarding Flemmie Birkins.

There is no doubt that Birkins, contrary to his trial testimony, sought consideration for his testimony. Also, due to non-disclosure, the jury also never heard that Birkins' had a lengthy relationship with the Tampa Police Department. Whenever Birkins faced a criminal charge or was incarcerated he requested assistance from the State in exchange for information about other crimes (Def. Ex. 35 & 36). Birkins'

relationship to the police and the State was important, because the State told the jury that Birkins did not ask for anything in exchange for his testimony. While this may be true, had the jury known that Birkins was no stranger to the "snitch game" trial counsel could have shown that Birkins and the police knew what to expect from each other.

ASA Episcopo admitted at the evidentiary hearing that it was "standard operating procedure" for him not to agree to a deal with a snitch pretrial so that the deal did not taint the witness' testimony (T. 62-3). However, because Birkins' knew the system and the police knew Birkins' it was unnecessary to enter into an agreement before the trial. Birkins' knew that he would receive consideration (T. 125).

However in 2001, **Birkins testified that he lied at Mr. Holton's trial** (T. 122-3). He testified that Rudolph Holton never told him anything about the Graddy homicide or any other crime (T. 122-3). The circuit court did not disregard Birkins' testimony in 2001 as incredible. The circuit court had to have relied upon it to conclude that the State suppressed exculpatory information regarding Flemmie Birkins.

In fact, the evidence that was in possession of the police clearly demonstrates that Birkins lied about Mr. Holton confessing to him. At trial, Birkins testified that he and

Mr. Holton had two conversations on June 26, 1986. The first conversation was of no consequence, however, shortly thereafter, Mr. Holton saw Birkins and confessed to killing Ms. Graddy (T. 289, 295). What the jury did not hear was that Birkins and Mr. Holton could not have had the second conversation wherein Mr. Holton allegedly confessed. On June 26, 1986, Detectives Durkin and Noblitt "checked the defendant out of Central booking and transported him to the Police Dept." At approximately, 5:00 p.m., Mr. Holton was being checked out of the jail and transported. This was at the same time Birkins claimed that Mr. Holton was confessing to him (Def. Ex. 34).

In State v. Huggins, 788 So.2d 238, 244 (Fla. 2001), this Court analyzed a Brady claim and stated:

The State presented a purely circumstantial case against Huggins. As Angel was its key prosecutorial witness who established crucial details in the State's theory of the case, her credibility was critical.

Likewise, Birkins was crucial to the State in obtaining a conviction against Mr. Holton. The prosecutor recognized that Birkins' was critical in obtaining a conviction. There is no doubt that the documents reflecting the true benefit Birkins received and the proof that Birkins lied at Mr. Holton's trial, "shake[] the confidence in the verdict." State v.

Huggins, 788 So. 2d at 243-4.

The United States Supreme Court has cautioned that in showing materiality, petitioners:

need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley 514 U.S. 419, 435-6 (1995). Mr. Holton has proved that the State committed several Brady violations at his capital trial. The undisclosed evidence places his case in a whole new light. Mr. Holton requests that this Court affirm the circuit court's order vacating Mr. Holton's convictions.

ISSUE II

MR. HOLTON IS ENTITLED TO RELIEF BASED ON HIS NEWLY DISCOVERED EVIDENCE CLAIM.

The State argues that the circuit court erred in finding that the newly discovered evidence based upon the results of mitochondrial DNA (mt DNA) testing, would not probably produce an acquittal upon retrial (IB at 64). Initially, the State refers to the circuit court's order in which Judge Perry

stated:

As to claim III-f, Defendant fails to meet the standard of newly discovered evidence and requests leave to amend pending further investigation. However, this Court held an evidentiary hearing on this claim.

(PC-R. 813). The State argues that in its order the court reversed itself in regard to the newly discovered evidence (IB at 62). However, the more probable explanation is that the introductory sentence in that paragraph which is quoted above contains a typographical error. Clearly, that sentence does not represent the finding of the circuit court. Obviously, the circuit court was convinced at the evidentiary hearing that relief was warranted upon this claim.

In the Initial Brief, the State claims for the first time that Mr. Holton's claim was untimely and therefore barred. (IB at 63). The State argues that Mr. Holton could have raised his claim before he requested mt DNA testing and before he amended his Rule 3.850 motion (IB at 63). However, this diligence argument was not raised in the circuit court, and therefore was waived and not properly preserved for appeal. Keech v. Yousef, 815 So. 2d 718, 719-20 (Fla. 4th DCA 2001); Cosid v. Bat Steel Products Co., Inc., 288 So. 2d 277 (Fla. 4th DCA 1974)("[A]n appellate court must confine itself to a consideration of only those matters in question that were

before the lower court").

During Mr. Holton's postconviction proceedings, the State objected to Mr. Holton's request to test evidence using the advanced technology of DNA methods. But, the objection was not based on a diligence argument. Rather, the State argued that there was no authority for DNA testing in postconviction and that allowing Mr. Holton to test evidence would open the "flood gates for [testing] motions" (Supp. PC-R. 560, 562). Subsequently, both the Court and the State requested further DNA testing (T. 385-6; 396). The Court sua sponte ordered additional mt DNA testing at the closing of evidence (T. 657-8). The State requested further DNA testing in June, 2001, and the circuit court granted the motion in November, 2001.⁴¹

It is inconsistent for the State to take the position that no authority exists for Mr. Holton to test evidence, and then after the results were favorable for Mr. Holton, argue that Mr. Holton could have tested the evidence sooner.⁴²

⁴¹**All of the DNA testing results have been exculpatory for Mr. Holton.** In fact, the mt DNA testing ordered by the circuit court resulted in a mt DNA profile of hairs found in the black shaving kit that matched neither Mr. Holton nor Ms. Graddy. Therefore, a third, unknown source has been injected into the case (Def. Ex. 41).

⁴²The DNA statute promulgated by the Florida Legislature in 2001, also serves to render the argument moot. Clearly, under the DNA statute Mr. Holton would currently be entitled to test the evidence in his case, plead any favorable results

Because the State failed to argue that Mr. Holton was not diligent in the circuit court it has defaulted this argument on appeal.

Further, the State attempts to mislead this Court by citing to Zeigler v. State, 654 So. 2d 1162 (Fla. 1995), to suggest that Zeigler supports the State's position. In Zeigler, this Court found that Zeigler's request for DNA testing was procedurally barred because Zeigler was a successive postconviction litigant:

[H]e should have raised the claim in his pending motion for postconviction relief in order to avoid the procedural bar of successive motions. Instead, he waited in excess of two years before first raising the claim in 1994.

Id. at 1164. Unlike Mr. Holton, Mr. Zeigler raised his testing claim in a successive postconviction motions, therefore his request was denied based on a procedural bar.⁴³

and would not be subject to default based on a diligence argument.

⁴³The State suggests that mt DNA testing was conducted in 1992 and cites Bolin (IB at 63). What the State fails to inform this Court is that mt DNA testing was inadmissible in court until very recently. (In fact, Bolin may have been the first case in which mt DNA results were admitted, and they were only admissible at his most recent trial). Dr. Melton testified that in 2001, only five labs in the United States conduct mt DNA testing and only three states have found results admissible (T. 11-2, 26).

In addition to his diligence argument, the State also argues that Mr. Holton's mt DNA results do not meet the standard for relief under newly discovered evidence. See Jones v. State, 591 So. 2d 911 (Fla. 1991). The State contends that the testimony the jury heard at trial regarding the hair evidence was not incorrect (IB at 64). While Mr. Holton's jury may have heard accurate testimony about the characteristics of the hairs found on the victim's mouth, they heard incorrect testimony and false argument from the prosecutor about who was the source of the hairs. Mr. Holton, through testing, proved that the hairs excluded him as the source, while the jury heard that Mr. Holton could not be excluded as the source. What the jury heard was factually incorrect, inaccurate and misleading.

Further, at trial, the prosecutor capitalized on FBI Agent Quill's testimony. The prosecutor argued in no uncertain terms that the hairs linked Mr. Holton to the crime:

No, we can't say these are the hairs of the defendant. We never purported to say they were the hairs of the defendant. We wanted to show that she died with Negro hairs in her mouth. **We can say that they are not her hairs.** You know why? Because they came from either here or here or back here. That is what Quill said.

How are hairs down there going to get in her mouth? And there are no Caucasian hairs. Proof beyond a reasonable doubt, Negro hairs in her mouth from a certain location on the body, and I would

just defy anybody to tell me how those are her hairs, how she got them.

(R. 707-8)(emphasis added). The State now contends that this closing argument was not unsupported or misleading (IB at 65). However, in the Tomkins warrant litigation, the same prosecuting authority, in an attempt, to convince the circuit court to reject DNA testing filed a motion which stated:

Tompkins reliance on the Hillsborough County case of State v. Holton, is unavailing. The issue in Holton was that the prosecutor had argued to the jury that the hair in question could not have been from the victim. The DNA testing subsequently excluded Holton as the possible source and noted that it could not exclude the possibility that the questioned hairs came from the victim or a maternally related individual. That situation is far different here **where the prosecutor made no misrepresentations as to hair and fibers . . .**

(Def. Ex. 4). In Tomkins, the State argued that the prosecutor in Mr. Holton's case misrepresented the evidence, while in Tompkins the prosecutor did not. Therefore, the State's position is refuted by its position in Tompkins.

Again, contrary to the State's argument, the prosecutor's closing argument was incorrect because he told the jury that the hair could not be the victim's and could be Mr. Holton's, beyond a reasonable doubt (R. 707-8). We now know that the test results prove that the hair was not Mr. Holton's and was consistent with the victim's hair (T. 29, Def. Ex. 3).

The State asserts that the hairs were not a critical piece of evidence in the State's case against Mr. Holton. The hair evidence was the only piece of physical evidence that linked Mr. Holton to Ms. Graddy or the crime scene on the night of the murder. The State believed that the hair evidence was critical enough to arrange for FBI Agent Quill to travel to Tampa so that he could testify to the results of his hair examination. The State also believed that the hair evidence was critical enough to tell the jury that it provided evidence beyond a reasonable doubt about the crime (R. 707-8). By the State's own admission, the evidence against Mr. Holton was circumstantial and trial counsel impeached all of the lay witnesses who testified against Mr. Holton - Birkins, Newsome, Nelson and Schenck.

The circuit court found that the mt DNA results would probably produce an acquittal on retrial. The evidence supports the court's finding. "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, . . . ". Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). Thus, Mr. Holton respectfully requests that this Court affirm the circuit court's order vacating Mr. Holton's convictions and granting a new trial.

ISSUE III

THE CUMULATIVE EFFECT OF THE ERRORS THAT OCCURRED AT MR. HOLTON'S TRIAL DEPRIVED HIM OF A FAIR TRIAL.

Essentially, the State repeats its arguments in Issues I and II of his Initial Brief and says that Mr. Holton's claims of error, which the circuit court found entitled him to relief, are meritless (IB at 67-8). The State suggests that when the evidence as it existed at trial is viewed as a whole against Mr. Holton, he is not entitled to relief.⁴⁴ (IB at 68).

While Mr. Holton may not agree that the evidence presented at trial should have produced a verdict of guilty, he does not quarrel with the fact that it lead to his convictions. However, the State ignores the evidence presented at the evidentiary hearing. At his evidentiary hearing, Mr. Holton undermined virtually every piece of

⁴⁴The State misstates the evidence from trial. For example, "Appellee used cocaine and had sought drugs from the victim prior to her death." (IB at 68). Mr. Holton did not know the victim and never asked the victim for drugs. Rather, Ms. Woods testified that when passing by, Mr. Holton once asked if she and Ms. Graddy knew where he could buy drugs (R. 588-90). Ms. Woods made clear that she had never seen Mr. Holton with the victim (Def. Ex. 33). Also, the victim was not found in the "front of the house", as the State avers (IB at 69). The significance of the front room of the house was that the police found a cigarette pack and a syringe in that room, however, Ms. Graddy's body was not found in that room.

evidence that the State presented to his jury in 1986 to secure his conviction and death sentence.

Flemmie Birkins, the State's star witness at trial admitted he lied about Mr. Holton's alleged confession and about his expectations for leniency due to his testimony. The circuit court accepted Birkins' 2001 testimony. Documents introduced at the hearing, including the transcript of Birkins's sentencing hearing, and the police report that indicated that Mr. Holton was not in the jail at the time Birkins said he confessed, support the court's finding.

Likewise, Newsome admitted he lied at Mr. Holton's trial. While the judge did not find Newsome credible, that fact, provides valuable impeachment to Newsome's trial testimony. Further, trial counsel admitted that reports about Newsome's criminal activities prior to the trial existed and she had no reason for why did not use them to impeach Newsome. Newsome's trial testimony should be viewed as incredible, as well.

The consistent statements made to Mr. Holton's investigators by Willie Dan Simmons completely refuted the testimony of Nelson at the trial.

Schenck testified that had he viewed a photo of Pearson in 1986, he would have chosen Pearson as the individual resembling the hitchhiker and not Mr. Holton.

The evidence regarding the mt DNA result of the hairs found on the victim's mouth, the only physical evidence connecting Mr. Holton to Ms. Graddy, and the hairs found in the black shaving bag conclusively exclude Mr. Holton as being the source of the hairs; the hairs in the black bag prove that someone other than Mr. Holton or the victim contributed the hairs.

The testimony about the scratches on Mr. Holton's chest was also refuted by Mr. Holton's medical expert.

Additionally, Mr. Holton had an alibi for the night of the murder. Ms. Woods established a time line which corroborated Mr. Holton about his whereabouts on the night of the crime. And, as Mr. Holton has proved, the evidence implicating Pearson in the crime is overwhelming. Pearson had a motive to harm Ms. Graddy, he threatened her and he ultimately confessed to her murder. In State v. Gunsby, this Court stated that in reviewing errors that occurred at a capital defendant's trial:

when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's trial has been undermined and that a reasonable probability exists of a different outcome.

670 So. 2d 920, 924 (Fla. 1996). In reviewing the errors

found by the circuit court, both individually and cumulatively, Mr. Holton is entitled to relief.

CONCLUSION

The lower court properly determined that Mr. Holton is entitled to a new trial due to the State's suppression of material, exculpatory evidence. For all the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail, postage prepaid, to Stephen D. Ake, Assistant Attorney General, Westwood Center, 2002 North Lois Ave., Suite 700, Tampa, FL 33607, this 1st day of August, 2002.

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