**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT**
**IN AND FOR PINELLAS COUNTY, FLORIDA**

**STATE OF FLORIDA,**

Plaintiff,

v. Case No. 84-CF-3982

**RICHARD W. RHODES, JR.,**

Defendant.

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**SUCCESSIVE MOTION TO VACATE JUDGMENT AND SENTENCE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851**

Richard W. Rhodes, Jr., respectfully moves for an order, pursuant to Florida Rule of Criminal Procedure 3.851, vacating and setting aside his conviction and death sentence.

**PROCEDURAL HISTORY**

1. In 1985, Rhodes was convicted of first-degree murder in the Sixth Judicial Circuit, in and for Pinellas County.[1] *See Rhodes v. State*, 547 So. 2d 1201, 1203 (Fla. 1989). The jury recommended the death penalty by a vote of 7 to 5, and this Court thereafter imposed a death sentence. On direct appeal, the Florida Supreme Court affirmed Rhodes' conviction but vacated his death sentence because it found that "only one of the three aggravating circumstances upon which the trial court relied [was] valid," and that there was "substantial psychiatric testimony presented in mitigation." *Rhodes v. State,* 547 So. 2d 1201, 1208 (Fla. 1989).[2] The Court remanded

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[1] Citations are as follows: references to the record on Rhodes' first direct appeal are "R1. __." References to the record on Rhodes' resentencing appeal are "R2. __." References to the initial postconviction proceedings on appeal are "PC-R1. __."

[2] Rhodes raised the following issues: (1) The trial court erred in denying Rhodes' motion to suppress statements he made after his arrest; (2) Incriminatory statements Rhodes allegedly made to Edward Cottrell should have been suppressed; (3) The trial court erred in permitting Michael Allen to testify concerning statements allegedly made by Richard Rhodes; (4) The trial court erred in admitting into evidence color photographs and a color videotape of the victim which were cumulative, irrelevant, and had the effect of inflaming the jury; (5) The trial court erred in admitting testimony of FBI Agent Michael Malone that was outside of his area of his expertise in hair and fiber analysis; (6) The trial court erred in admitting irrelevant evidence of collateral crimes which only tended to prove Rhodes' propensity to commit crime; (7) The trial court erred in excluding on hearsay grounds testimony of a defense witness as to a statement made by Karen Nieradka; (8) The State should not have been permitted to present rebuttal evidence that was either hearsay, impeachment on collateral matters, or did not serve rebut anything presented by the defense; (9) The trial court erred in denying Rhodes' motions for mistrial due to improper remarks by the prosecutor during closing; (10) The trial court

for a new sentencing proceeding. *Id.* At resentencing, the jury recommended a death sentence by a 10 to 2 vote and this Court sentenced Rhodes to death. The Florida Supreme Court affirmed. *Rhodes v. State*, 638 So. 2d 920 (Fla. 1994).[3]

2. On April 12, 1996, Rhodes filed an initial postconviction motion in this Court pursuant to Fla. R. Crim. P. 3.850.[4] He filed an amended motion for postconviction relief on January 8, 1999.[5]

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erred in instructing the jury on flight, giving an erroneous instruction regarding proof of the time of commission of the crime, and in refusing to instruct on second degree felony murder; (11) The trial court erred in instructing the alternate jurors, in the presence of the jurors who ultimately found Rhodes guilty of murder, to remain in the courtroom in case they were needed for a penalty phase; (12) Rhodes' penalty phase was tainted by evidence he was unable to confront, improper cross-examination of a defense witness, and improper and inflammatory argument by the prosecutor; (13) The trial court erred in answering a question from the jury without notifying counsel for the State or counsel for the defense, and without conducting the jury into the courtroom; (14) The trial court's findings in aggravation and mitigation are insufficient to support the imposition of the death penalty; and (15) The trial court erred in sentencing Rhodes to die in the electric chair, because the sentencing weighing process included improper aggravating circumstances and excluded existing mitigating circumstances.

[3] Rhodes raised the following issues: (1) The trial court erred by excusing for cause a juror who was qualified to serve; (2) The trial court erred in permitting the State to present extensive hearsay evidence at the resentencing, some of which Rhodes had no opportunity to confront or rebut; (3) The trial court erred in permitting the State to inject irrelevant and prejudicial matters, including evidence of Rhodes' statements following his arrest for robbery in Oregon; (4) The death recommendation is unreliable because the jury was misled regarding its role in the sentencing process, and was permitted to consider a non-statutory aggravating circumstance; (5) The trial court erred in instructing the jury on, and finding in aggravation, that the capital felony was committed while Rhodes was engaged in committing a sexual battery or attempted sexual battery; (6) The trial court erred in failing to afford Rhodes an opportunity to be heard in person prior to imposing sentence, and in predicating the sentence upon inappropriate considerations, without sufficient and legally correct analysis; (7) The death sentence is disproportionate; and (8) One of the two written judgments filed is extraneous and must be stricken. The Florida Supreme Court struck the additional judgment of conviction since the initial conviction had not been vacated.

[4] Rhodes raised the following claims: (1) Rhodes was denied access to records in violation of Chapter 119, Fla. Stat.; (2) Ineffective assistance of counsel at the penalty phase for failing to adequately investigate and prepare additional mitigating evidence and failed to adequately challenge the State's case; (3) Rhodes' sentencing jury was improperly instructed on the in the course of a sexual battery aggravator; (4) Rhodes is being denied his right to effective representation by the lack of funding available to postconviction counsel; (5) The one year timeframe to file his 3.850 motion is unconstitutional; (6) Ineffective assistance of counsel pretrial and at the guilt phase; (7) Rhodes was denied access to his trial counsel's files; (8) Access to records in possession of the judge has not been provided pursuant to Rule 2.051 of the Florida Rules of Judicial Administration; (9) Rhodes' constitutional rights were violated due to unreliable trial transcripts; (10) Unfair introduction of gruesome photos and videos; (11) Denied access to adequate mental health assistance; (12) The State violated *Brady* in failing to produce records related to alternate suspects; (13) Unconstitutional prohibition on conducting juror interviews; (14) *Miranda* violation; (15) Trial counsel failed to obtain a competent mental health profession to address Rhodes' incompetency to proceed to trial; (16) No probable cause for Rhodes' arrest; (17) Innocence of first degree murder and of the death sentence; (18) *Massiah/Henry* violation relating to the jailhouse agents; (19) Improper instructions on the standard by which expert testimony is judged; (20) *Giglio* violation relating to the jailhouse agents; (21) Newly discovered evidence (not fully pled due to denial of records); (22) Trial court erred in failing to sequester the jury upon motion by counsel; (23) Multiple procedural and substantive trial court errors; (24) Prosecutorial misconduct related to improper comments; (25) Ineffective assistance for failing to object to the introduction of non-statutory aggravators; (26) Prosecutor improperly suggested to the jury that death was required by law; (27) Florida's capital sentencing statute is unconstitutional facially and as applied; (28) Rhodes is innocent of the death penalty; (29) Jury improperly informed about its role in sentencing; (30) *Caldwell* violation; (31) Improper burden shifting in penalty phase jury instructions and the trial court's error in employing this burden shifting in sentencing Rhodes; (32) The trial court refused to find and weigh mitigation circumstances set out in the record; (33) Ineffective assistance during voir dire; (34) Inadequate direct appeal due to omission in the resentencing record; and (35) Cumulative error. Many of Rhodes' claims could not be full pled due to denial of access to records.

[5] Rhodes amended his motion adding new claims and amended existing claims: (36) Electrocution is cruel and unusual; (18 amended) Jailhouse agents made deals for their testimony, thus their testimony should have been excluded; (37) Rhodes has not received all of the information in the possession of the federal government with respect to the investigation into the FBI crime lab; and (21 amended) Newly discovered evidence relating to FBI agent Malone's testimony.

This Court denied relief, (PC-R1. 1033-1035), and the Florida Supreme Court affirmed, *Rhodes v. State*, 986 So. 2d 501 (Fla. 2008).[6]

3. In November 2016, Rhodes filed a successive Rule 3.851 motion in this Court, seeking relief under *Hurst v. Florida*, 577 U.S. 92(2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

## STATEMENT OF RELEVANT FACTS

### I. The State's case against Rhodes

4. On March 23, 1984, the decomposing body of a female was found in debris being used to construct a berm in St. Petersburg. (R1. 1454-55, 1486, 1488-92). Debris from two buildings was being used to construct the berm, but the debris in the immediate area of the body came from the Sunset Hotel in Clearwater. Demolition of the Sunset Hotel began on March 15, 1984. (R1. 1453, 1455, 1467). The body was identified as that of Karen Nieradka. (See R. 1553-54, 1557-59, 1570-72, 1888).

5. Dr. Joan Woods, medical examiner for Pinellas County, determined the cause of death was manual strangulation. (R1. 1701). Her opinion was based upon the hyoid bone being broken, negative testing for drug overdose, the circumstances on which the body was found, and the lack of any other obvious cause of death. (R1. 1702). Nieradka had been dead from two to eight weeks. (R1. 1705). Dr. Woods testified that all the bone fractures, except the left wing of the hyoid bone, occurred postmortem. (R1. 603-05, 1717).

6. Hairs were found on and around her body, including in her hands. FBI Agent Michael Malone testified that in the moment before death, people have a tendency to grab their own hair. (R1. 1876-77). These hairs were identified before the jury as hair evidence that Malone had tested.

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[6] Rhodes raised the following issues: (1) The trial court erred in denying Rhodes' *Brady/Giglio* claim; (2) Ineffective assistance of counsel at resentencing; (3) The trial court erred in failing to allow Rhodes to challenge the State's DNA evidence; and (4) The trial court erred in summarily denying various claims: Ineffective assistance of resentencing counsel-Jailhouse informants, Ineffective assistance of counsel-other errors, Ineffective assistance of counsel-Guilt phase, Other errors. Rhodes also appealed some claims just for preservation purposes.

But at the postconviction evidentiary hearing, the State disclosed for the first time that Malone's 1985 trial testimony was false when he testified that the hair in Nieradka's left hand was hers. (PC-R1. 1178-81). In truth, the hair in Nieradka's left hand was not suitable for comparison. (PC-R1. 1181). At the hearing, Malone acknowledged that his trial testimony was inaccurate as to this point. (PC-R1. 1245-46).

7. On March 2, 1984, Trooper Robert Drawdy of the Florida Highway Patrol stopped Rhodes in Hernando County. (R1. 1779-80). Rhodes was driving a white 1983 Dodge Dart. (R1. 1781). Documents in the glove compartment showed the car was registered to Nieradka. (R1. 1783-85). Also in the glove compartment was a note giving Rhodes permission to use the car. (R1. 1786-87). When Trooper Drawdy asked who Nieradka was, Rhodes replied she was one of his girlfriends. (R1. 1788). Rhodes was then transported to the Citrus County Jail. (R1. 1789).

8. On March 26, 1984, Detectives Steve Porter and Walter Kelly, Jr. of the Pinellas County Sheriff's Department interviewed Rhodes in Citrus County. (R1. 1893-94, 2006). Rhodes gave the detectives a series of different accounts of his involvement with Nieradka. In one of the accounts, he told the detectives he knew why they were there and that they could not prove the case because too much time had passed. (R1. 1912). In another account, he said a man called "Crazy Angel" killed Nieradka at the Sunset Hotel and instructed Rhodes to dispose of the car. (R1. 1924-25, 1929). In another account, he said he saw Crazy Angel strangling Nieradka. (R1. 2012). This account also included Crazy Angel instructing Rhodes to dispose of the car. (R1. 2012-13). On March 29, 1984, Rhodes was interviewed again. In this interview, Rhodes said he did not know of Nieradka's murder until after it happened, when a person named Kermit Villeneuve told him that he had killed Nieradka. (R1. 1945-46, 2013-14).

9. On April 27, 1984, Rhodes was arrested for first degree murder. (R1. 1954). During

transport to Pinellas County, he described himself as a vampire who preys on others. (R1. 1956). Rhodes offered to tell Porter how Nieradka died if Porter would promise Rhodes he would spend the rest of his life in a mental health facility. (R1. 1956). Rhodes then said Nieradka died accidentally when she fell three stories at the Sunset Hotel. (R1. 1956-57). The State's theory at trial was that Rhodes strangled Nieradka. To prove that theory, the State relied in large part on several jailhouse agents. The jailhouse agents testified about incriminating statements that Rhodes supposedly made to them.[7] The State's entire case was based upon circumstantial evidence. The only offered evidence linking Rhodes to the crime was the jailhouse agents' testimony. Most of the evidence produced does not withstand scrutiny or is easily explained.

**II. Evidence pointing to a third-party**

10. Rhodes' primary defense at trial was that Richard Nieradka, the victim's ex-husband, murdered her. Rhodes presented the testimony of Sandra Nieradka, another ex-wife of Richard Nieradka's, who testified to a physical confrontation she had with a very drunk Richard Nieradka in which he shot a gun at her, held her down, and choked her while telling her, "This is how I killed Karen." (R1. 2228-31). Rhodes also presented the testimony of Jackie Wiley and Leona Cliff, who both confirmed that Sandra contemporaneously told them about Richard Nieradka's harrowing confession. (R1. 2254-55, 2260-61). Richard Nieradka admitted to firing a gun during the altercation but denied choking Sandra and murdering Karen. (R1. 2279-82).[8]

11. As to Rhodes coming into possession of the victim's car, Rhodes attempted to put on the testimony of Paul Collins, who would have testified to having a discussion with Karen Nieradka before she died in which she told him that she had lent her car to Rhodes who was up in New Port

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[7] The four jailhouse agents were Edward Cottrell, Harvey Duranseau, Michael Allen, and John Bennett.

[8] Richard Nieradka did admit to trying to create an alibi for the murder of Karen Nieradka. (R1. 2293-94).

Richey. (R1. 2184).[9] The trial court deemed this inadmissible hearsay, and the jury did not learn this fact. (R1. 2181).

**III. The use of jailhouse agents at Rhodes' trial and resentencing**

12. The claims in this motion are based on recent recanting statements by jailhouse agents Edward Cottrell and Harvey Duranseau. At trial, the State presented four jailhouse informants, who allegedly elicited inculpatory statements from Rhodes. Cottrell and Duranseau have since admitted their testimony was false, that they were pressured by the State, and that they testified against Rhodes in exchange for favorable treatment.[10] Although the State presented several live witnesses at the resentencing, the State represented that Cottrell, Duranseau, and Allen were unavailable to testify. Instead, their testimony from the first trial was read into the record. (R1. 1832-61, 2027-55, 2064-91). The State's effort to locate and secure these witnesses' availability for live testimony was less than earnest. According to the State's investigator, the State first attempted to locate Allen "two to three weeks" prior to the day that his testimony was read into the record. (R2. 956). The attempt to locate Cottrell and Duranseau occurred the day before their testimony was read into the record. (R2. 957). All three were incarcerated at the time, but the State did not seek a court order to transport them to Pinellas County to testify. (R2. 956-57).

**A. Jailhouse agent Edward Cottrell[11]**

13. Cottrell was recruited by the State to testify about statements Rhodes allegedly made while in the Pinellas County Jail.[12] Cottrell was a trustee at the jail. (R1. 2031). According to Cottrell,

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[9] Other witnesses confirmed that she would commonly lend her car out to friends. (R1. 1632).

[10] Michael Allen and John Bennett are deceased.

[11] Trial counsel moved to suppress Cottrell's testimony. (R1. 164). This Court denied that motion. (R1. 981-82).

[12] Based on Cottrell's testimony, the following is the likely timeline of how Cottrell became a state agent. He was placed in the jail in February of 1984, (R1. 2054), and Rhodes was placed in the jail in April of 1984, (R1. 1954). A Pinellas County Jail officer named Mr. Phillips told Cottrell there was "a possibility that if the State needed new testimony," Cottrell could help himself out. (R1. 2043). Cottrell then talked to Porter about what he knew and later, after his depo but before a pre-trial suppression hearing, talked with ASA Zmober. (R1. 2043-47).

he and Rhodes talked every day about Rhodes' case. (R1. 2031). After their conversations, Cottrell wrote down what Rhodes said. (R1. 2032). Cottrell believed doing so would help him with his pending case. (R1. 2032).

14. At the time of Rhodes' trial, Cottrell had been awaiting sentencing for eighteen months. (R1. 2028, 2054). He pled to his charges about eight to nine months prior to his testimony. (R1. 2054). Between the time he entered his plea and the time of trial, he had been scheduled for sentencing on multiple occasions, but the sentencings were rescheduled several times because of Rhodes's trial (*id.*):

> Q: The state attorney wants you to get sentenced after this trial, don't they?
> A: Yes, sir.
> Q: That's why it's been set off since February of 1984?
> A: Yes, sir.
> Q: To see about your deal?
> A: Right, I guess so.

(R1. 2055). At that time, he was awaiting sentencing on charges that carried a possibility of life in prison. (R1. 2042). However, his sentence was reduced to fifteen years as part of a deal made "[w]ith [his] attorney." *Id.* Cottrell testified that it was "common knowledge" that he could help himself out if he helped the State which is why he decided to speak with Porter. (R1. 2043). When asked whether Porter in any way suggested to him that he should "go back and try to get some more statements," he testified that:

> A: [Porter] said if he was to tell me to go back and get information from Mr. Rhodes, that that would make me a state agent.
> Q: Did [Porter] say it in such a way that led you to believe, well, you're on your own, but go do it?
> A: Basically, I guess.
> Q: He said, "I can't tell you to do it, because that would be wrong"?
> A: Right.
> Q: But encouraged you to do it, didn't he?
> A: Without saying anything, yes sir.
> Q: It was kind of blinking your eye, go do it. It's not right, but go do it. Is that what was said, in effect?

A: I guess in effect, yes, sir.

(R1. 2044). Cottrell admitted that he was "looking for a deal and [would have done] anything" to get one. (R1. 2049).

15. Cottrell provided conflicting accounts of the terms of his agreement with the State. Initially, he testified that whether he would benefit would depend on the outcome of Rhodes' case, but after prompting by the State, he testified that the benefit would not depend on whether Rhodes was acquitted. (R1. 2029-30). On cross, Cottrell acknowledged that he "want[ed] out of jail bad" but was adamant he was not testifying against Rhodes for that reason. (R1. 2041).

16. Cottrell provided the State with the equivalent of a confession from Rhodes. Specifically, he testified that Rhodes told him how he killed Nieradka and how he disposed of her body. (R1. 2033-34). During this portion of his testimony, he was asked leading questions and was told multiple times by the prosecutor to refer to his notes if necessary. (R1. 2032-38). This Court sustained defense counsel's objection to leading the witness. (R1. 2037). Although Rhodes' account of the events that he shared with Cottrell changed at times, "[m]ost of the time the ending of the story about him choking her and hitting her in the head with a board and stuff like that stayed the same." (R1. 2034). Cottrell further linked Rhodes to Karen Nieradka's murder by testifying that Rhodes told him the murder happened at the Sunset Hotel. (R1. 2033).

17. At the time of the first trial, Cottrell was incarcerated in Pinellas County Jail. (R1. 2028, 2053-54). His presence for live testimony was secured on three separate occasions for his deposition, a motion to suppress hearing, and for his trial testimony. (R1. 756-790, 2832-49, 2863-66, 2027-55). During the resentencing, State Attorney investigator Joy Walker testified that she located Cottrell in a Florida prison in Daytona Beach the prior morning. (R2. 955-957). The State argued that because Cottrell was incarcerated in the Florida State Prison system he was unavailable

and his previous testimony was read into the record. *Id.*

**B. Jailhouse agent Harvey Duranseau**

18. Duranseau and Rhodes shared a cell at the Citrus County Jail. (R1. 1834). The State recruited Duranseau to testify against Rhodes at his trial. Duranseau was adamant that he was not a state agent. He testified that the State promised they would write him a letter and send it to the Department of Corrections in Michigan where he was then incarcerated, but Duranseau claimed he declined. (R1. 1833). Besides the letter, Duranseau testified that there were no other promises made. (R1. 1833). Duranseau testified he "fought [against testifying at Rhodes' trial] vigorously." (R1. 1833).

19. While at the jail, detectives from the Pinellas County Sheriff's Office visited Rhodes. (R1. 1839). After the visit, Rhodes purportedly told Duranseau that:

> "Between me and you," he said, "the only people that know what occurred is me," pointed to his mouth, and he said, "and I'm not going to tell." And he said the other person is the girl and he went like this with his hands like he was strangling somebody.

(R1. 1840). Duranseau testified that the first time he saw Rhodes, Rhodes appeared to have "some scratch marks on the groin area" that appeared to be "from a fingernail" or "barbed wire or thorns." (R1. 1839, 1845). The scratch marks appeared "raw and fresh." (R1. 1839). He also testified that while at the jail, Rhodes was not generally interested in watching the news. However, Duranseau claimed that after Rhodes watched a broadcast about a woman found dead at a landfill in Clearwater, he became exponentially more interested in the news. (R1. 1836). Allegedly, Rhodes also started asking Duranseau questions about dead bodies. (R1. 1836-37):

> A: [Rhodes] asked [Duranseau] specifically questions on like if the police could determine if a dead body had been -- cause of death, like if it had been strangled, if they could take fingerprints from a dead body; if they could tell if it was a male or female or if they could tell the cause of death and how long it had been there. . .
>
> Q: Did he mention a time that the body might have been decomposing, time frame

of it?

A: Yes. Discussed that and it was around a month, three weeks, a month, something to that effect.

(R1. 1837). Duranseau testified that Rhodes made a gesture with his hands when talking about strangulation. (R1. 1838). According to Duranseau, Rhodes also talked about the Sunset Hotel, specifically that the hotel was under demolition. *Id.* Rhodes allegedly inquired to Duranseau whether "if the body was either rolled up in something like either linoleum, carpeting, tar paper" would have an impact on the deterioration of a body. (R1. 1838-39).

20. On cross, Duranseau conceded that Rhodes never told him that he killed Nieradka. (R1. 1860). Rhodes' trial counsel sought to impeach Duranseau with two letters that Duranseau wrote to Rhodes. (R1. 1847-1853).[13] Duranseau acknowledged that in one of the letters, he said some of the statements he made to law enforcement were "under threat and promise." (R1. 1853). But on redirect, Duranseau claimed that what he wrote to Rhodes were lies to "gain his confidence and see if he would divulge any more information about this dead girl to me." (R1. 1859). Rhodes' trial counsel also sought to impeach Duranseau with statements he made to Detective Dean Sutton. (R1. 1853-54). Specifically, Duranseau told Sutton some of the statements he made to law enforcement about Rhodes were untrue. (R1. 1854). But Duranseau testified he did not remember what he told Sutton. (R1. 1854-55). Moreover, Duranseau was clear in his trial testimony that he was not pressured or threatened by the State, and that the statements he made to detectives incriminating Rhodes were true. (R1. 1859-60).

21. At the time of Rhodes' first trial, Duranseau was incarcerated in a Michigan state prison. The State engaged in rendition proceedings in Michigan state court to secure his appearance (R1. 979), and he testified before the jury during the guilt phase of Rhodes' trial. At the resentencing,

[13] The letters were dated June 22, 1984, and September 16, 1984. (R1. 1848).

investigator Walker established that the State made no efforts to secure Duranseau's appearance for live testimony. Walker testified that she had located Duranseau "[y]esterday morning," and that he was incarcerated in Illinois. (R2. 957). Duranseau's testimony was read into the record. (R2. 954).

**C. Jailhouse agent Michael Allen**

22. Allen was placed in the Pinellas County Jail on September 19, 1984. (R1. 2085). Prior to being transferred to the Pinellas County Jail, Allen was serving a life sentence in the Marion Correctional Institution on a robbery charge. (R1. 2078). He was transferred out of Pinellas County to Lake Butler at the end of December 1984. (R1. 2086). Pinellas County detectives spoke to everyone in Rhodes' cell block and made an open offer to anyone in the block who wanted to make a deal with the State. (R1. 2086-87).

23. Over trial counsel's objection, Allen testified for the State during the guilt phase of Rhodes' first trial. (R1. 2087-88). In exchange for his testimony, Allen expected to receive a letter of recognition from a prosecutor stating that he assisted in the case. (R1. 2078). The effect of the letter was for Allen to be paroled early. (R1. 2078). Allen testified:

> Q: Did [Rhodes] say what he was doing that night? How it happened?
> A: I think he said that he had been drinking, out drinking with this girl, and they went to a motel . . . And I asked Rhodes, I said, "What did you do? Did you shoot her or something?" He said, "No, I didn't shoot her." . . ..
> And he got up to the door and took his hand and her went like this right here (indicating), and he said, "I tried to break her neck." He said that.
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> ***
>
> Q: Was there any struggle?
> A: Yes. He said she had fought him and he got scratches all over him.

(R1. 2080-81). He also testified that the detectives told him that they "can't guarantee doing anything for [him] or helping [him] out" but that they "[could] try." (R1. 2087). Allen further testified that the detectives told him that if he wanted "to cooperate with them, to give them a call."

(R1. 2087). In response to being asked whether he felt that the detectives were encouraging him to provide them assistance, he responded "[w]ell, he gave me his card." *Id.*

24. He further testified that Rhodes stated that the victim "deserved everything she got." (R1. 2081-82). When asked if Rhodes spoke of leaving any evidence at the crime scene that could implicate him, Allen responded that "[h]e made sure he didn't have no evidence" against him. (R1. 2083). According to Allen, Rhodes threatened that if anyone snitched on him, "he would find out through his lawyer and that the snitch would be dead. It would be a dead snitch." *Id.*

25. At the resentencing, investigator Walker testified that she located Allen "[a]pproximately two to three weeks ago. Two weeks ago." (R2. 956). Allen was incarcerated in Ohio at the time of the resentencing. (R2. 956-57). Because the State made no efforts to secure Allen's presence at the resentencing, his testimony was read into the record. (R2. 954-55).

**D. Jailhouse agent John Bennett**

26. In the summer of 1984, Bennett was housed at the Pinellas County Jail to serve as a State-witness on a narcotics investigation. *Id.* Bennett conceded on cross that he was in the "Pinellas County Jail at that time because [he was] trying to get [his] sentenced shortened by testifying against someone else." (R1. 2061). He testified that he had spoken to Rhodes while in jail and that when he asked Rhodes what he was in for, Rhodes responded that he was in jail on a murder charge. Rhodes never "point blank" told Bennett that he killed Nieradka. (R1. 2061). Bennett denied receiving any promises for his testimony. *Id.* At the time of trial, Bennett was incarcerated at Henry Correctional Institution in Immokalee, Florida. (R1. 2058). Bennett's testimony was not presented to the jury at resentencing.

## VI. The newly discovered evidence

### A. Edward Cottrell

27. On March 16, 2022, in a sworn statement made to investigators working on Rhodes' case in federal court, Cottrell admitted for the first time that he was in fact a state agent:

> …the State directed me to get information from Richard Rhodes. Pinellas County Jail Officer Mr. Phillips, Detective Steve Porter, Assistant State Attorney Bruce Young, and Assistant State Attorney Fred Zinober coached and manipulated me…They told me what information they needed from Richard Rhodes, what questions they wanted me to ask…, and what to testify to at Richard Rhodes' trial."

Attachment B, p. 1 ¶ 4. This was the first time that Cottrell had not wavered in his admission that he was working as a state agent. In exchange for his testimony at trial, ASAs Bruce Young and Fred Zinober promised Cottrell that he would get two years in jail and probation for his pending charges. *Id.* at pp. 1-2 ¶ 4. Moreover, Phillips gave Cottrell commissary items, like sandwiches and cigarettes. *Id.* at p. 2 ¶ 4. Cottrell was also allowed to move around anywhere he wanted in the jail. *Id.*

28. Additionally, for the first time, Cottrell admitted that the testimony the State elicited out of him was manufactured. *Id.* at p. 1 ¶ 3. The State "gave [him] facts about the case, like how the victim's body was found among carpet and how they found the victim's belongings." *Id.* p. 1 ¶ 4. Contrary to his trial testimony, Cottrell now says it was the State, not Rhodes, that told him Rhodes murdered Karen Nieradka. *Id.* p. 2 ¶ 5. Indeed, Rhodes told him that he did not commit the murder. *Id.* Finally, according to Cottrell, after Rhodes trial, the State asked Cottrell to testify against Rhodes at the resentencing hearing, and they "told [him] what they wanted [him] to say, but [he] refused." *Id.* p. 2 ¶ 6.

### B. Harvey Duranseau

29. Following Cottrell's new sworn statement, federal investigators spoke with Duranseau on April 26, 2022. He told the investigators that when he was arrested in Citrus County, the State

seized his property, including gold, silver, his trailer, and the contents of his trailer. *See* Attachment A1, p. 1 ¶ 3 (Duranseau Affidavit #1). While at the Citrus County Jail with Rhodes, the State was still holding his property. *Id.* Detective George Simpson told Duranseau that if he testified against Rhodes, there was a chance he would get his property back. *Id.* Duranseau attested that he felt pressured to testify against Rhodes. *Id.*

30. On July 11, 2022, Duranseau sent Rhodes' federal counsel a second affidavit further highlighting the pressure Simpson exerted on him. *See* Attachment A2 (Duranseau Affidavit #2). In this affidavit, he added that Simpson fed him information about another inmate who claimed to see Rhodes "making choking moves with his hands in relation to a murdered girl in the Tampa area of Florida." *Id.* Duranseau was never contacted by the State about testifying at Rhodes' resentencing. *Id.* at ¶ 4.

## GROUNDS FOR POSTCONVICTION RELIEF

31. For the reasons below, Rhodes' conviction and death sentence are in violation of the Sixth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.[14]

### Claim 1: The State violated Rhodes' rights under the Fourteenth Amendment by suppressing favorable, material evidence

32. The State is obligated to disclose evidence or information in its possession that is favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963). This requirement applies to both exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667 (1985). Relief is

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[14] Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C), the witnesses who will testify under oath in support of the claims raised in this motion are: (1) Harvey Duranseau, 306 Highway 6, Big Falls, MN 56627, (218) 276-3156; (2) Edward Cottrell, Miami Dade Correctional Institution, phone number n/a; (3) Jennifer Nepstad, 227 North Bronough Street, Suite 4200, Tallahassee, FL 32301, (850) 942-8818; and (4) Nels Roderwald, 227 North Bronough Street, Suite 4200, Tallahassee, FL 32301, (850) 942-8818. The witnesses will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in this motion and in the respective accompanying affidavits. The witnesses were not previously available to testify with respect to the facts at issue in this motion because the facts arise from newly discovered evidence, as set forth herein.

warranted if the undisclosed information creates a reasonable probability of a different result. *Id.* at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

33. First, the information revealed by Duranseau's and Cottrell's affidavits was never disclosed to trial counsel and therefore was suppressed by the State. When police or prosecutors conceal exculpatory or impeaching material in the State's possession, it is "incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 676 (2004). With respect to any information only known by investigators, it is imputed to the State. *See Kyles*, 514 U.S. at 437.

34. Second, the suppressed information was favorable. The statements from Duranseau and Cottrell shine a light on the State's use of false testimony and state agents to convict Rhodes. This is quintessential impeachment evidence. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974).

35. The information is also material. The materiality of suppressed evidence must be considered "collectively, not item-by item." *Kyles*, 514 U.S. at 436. As shown above, the State's case against Rhodes "resemble[d] a house of cards, built on the jury crediting" jailhouse agent testimony. *Wearry v. Cain*, 577 U.S. 385, 392 (2016). The newly discovered evidence demonstrates that Duranseau and Cottrell were state agents.[15] Cottrell's statement asserts that he was "coached and manipulated" by law enforcement officers and prosecutors as to "what information they needed from Richard Rhodes, what questions they wanted [him] to ask Richard Rhodes, and what to testify to at Richard Rhodes' trial" demonstrates its materiality. Attachment B, p. 1 ¶ 4. Duranseau's statement that Detective Simpson questioned him in a private room, told him that Rhodes was a violent homosexual that was a suspect in local murders of "old ladies," and

[15] The newly discovered evidence also impeaches the testimony of deceased jailhouse snitches Bennett and Allen because a reasonable juror could clearly infer that if two informants were state agents who fabricated their testimony, so did the other two.

that any help that he could give to law enforcement in the matter of Rhodes would be considered in returning his seized property demonstrates its materiality as he, too, was working on behalf of the State. Attachments A1, A2.

36. Armed with the new evidence, Rhodes would have been able to impeach Cottrell and Duranseau, discredit Allen and Bennett, and call into question the prosecution and investigation of this case as a whole. *See Kyles*, 514 U.S. at 445.

37. Moreover, the newly discovered *Brady* material is entirely consonant with Rhodes' trial strategy of attacking the investigation and prosecution of this case. The State's entire case was based upon circumstantial evidence. Most of the evidence produced—the hyoid bone fracture allegedly being cause by strangulation and the hair surrounding, and on the victim—does not directly implicate Rhodes. Other evidence—the fact that Rhodes was driving the victim's car and that his statements to law enforcement wildly varied—is easily explained. The United States Supreme Court has counseled against over relying on confessions. As the Court explained in *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964), "[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." Confessions are so inherently unreliable that there is a presumption of unreliability when the confession stems from a codefendant. *Franqui v. State*, 699 So. 2d 1332, 1335-36 (Fla. 1997). Though a defendant's own confession is not subject to the same presumption, the circumstances surrounding said confession may nonetheless render it suspect. Such circumstances include the mental state of the defendant and whether the defendant's statements comport with the physical evidence.

38. There are large gaps in the State's case. When the jailhouse agents' testimony is excluded,

there is a great scarcity of evidence tying Rhodes to the crime, which is particularly notable given Richard Nieradka's own admission to committing this murder. Had Rhodes had access to the newly discovered *Brady* material, his counsel would have been able to effectively attack the credibility of all four jailhouse agents and law enforcement at the first trial. Further, the suppressed evidence would have bolstered counsel's efforts to suppress the agents' testimony from being read into the record at the resentencing. The suppressed evidence denied Rhodes a fair trial and creates a reasonable probability of a different result had it been presented at trial and/or at resentencing. *See Kyles*, 514 U.S. at 434; *see also Bagley*, 473 U.S. at 680. The verdict is not worthy of confidence and, therefore, Rhodes is entitled to a new trial.

**Claim 2: The State violated Rhodes' rights under the Fourteenth Amendment by presenting and/or failing to correct false testimony**

39. The State violates the Fourteenth Amendment when it presents false or misleading evidence. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). Implied misrepresentations, even if "technically correct," are a due process violation. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957). Even if the State does not solicit false testimony, the State cannot "allow[] it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. It is a violation if the prosecutor knew or should have known the testimony was false or misleading. *United States v. Agurs*, 427 U.S. 97, 103 (1976). The State must show that the violation was harmless beyond a reasonable doubt. *Guzman v. State*, 941 So. 2d 1045, 1050-51 (Fla. 2006).

40. Four key witnesses against Rhodes—Cottrell, Duranseau, Allen, and Bennett—testified falsely at his trial. Each testified that there was no deal between them and the State, or a connection between their testimony and any benefits they received. Cottrell and Duranseau have now come forward refuting their prior testimony, thus casting doubt as to the reliability of the testimony of all four jailhouse agents. The State provided them with facts about the case. Cottrell attests that:

> When I was incarcerated at the Pinellas County Jail with Richard Rhodes, the State directed me to get information from Richard Rhodes. Pinellas County Jail officer Mr. Phillips, Detective Steve Porter, Assistant State Attorney Bruce Young, and Assistant State Attorney Fred Zinober coached and manipulated me in Richard Rhodes' case. They told me what information they needed from Richard Rhodes, what questions they wanted me to ask Richard Rhodes, and what to testify to at Richard Rhodes' trial. They gave me facts about the case, like how the victim's body was found among carpet and how they found the victim's belongings.

Attachment B, p. 1 ¶ 4. Cottrell attests that "[i]n exchange for [his] help in Richard Rhodes' case, Mr. Young and Mr. Zinober promised me that I would get only 2 years jail and probation for my own charges." Attachment B, pp.1-2 ¶ 4. Further, "[i]n the 1990s, after [Cottrell] got out of jail, Mr. Young and/or Mr. Zinober asked [him] to testify…at a hearing. They told [him] what they wanted [him] to say, but [he] refused." *Id.* at 2 ¶ 6. This contradicts what the prosecution represented to this Court at the resentencing. (R2. 957).

41. Duranseau has also come forward to attest that George Simpson, of the Citrus County Sheriff's Office, told him that Rhodes "was a violent homosexual that was suspected in the killing of old ladies in the area." Attachment A2. Simpson also told him that another inmate had seen Rhodes make a choking motion with his hands in "relation to a murdered girl." *Id.* Simpson suggested that Duranseau "think it over" and consider "what [his] testimony could do for society!" *Id.* Simpson told Duranseau that "any help in this matter would be considered in the return of" property that law enforcement had seized from him. *Id.* Duranseau attested that "there was an incentive for me to testify against Richard Rhodes" and that "it's fair to say that I felt pressured to testify." Attachment A1, p. 1 ¶ 3. Duranseau also stated that the State never contacted him about testifying at the resentencing. *Id.* at ¶ 4.

42. The false testimony not only casts doubt on the reliability of Cottrell and Duranseau, but it also casts doubt on the testimony of Allen and Bennett. ASAs Zinober and Young knew, or should have known, that the testimony given by these witnesses was false. Cottrell has made clear that, in

addition to Phillips and Porter, both ASA Zinober and ASA Young were involved in the law enforcement-state agent relationship and even coached and manipulated his testimony. Attachment B, p. 1 ¶ 4. Because law enforcement knew or should have known the testimony was false, that knowledge is imputed to the State. *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1349 (11th Cir. 2011).

43. "[W]hether the nondisclosure was the result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154. As shown above the false testimony in this case was material and the State cannot prove it was harmless beyond a reasonable doubt. *Guzman*, 941 So. 2d at 1050-51. The State, in making its case during both the guilt phase of Rhodes' first trial and the resentencing penalty phase, failed to correct this false testimony. Instead, it chose to rely upon it to twice secure a conviction and ultimately a death sentence. Therefore, Rhodes is entitled to a new trial.

**Claim 3: The State violated Rhodes' rights under the Sixth and Fourteenth Amendments by eliciting statements through state agents**

44. The State violates a defendant's Sixth Amendment right to counsel "by intentionally creating a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel." *United States v. Henry*, 447 U.S. 264, 274-75 (1980); *Massiah v. United States*, 377 U.S. 201 (1964). "Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). This occurs when the State uses a jailhouse informant as a state agent to deliberately elicit information from a defendant. *Johnson v. State*, 135 So. 3d 1002, 1026 (Fla. 2014). "Statements deliberately elicited [in violation of this right] . . . are rendered inadmissible and cannot be used against the defendant at trial." *Rolling v. State*, 695 So. 2d 278, 290 (Fla. 1997).

The State has the burden to prove beyond a reasonable doubt that the inadmissible testimony did not contribute to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

45. When Cottrell was recruited by the State, he was a trustee at the Pinellas County Jail. (R1. 2031). Jail officers arranged a meeting for Cottrell with Detective Porter. (R1. 2838-39). Cottrell acknowledged that he expected something in return for his testimony against Rhodes. (R1. 2041). At the time of his testimony, Cottrell had been awaiting sentencing for eighteen months. (R1. 2028, 2054). He pled to his charges about eight to nine months prior to his testimony. (R1. 2054). Between the time he entered his plea and the time of trial, he had been scheduled for sentencing on multiple occasions, but those hearings were rescheduled several times because of Rhodes's trial. *Id.* Cottrell testified that it was "common knowledge" that he could help himself out if he helped the State out and because of this, he spoke with Porter about Rhodes. (R1. 2043). Cottrell also testified that "without [Porter] saying anything" explicitly, he knew what was being asked of him. (R1. 2044). Cottrell admitted that he was "looking for a deal and [would have done] anything" to get one and that he would "help the State out." (R1. 2049).

46. Duranseau and Rhodes shared a cell in the Citrus County Jail. (R1. 1834). During this time, Duranseau was in communication with law enforcement about the case against Rhodes. On cross, Duranseau acknowledged that his statements to law enforcement were coerced (R1. 1851, 1853), but changed his story when questioned further on redirect. (R1. 1859).

47. Allen and Bennett were also incarcerated at the Pinellas County Jail with Rhodes and testified for the State. Allen testified that the detectives told him that if he wanted "to cooperate with them, to give them a call." (R1. 2087). In response to being asked whether he felt that the detectives were encouraging him to provide them assistance, he responded "[w]ell, he gave me his card." *Id.* Bennett was housed at the Pinellas County Jail to serve as a State-witness on a narcotics

investigation in another case. *Id.* He conceded on cross that he was in the "Pinellas County Jail at that time because [he was] trying to get [his] sentenced shortened by testifying against someone else." (R1. 2061).

48. At the time that the jailhouse agents were placed with Rhodes, law enforcement had "committed itself to prosecute" Rhodes, who found "himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *See United States v. Gouveia*, 467 U.S. 180, 189 (1984). Adversarial judicial criminal proceedings had thus been initiated. *Gouveia*, 467 U.S. at 188. Therefore, by this point the right to counsel had "attached and been asserted" and the State was obligated to honor it. *Moulton*, 474 U.S. at 170. As Rhodes can now demonstrate through the statements of Duranseau and Cottrell, the State violated Rhodes' right to counsel and used Cottrell, Duranseau, Allen, and Bennett as state agents to deliberately elicit information from him. From the time that each of these men were placed with Rhodes up until their trial testimony, multiple meetings occurred with law enforcement, and with state attorneys, so that they could direct questioning of Rhodes based on facts they knew or suspected about the case. Cottrell, seemingly, was rewarded for his work with a deal having been worked out with his attorney for a fifteen-year sentence in lieu of life in prison. (R1. 2042).

49. Whether or not the State made an explicit deal with Cottrell, Duranseau, Allen, or Bennett before turning them into state agents is irrelevant. *Cf Wearry*, 577 U.S. at 385 ("[E]ven though the State had made no binding promises, a witness' attempt to obtain a deal before testifying was material because the jury 'might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution's] favor'"). Particularly because each had extensive experience in jail and that it was "common knowledge" that "if you can help the State out, sometimes they'll do something for you." (R1. 2043). Each of these witnesses was keenly aware that any favorable

information that they could pass along to law enforcement that Rhodes allegedly said would be viewed as favorable to them when it came to resolutions in their own criminal proceedings. (R1. 1841, 2043-44, 2085, 2087, 2060-61, 2063).

50. It is not Rhodes' burden to show direct proof of the State's knowledge or intentional disregard of his right to counsel. "Direct proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." *Moulton*, 474 U.S. at 176. Thus, a defendant need only show that the State "must have known" that the state agent would "likely" secure incriminating information. *Id.* at 176 (citing *Henry*, 447 U.S. at 271). Here, the State "must have known"—Allen was encouraged to provide assistance; Bennett was a witness for the State in other criminal proceedings who knew that he was expected to elicit information from Rhodes once he was placed into Rhodes' cell; law enforcement suggested to Duranseau that cooperation was necessary to secure the return of his personal property; and Cottrell was coached and manipulated by the state attorneys and law enforcement as to what information to elicit from Rhodes.

51. The testimony of Cottrell, Duranseau, Allen, and Bennett should have been suppressed because they were state agents and Rhodes is entitled to a new trial because the State cannot prove the violation was harmless beyond a reasonable doubt in either the guilt phase or resentencing penalty phase. As shown above, the State's case was a house of cards that could not stand without the inadmissible testimony.

**Claim 4: Rhodes is entitled to a new trial based on the newly discovered evidence**

52. Even if this Court does not find that the statements of Cottrell and Duranseau establish a violation of Rhodes' constitutional rights, this Court must separately analyze the newly discovered evidence under the *Jones* test. *See Lightbourne v. State*,742 So. 2d 238, 247 (Fla. 1999). To qualify as newly discovered, the evidence in question "must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could

not have known of it by the use of diligence." *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016) (quoting *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008)); *see also Walton v. State*, 246 So. 3d 246 (Fla. 2018). Rhodes must also show the evidence to be material, which requires that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So. 2d at 915.

53. In determining whether newly discovered evidence compels a new trial, the reviewing postconviction court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which *was introduced* at trial." *Jones*, 591 So. 2d at 916 (emphasis added). Further, under the expanded guidance of *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998), a postconviction court "must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that *could be introduced* at a new trial, and conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Hildwin v. State*, 141 So. 3d 1178, 1187-88 (Fla. 2014) (emphasis added) (quoting *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013)). This includes evidence "that was previously excluded as procedurally barred or presented in another postconviction proceeding[.]" *Hildwin*, at 1184 (citing *Swafford*, at 775-76, and *Lightbourne v. State*, 742 So. 2d at 247). If there is dispute regarding whether evidence is newly discovered, or about the quality of the newly discovered evidence, an evidentiary hearing is necessary. *Id.*; *see also Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996) (factual allegations as to the merits of a constitutional claim, as well as to issues of diligence, must be presumed true); *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995) (in successive postconviction motions, allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or a procedural bar does not "appear[] on the face of the pleadings.").

54. This claim is timely.[16] Recanted testimony cannot be "discovered" until the witness chooses to recant, regardless of the time span. *Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009). Rhodes obviously could not discover that testimony until Cottrell and Duranseau made it. Cottrell and Duranseau have now come forward and confirmed that at an evidentiary hearing they would testify to the statements contained in this motion.

55. Cottrell and Duranseau have only come forward within the last year. The new evidence gives rise to a reasonable doubt as to Rhodes' culpability and would probably produce an acquittal on retrial. As demonstrated above, the State's case against Rhodes was a house of cards which relied extensively upon jailhouse agent testimony. Cottrell and Duranseau have established the State's use of jailhouse agents and false testimony to convict Rhodes. Considering the lack of evidence that he committed the crime for which he has been convicted, a cumulative analysis of the case shows that there is reasonable doubt as to his culpability. Rhodes is entitled to a new trial.

56. Based on the foregoing, each of the claims set forth above timely because the facts on which each claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.

57. With respect to each of the claims set forth in this motion, the witnesses listed in footnote 14 will be available to testify under oath to the facts alleged in the motion and in the respective accompanying affidavits.

**CONCLUSION AND RELIEF SOUGHT**

Based on the foregoing, Rhodes requests the following relief:

1. Conduct an evidentiary hearing on this motion and allow him to introduce testimony in support of his allegations; and/or

2. Vacate his conviction of first-degree murder and conduct a new trial.

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[16] This timeliness analysis also applies to claims 1-3.